I was asked to welcome you to this important event, but this event belongs to all of you, and I appreciate your willingness to welcome me here. 

... This openness and even embrace of "the other," especially in the face of a persistently exclusive society and history of subordination, is a remarkable step forward. 

Without in any way ignoring the richness, complexity, and diversity of the LatCrit scholarship, I suggest it holds out a most optimistic vision -- to act as a bridge in crossing the racial/ethnic gap of the Americas of the last five hundred years to perhaps a twenty-first century society in which we are all minorities -- all the "other" -perhaps a glimpse into a society in which minoritiness and otherness disappears, altogether. ... 

I was asked to welcome you to this important event, but this event belongs to all of you, and I appreciate your willingness to welcome me here. U.C. Davis is proud to be one of the sponsors of LatCrit IV. Thanks to Frank Valdes for asking us. I want to thank the hardworking organizing committee for putting this conference together, allowing the U.C. Davis Law Review to publish the proceedings, and giving me the opportunity to speak briefly with you this evening.

The several LatCrit symposia have attacked some of the most pressing, and intractable, social issues of our times. This work includes some of the most important scholarship being done today. Your thinking is a much needed antidote to Propositions 187 and 209, to the Hopwoods, to the English-Only laws, to the deaths resulting from increased border enforcement, and to the anti-immigration hysteria currently in political fashion. These are difficult times for minorities in the United States. Your voices must be heard.

During my short time at this conference, I have been struck by two themes that run through the papers and commentary. First, the remarkable ability of LatCrit IV scholars to blend academic theory -much of it from outside traditional legal doctrine -- with one of the law's most positive attributes -- its link with people's day-to-day lives and their communities. Second, your embrace of many perspectives from "other" groups, as stated in your introduction, "a legal discourse that centers Latinas/os but also relates the Latina/o condition to that of other groups." This openness and even embrace of "the other," especially in the face of a persistently exclusive society and history of subordination, is a remarkable step forward.

Without in any way ignoring the richness, complexity, and diversity of the LatCrit scholarship, I suggest it holds out a most optimistic vision -- to act as a bridge in crossing the racial/ethnic gap of the Americas of the last five hundred years to perhaps a twenty-first century society in which we are all minorities -- all the "other" -perhaps a glimpse into a society in which minoritiness and otherness disappears, altogether.

In any case, as the Latina/o population grows in this country, these questions will likely become all the more pressing. You, as pioneers, have made, and will make, an important contribution to our understanding of the Latina/o condition and, as we reflect, on the condition of all of us in the United States. We are all indebted to you.

Thank you.
LATCRIT IV SYMPOSIUM: ROTATING CENTERS, EXPANDING FRONTIERS: LATCRIT THEORY AND MARGINAL INTERSECTIONS:
FOREWORD: Celebrating LatCrit Theory: What Do We Do When the Music Stops?

Kevin R. Johnson *

BIO:

* Associate Dean of Academic Affairs and Professor of Law, University of California, Davis School of Law. A.B., University of California, Berkeley; J.D., Harvard University. Thanks to Dean Rex R. Perschbacher for financial and other support for, and commitment to, LatCrit IV and my scholarship. The LatCrit IV Planning Committee (Rudy V. Busto, Robert Chang, Roberto Corrada, David Cruz, Laura Gomez, Elizabeth M. Iglesias, Guadalupe Luna, Pedro Malavet, Laura Padilla, Estevan Rael y Galvez, Dorothy Roberts, and especially Frank Valdes) worked incredibly hard to organize the conference. I thank them for giving me the opportunity to write this Foreword. The U.C. Davis Law Review, a cosponsor of LatCrit IV, should be commended for its commitment to publishing the conference proceedings. Editor in Chief Sarah J. Heidel and Executive Editors Sharon Fiedler, Laura Granier, and Stephanie Pennix worked long and hard to publish a quality symposium issue in a timely manner. The law school sponsors of LatCrit IV also deserve acknowledgment: U.C. Davis, U.C. Berkeley (Boalt Hall), UCLA, California Western, Florida, Loyola-Los Angeles, San Diego, Santa Clara, USC, Southwestern, Stanford, and the Center for Hispanic and Caribbean Legal Studies of the University of Miami School of Law. George A. Martinez, Leti Volpp, Mary Romero, Sylvia Lazos, Guadalupe Luna, and Chris Cameron offered thoughtful comments on a draft of this Foreword. Conversations with Frank Valdes, Lisa Iglesias, Celina Romany, Robert Westley, Pedro Malavet, Ediberto Roman, Tom Joo, Richard Delgado, and friends too numerous to name shaped my thinking on the issues discussed here. Kristi Burrows provided helpful editorial assistance.

SUMMARY: ... We see a full range of methodological approaches, from doctrinal analysis of the civil rights laws, to new theoretical approaches to international law, to narrative scholarship shedding fresh light on legal issues. ... Dean Rex Perschbacher of U.C. Davis praised "the remarkable ability of LatCrit IV scholars to blend academic theory . . . with one of the law's most positive attributes -- its link with people's day-to-day lives and their communities. ... On the heels of LatCrit I, a LatCrit colloquium at the Hispanic National Bar Association 1996 annual conference explored international law and human rights. ... This ambitious cluster proposes not one, but two, important international law perspectives that require future exploration. ... Similarly, Professor Ediberto Roman advocates a Critical Race approach to international law. Ferment in international law has spawned many new approaches, including New Approaches to International Law, Third World Approaches to International Law, and feminist approaches to international law. However, the impact of race on international law generally goes unexplored.

HIGHLIGHT: seamos la llave que abre let us be the key that opens
nuevas puertas a nuestra gente new doors to our people
que manana sea hoy let tomorrow be today
ayer nunca se ha ido yesterday has never left
demos en este instante let us all right now
take the first step:
el primer paso: take the first step:
por fin lleguemos let us finally arrive
a nuestra Tierra Prometida! at our Promised Land! n1

[Introduction]

The fourth annual critical Latina/o theory conference (LatCrit IV) entitled "Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections," built on the scholarly and collegial successes of the first three. n2 On the shores of Fallen Leaf Lake at the Stanford Sierra Center near Lake Tahoe, n3 race
scholars, students, and governmental officials, including Greg Stewart, General Counsel of the Equal Employment Opportunity Commission, from across the nation came together to discuss racial and other subordination in the United States. One of the most diverse conferences in legal (if not all) academia, LatCrit IV included African American, Asian American, Native American, Latina/o, Anglo, gay, lesbian, straight, and other participants. Legal academics, historians, sociologists, ethnic studies scholars, and students of many other disciplines facilitated the cross-fertilization of ideas. The varied backgrounds of the participants contributed immeasurably to the intellectual discourse. The following pages document those proceedings, including the scholarly achievements, intellectual ferment, and high ambitions, as well as the emerging tensions and fault lines in critical Latina/o theory.

The uninitiated might ask: just what is LatCrit? "LatCrit is a group of progressive law professors engaged in theorizing about the ways in which the law and its structures, processes and discourses affect people of color, especially the Latina/o communi " * [*755] ties." In many ways, LatCrit is helping us delve deeper into the impact of the law on Latina/o lives, dispelling popular stereotypes without essentializing or bracketing the Latina/o experience. But the LatCrit project has broader ambitions; it seeks to further (1) "The Production of Knowledge"; (2) "The Advancement of Transformation"; (3) "The Expansion and Connection of Struggle(s)"; and (4) "The Cultivation of Community and Coalition." This symposium exemplifies the breadth and expansiveness of LatCrit.

LatCrit events have become known as celebrations of wideranging intellectual interchange, marked by frank, tough, and critical discussion; tensions arise and tempers flare. LatCrit IV was no different. Capitalizing on the successes of LatCrit III, LatCrit IV generally was positive, upbeat, and focused on scholarship and community. This description is not meant to mute tensions that arose during the conference and will likely resurface within LatCrit. Nonetheless, LatCrit IV focused on the substantive in a positive and generally constructive way.

The essays in this symposium issue reflect differences of opinion and sincere efforts to grapple with the complexities of the issues facing Latinas/os and other subordinated peoples in the United States. As Professor Frank Valdes aptly put it, LatCrit theory, like all scholarly movements, is "under construction." In forming this new intellectual community, LatCrit theorists, unified by their experiences as outsiders in the law, seek to move the law toward new frontiers.

In my mind, the contributions to this symposium demonstrate the strength, vibrancy, and potential of LatCrit scholarship. Racial identity, diversity, commonality, religion, gender, class, and international linkages, among many other topics, are scrutinized. The richness, ambition, insight, and foresight of these essays show dedicated scholars attempting to reveal and remedy the various subordinations, especially that of Latinas/os, afflicting modern social life in the United States. We see a full range of methodological approaches, from doctrinal analysis of the civil rights laws, to new theoretical approaches to international law, to narrative scholarship shedding fresh light on legal issues.

As we begin a new century, such eclecticism, energy, excitement, and engagement are necessary and essential for scholars truly committed to the antisubordination project.

Once again, the melding of theory and practice, a bedrock principle of LatCrit theory, played a prominent role at LatCrit IV. This issue offers an important cluster of essays focusing on making theory practical. Other contributions engage legal doctrine and the making of law by legislatures and courts. Such inquiries are crucial to prevent LatCrit from becoming a purely intellectual exercise. Dean Rex Perschbacher of U.C. Davis praised "the remarkable ability of LatCrit IV scholars to blend academic theory . . . with one of the law's most positive attributes -- its link with people's day-to-day lives and their communities."

Narrative scholarship can be seen in the latest LatCrit installment, reflecting acceptance of the wisdom that counter-stories are needed to counteract the conventional wisdom in our society. LatCrit narrative helps us better understand "Latina/o marginality and vulnerability traceable to dominant race/ethnicity norms of AngloAmerican society." The stories employed in the symposium essays address a broad range of issues, from insights about the complexities of, and tensions at, LatCrit conferences to discussions of the vulnerability experienced by untenured law professors of color.

Part I of this Foreword situates the essays comprising the written record of the LatCrit IV conference into the existing body of LatCrit literature and shows how this scholarship poises the movement for theoretical development. The five clusters are (1) Diversity, Commonality, and Identity, (2) Religion, Subordination, and Gender, (3) Class, Workers, and the Law, (4) LatCrit Praxis, and (5) International Linkages and Domestic Engagement. Part II discusses the evolution of LatCrit, including its past achievements and future aspirations, as well as its
potential pitfalls. Ultimately, we all -- LatCrit scholars, organizers, participants, and other interested bystanders -- must be vigilant to ensure the survival of this emergent project so that it satisfies its lofty, all-important objectives.

I. LatCrit IV: A Celebration of Intellectual Interchange

The contributions to this symposium reflect the intellectual breadth and ambition of LatCrit theory. At the same time, they reveal the ferment and potential fault lines that will shape future theoretical development. Ultimately, this development hopes to influence the law to improve the status of Latinas/os and other people of color.

A. Diversity, Commonality, and Identity

A cornerstone premise of LatCrit theory is that the various forms of subordination in U.S. society, if not the world, are deeply interrelated and intertwined. n19 Woven together into the American social fabric, racial, gender, sexual orientation, class, and other subordinations all warrant careful inquiry. This section amply demonstrates the breadth of experiences relevant to LatCrit inquiry.

A much-debated issue at all LatCrit conferences has been the need to expand the discussion of civil rights discourse beyond simply African American and White relations. n20 LatCrit III focused our attention on the African American experiences in an important panel entitled "From Critical Race Theory to LatCrit to BlackCrit? Exploring Critical Race Theory Beyond and Within the Black/White Paradigm." n21 Nobody seems to disagree with the need for a multiracial understanding of civil rights in the United States; indeed, such analysis has gone on for quite some time. n22 However, objections to the sustained LatCrit criticism of the "Black-White paradigm," as it has been denominated, have emerged. Sensitivity in this area is especially necessary. Like all communities, anti-African American sentiment exists in some quarters of the Latina/o community. All interested in civil rights must take great care not to exacerbate, tap into, or capitalize upon such sentiment in advocating for Latina/o civil rights. n23 Unfortunately, however, the subject has not always been approached as delicately as it could have been. n24 [*759]

Besides the focus on the Black-White paradigm, LatCrit discourse also has considered the connections between the subordination of Latinas/os and other racial groups. Beginning in earnest at LatCrit II and continuing at LatCrit III, n25 LatCrit has analyzed the relationship between Latinas/os and indigenous peoples. In Mexico and other Latin American countries, the mixing of native and European peoples, known as mestizaje, has been the norm. n26 Over time in the United States, there have been efforts, part of the assimilation process imposed on Latinas/os, to downplay indigenous roots and emphasize a Spanish ancestry. n27 As influential Chicano/a Studies scholar Rudy Acuna, a keynote speaker at LatCrit IV, put it in referring to the Chicano/a experience in Los Angeles, efforts were made to be "Anything But Mexican." n28

Several conference presentations analyzed the intricacies of the indigenous heritage of Latinas/os. Professor Berta Hernandez describes her painful reaction as others at LatCrit IV questioned her exploration of her native ancestry because no tribe claimed her as a member. n29 This challenge to Professor Hernandez's interrogation of her identity misses the central point of recognizing racial mixture among Latinas/os, which has relatively little to do with tribal membership. "Despite the fact that most Chicanos have substantial indigenous ancestry, Chicanos do not generally, as a group, identify as an Indian tribe." n30 Sadly enough, coerced assimilation [*760] led to destruction of tribal cultures, denial of indigenous roots, and efforts to strive to be white. To counteract this unfortunate history, Chicano/a activists embraced mestizaje and the recognition of our native ancestors. Chicanismo employs positively the phrase "La Raza" (the race) to connote that mestizos, a mixture of Spanish, native peoples, and others in Mexico, are in fact a separate and new race. n31

Professor Hernandez's story further suggests the need to avoid blind application of other group's experiences to Latinas/os and to ensure sensitivity by all LatCrit participants. If one of the most prolific scholars of the LatCrit movement can feel under attack, n32 we should all take pause.

Bringing her federal Indian law expertise to bear on LatCrit theory, n33 Professor Rebecca Tsosie's presentation considered the parallels between Native American and Chicano/a struggles for land. n34 Similar to Latinas/os, Indian peoples historically have suffered due to coerced assimilation at the hands of the U.S. government. n35 Professor Tsosie observed that, just as land is important to the identity of native peoples, it also plays a role in the Chicano/a movement, specifically the mythical Aztlán. n36 Her preliminary ideas on this [*761] subject raise important issues for future inquiry. Importantly, Aztlán and land do not appear to be as central to Chicano/a identity or to activism as they are to Indian tribes. n37 "Few Chicanos advocate the secession of Aztlán as a realistic solution to problems facing the community"; however, "the idea that Chicanos are indigenous to the Southwest remains powerful today." n38 Chicano/a activism over land in the past centered on efforts to
reclaim lands in New Mexico and Arizona based on legal claims under the Treaty of Guadalupe Hidalgo.  

Considering the status of native Hawaiians through a LatCrit lens, Professor Eric Yamamoto, who has analyzed interracial conflict, n40 shows how the perception of native Hawaiians, based on the performance of a hula dance, may affect judges and judging.  n41 He opines that the Supreme Court's decision in Rice v. Cayetano, n42 "probably the most important Hawaiian rights case ever," n43 might well rest on whether indigenous Hawaiian communities are characterized as a political or a racial group. His insights about the centrality of judicial perceptions to the resolution of the dispute dem [*762] onstrate that culture's impact on the law is well worth LatCrit inquiry. n44

Two intriguing essays focus attention on the place of Filipinos in the American racial mosaic.  n45 Although Filipinos commonly are thought of as "Asians," this classification, like all racial ones, is not inevitable. The Philippines once was a Spanish colony and the SpanishAmerican War of 1898 brought the Philippines under U.S. colonial control for half a century.  n46 Due to the legacy of Spanish colonialism, Filipinos share cultural, religious, and other affinities and similarities with Latinas/os. Like Latinas/os, Filipinos have long been racialized in the United States, especially in California. n47

Consistent with his previous call for interracial understanding, n48 Professor Victor Romero analyzes how commonality between Latinas/os and Filipinos may allow for "building bridges" between the groups.  n49 Advocating the investigation of minority-on-minority oppression, n50 he identifies schisms among Asian Americans and Latinas/os by analyzing his naturalization interview with a hostile Latina Immigration & Naturalization Service officer. Showing the fluidity of racial identity, Professor Romero tells of the differences in how he is treated by those that see him without knowing his last name (and assume because of his physical appearance that he is Asian) and those that have not seen him but assume that he is Latino because of his Spanish surname. n51 This shows the importance [*763] that surname and phenotype can play in racial identity and racial identification. n52

In a similar vein, Professor Leti Volpp, whose vibrant scholarship considers the complex relationship between law, culture, race, and gender, n53 analyzes the difficulties historically faced by the courts in fitting Filipinos into a racial category under California's antimiscegenation laws. n54 Evidence used by the courts and policymakers to determine whether Filipinos were subject to the antimiscegenation laws once again demonstrate how race is socially, not biologically, constructed. n55 Professor Volpp's analysis of the antimiscegenation laws raises fascinating points, among them the observation that many of the prevailing stereotypes about Filipino men, such as their "sexual passion," had long been held about African American men. n56 Her analysis also suggests some anomalies, however. For example, why weren't the antimiscegenation laws applied to people of Mexican ancestry? Why, if people of Mexican ancestry were treated as white under these laws, was concern not expressed about relationships between Filipino men and Mexican "girls"? n57 One legal classification treated Mexicans as White (i.e., not subject to the antimiscegenation laws) while social custom treated them as non-White (i.e., society did not penalize Filipino/Mexican relationships). n58 This suggests that Filipinos and Mexican-Americans may have different as well as common experiences. It more generally suggests that race mixing was not a concern unless "Whites" were part of the mix.

Professor Romero's and Volpp's essays raise the intriguing question whether Filipinos are Latinas/os. Professor Volpp directly poses the question whether "we should place Filipino/as within the [*764] rubric of Latina/o, primarily because of a shared legacy of Spanish colonization." n59 Similar questions might be asked about other groups whose histories bear commonalities with the Latina/o experience. Are people of Jamaican ancestry from the Caribbean Latinas/os? n60 This once again illustrates the "messiness of race," n61 its uncertain borders, and the inherent contradictions of socially constructed meanings.

This cluster of papers makes it clear that the process of racialization is complex, affecting different groups in different ways. n62 Latinas/os comprise a truly complex racial mixture of peoples facing complex identity choices. By political necessity, Latinas/os have built coalitions at different historical moments. n63 Filipinos, for example, were a critical component of the United Farm Worker movement. n64 Geography plays a crucial role in the racialization process as well. n65 For example, intermarriage rates between Anglos and Mexican Americans are high in California's urban centers, but much lower along the border with its high racial tensions. n66

We should be sensitive to the complex interaction between law and racial mixture. On the one hand, racial mixture shapes law. The antimiscegenation laws responded to the mingling of the races and the fear that intermarriage and mixed race offspring might undermine racial hierarchy. n67 Racial mixture,
however, need not [*765] be feared. n68 Juan Gomez Quinones, for example, observed that, in New Spain, "the process of mestizaje . . . which moved from Central America to New Mexico . . . undermined racial prejudice in its wake." n69 It also changed the way that racism manifested itself. n70 On the other hand, the law shaped racial mixture in that the antimiscegenation laws limited interracial marriage and, thus, racial mixture.

B. Religion, Subordination, and Gender

The understatement of LatCrit I probably was Professor Keith Aoki's prescient observation that "religion and spirituality are submerged not far below the surface of emerging Latina/o Critical Theory." n71 The complexities of religion flashed in a tense emotional outburst at LatCrit II. n72 Religion, specifically Catholicism, obviously is a difficult topic for many Latinas/os. n73 It proves all the more complex because Catholicism, for example, has contributed to the subordination of women, lesbians, and gay men; at the same time, it has been at the core of important social movements, such as the Chicano/a Movement of the 1960s, the United Farm Workers' organizing efforts of the 1960s and 1970s, and the Sanctuary movement of the 1980s. n74 Catholicism, as well, remains an important aspect of Latina/o culture, and shapes individual identities. We cannot fully understand Latinas/os without appreciating the impact of Catholicism on the historical development and current status of our communities.

Latinas/os must squarely and critically address the problematic aspects of religion on the community. n75 The papers in the Religion, Subordination, and Gender cluster contribute to the ongoing LatCrit analysis. The author of foundational work on the legal history of the enforcement of the Treaty of Guadalupe Hidalgo, which ended the U.S./Mexico War in 1848, n76 Professor Guadalupe Luna considers how the Catholic missionaries subordinated, often violently, native peoples and taught them how to subordinate women. n77 Her analysis of this legal history demonstrates how the concept of "saving souls for Christianity" authorized unmitigated brutality against indigenous peoples. n78 In the name of the Father, missionaries forcibly restructured tribal societies to bring them into compliance with a "patriarchal ideology." n79 This historical chapter starkly shows the role played by the Catholic Church in the subordination of indigenous Californians and women.

Building on Professors Iglesias's and Valdes's analysis of religion, n80 Professor Terry Rey analyzes how the sacred religious symbol of the Virgin Mary contributes to Latina subordination. n81 Professor Rey offers examples of how Latin American Catholicism functions [*767] as a "repressive and antisubordinationalist force in Latin American history and cultures and select diasporic Latina/o communities." n82 Viewing Marianist Catholicism as Max Weber's "legitimizing authority" (legitimierende Macht), Professor Rey critically analyzes the symbols of the Virgin for Latinas. n83

Religion, however, continues to present vexing perplexities for LatCrit theorists. Central to the organizing of the original LatCrit conference (as well as LatCrit IV) and a knowledgeable observer of the impact of the law on women of color, n84 Professor Laura Padilla highlights the intricacies posed to Latinas by religion. n85 She contends that "religion simultaneously subordinates Latinas while serving as a source of strength" n86 and considers the important role of religion in Latina/o culture and family. n87 Far from an apologist for Catholicism, Professor Padilla considers the racial and gender discrimination in the Church, noting for example the fact that it was not until 1970 that the first Mexican American bishop was ordained by the American Catholic Church and that less than one percent of the nuns in the United States are Latina. n88 Professor Padilla contends that, although Latinas may look to the Church for solace, they must reconstruct the Church in their image.

In analyzing religion, one wonders whether national origin differences, as well as class differences, might exist among Latinas/os with respect to Catholicism. One would expect Cuban immigrants, for example, who have experienced the Castro government's attempts to stifle religion, to have a different perspective on the subject than Mexican immigrants and Mexican American citizens. n89 [*768] Similarly, as with all religion, class differences divide the Latina/o community. As Richard Rodriguez's famous Hunger of Memory n90 illustrates, devout Catholicism often flourishes with first generation immigrants as well as blue collar and farm workers. Rodriguez's own transformation shows that reaching professional status has often meant for many Latinas/os downplaying or abandoning their spirituality.

Importantly, we must not essentialize the Catholic Church as a unified monolith, because parts of the church have lent support to social justice movements. n91 Liberation theology has transformed some sectors of the Church, as have clergy who have fought for social justice in various locales. n92 Theological teaching may be relevant to legal analysis. n93 For example, some contend that religious convictions mandate more generous, less punitive immigration and welfare laws. n94
As these essays make clear, we must be forever attentive to how Latinas are mistreated, legally, religiously, and otherwise. n95 Spousal abuse is an obvious, all-too-common example. Professor Donna Coker analyzes how, as suggested by influential articles on the concept of intersectionality, n96 spousal abuse disparately affects women of color. n97 She highlights social science research illustrating this [*769] point and calls for additional remedial action. Professor Coker's article fits in with the burgeoning Critical Race Feminism movement, which posits that women of color are disparately affected by the law. n98 The focus on the particular forms of oppression suffered by women of color invites further inquiry into the class, gender, and race disadvantages facing Latinas in employment, housing, and immigration. n99 Immigration law deserves especially close scrutiny, as it has had a devastating effect on the well-being of undocumented Latinas in this country, undermining their legal rights and, tragically enough, increasing the violence done to them. n100

The study of the subordination of Latinas is of central importance to the LatCrit project. LatCrit, as an intellectual community, is committed to not replicating the dynamics of subordination. We must continue to analyze how that subordination originates and perpetuates itself through religious and other social institutions.

C. Class, Workers, and the Law

Class issues are especially salient for Latinas/os in the United States. n101 Early in LatCrit, attention was paid to the diversity among Latinas/os, including class diversity among national origin groups. n102 The LatCrit III symposium included a cluster on "In [*770] ter/National Labor Rights: Class Structures, Identity Politics and Latina/o Workers in the Global Economy." n103 The essays in this cluster on Class, Workers, and the Law continue this important discussion.

A thoughtful observer of racial stratification in the United States, n104 Professor Tanya Hernandez raises the important issue of intra-Cuban class and racial conflicts. n105 She documents the history of repression of Afro-Cubans, replete with atrocities, and shows how in modern times they are poorer on the whole than most Cubans. More recently, class and race differences have, for example, contributed to lukewarm Cuban American support for continued refugee admissions in south Florida. n106 Today's Cuban migrants are poorer and Blacker -and, not coincidentally, less popular in the United States -- than ones of times past. Professor Hernandez questions whether LatCrit theory's "antisubordination goal can be achieved if we as scholars do not explicitly challenge

the Latin American model of discounting our own racial diversity . . . ." n107 Importantly, Latinas/os must uncover racial subordination within their communities, which by necessity requires a race conscious approach. Professor Hernandez ties this into criticism of class-based affirmative action by contending, in effect, that its failure in Cuba suggests a similar fate in the United States. Such comparisons must remain tentative, although the central point remains well taken.

More generally, Professor Hernandez's article implicates broader questions concerning Afro-Latinas/os. Scholarship has begun to focus attention on Black immigration to the United States from the [*771] Caribbean n108 and other nations. n109 Additional inquiry must be focused on Mexican, Cuban, Puerto Rican, and other Latinas/os of African ancestry; the experience in each of these communities, inside and outside the United States, differs from that of non-Afro Latinas/os in important respects. Scholarship on this topic is emerging. n110 This phenomenon demonstrates once again the diversity of the Latina/o experience and how LatCrit theorists must take care not to homogenize or essentialize the communities.

Other essays in this cluster document how the law continues to adversely affect working class and poor Latinas/os. Dean Christopher David Ruiz Cameron skillfully analyzes how the ban of gas-powered leaf blowers by the city of Los Angeles, supported by environmentally conscious celebrities, negatively affected Mexican gardeners. n111 He effectively ties this movement into the fundamental LatCrit tenets of Latina/o invisibility and forced assimilation. Class dynamics cannot be missed in a story in which white Hollywood media stars seeking more personal comfort and environmental aesthetics advocate changes in the law that would make the lives of poor Mexican workers harsher than they already are. Although interests of environmentalists and people of color have been [*772] aligned in the environmental racism movement, n112 this case study reflects the continuing class and racial divisions on environmental issues. n113

The next contribution analyzes how the law has used proxies -facially neutral substitutes for racial classifications -- to discriminate against Latinas/os, with particular impacts on poor and working class Mexican immigrants. n114 Immigration status n115 and language discrimination, n116 two issues of central importance to LatCrit inquiry, constitute two proxies for race that discriminate subtly yet with impunity against Latinas/os. Professor George Martinez and I, n117 "writing squarely as law
Professor Backer further posits that the evidence presented by the California voters in June 1998, in effect discriminated against Spanish-speaking persons of Mexican ancestry. This measure fits into a longer history of discrimination against people of Mexican ancestry. The discrimination by proxy concept may prove to be an important doctrinal tool that has the potential of increasing Latinas/os' and other subordinated peoples' ability to attack the often subtle discrimination directed at them. As discrimination is driven underground, legal doctrines must evolve in sophistication to keep up with ingenious, facially neutral devices that discriminate.

Professor Pamela Smith offers a perspective on the difficulties of minority "workers" -- law professors -- in legal academia. Her essay serves as a reminder to those among our ranks with tenure to consider the experiences, perspectives, and perceived vulnerability of the untenured, even at relatively safe settings such as LatCrit conferences. The discussion group of untenured professors that originated at LatCrit IV should be continued at future conferences. Moreover, Professor Smith tells of the kindness offered her as she entered the turbulent waters of legal academia by a tenured African American professor, Isabelle Gunning, who serves as a model for us all.

Placing into doubt the ability of LatCrit theorists to influence the law and help the subordinated, Professor Larry Cata Backer, an important voice on welfare "reform," offers a gloomy forecast about the future impact of critical scholarship on the courts. He presents the results of searches of computer databases showing few judicial citations to leading Critical Race scholars, which he interprets as suggesting that hope of changing the law through scholarship may be misplaced. However, even if citations fail to register on the computer databases, critical scholarship may well inform and influence judicial decision-making in subtle ways, through, for example, amicus curiae briefs and by educating the next generation of lawyers. Critical theory indeed may help bring about shifts in ways of thinking about the law. For example, even if a court does not cite Paul Butler's famous jury nullification article, national attention has been raised about the racial implications of the criminal justice system.

Professor Backer further posits that the evidence indicates that state courts may be more likely to adopt a critical bent than the federal courts. In light of the anti-Latina/o sentiment in the states, often embedded in laws upheld and enforced by the state courts, this optimism seems unwarranted. The trust in federalism requires a leap of faith and, at a minimum, a considerable amount of further investigation.

Is there reason for hope? Bill Tamayo, Regional Attorney for the Equal Employment Opportunity Commission ("EEOC") who has written important work on civil rights issues, documents recent EEOC efforts to protect Latina/o farm workers. Tamayo discusses outreach programs of the EEOC, including training of California Rural Legal Assistance attorneys about the law of sexual harassment. He recounts the EEOC-initiated litigation culminating in an over $1.8 million settlement for the atrocious sexual harassment of farm worker Blanca Alfaro. Such successes warrant celebration. One wonders, however, how effective litigation like this will ultimately prove to be, especially given the fact that farm worker labor conditions have been shameful for years without significant change.

D. LatCrit Praxis
LatCrit theory has an enduring commitment to putting theory into practice. In this spirit, Professors Sumi Cho and Robert Westley offer a history of progressive political activism at U.C. Berkeley's Boalt Hall School of Law that contests the conventional wisdom. They contend that student activism from the 1960s to the 1990s was central to the development of Critical Race Theory. To shed light on that contention, we focus on the history of U.C. Berkeley's Boalt Coalition for a Diversified Faculty, an organization in which both authors played leadership roles as law students. This history is absent from the official record of this distinguished law school. Their historical research shows that the student activism that facilitated the formation of Critical Race Theory was not just a Harvard-centered phenomenon, as is commonly understood. Because Critical Race Theory helped create the intellectual space necessary for the emergence of LatCrit theory, its roots and its fortunes in legal academia are important to this project.

As history reveals, art also can be employed for political ends. In a fascinating LatCrit IV panel on "Literature and Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production," the panelists explored the nexus between art and LatCrit theory. Professor Pedro Malavet offers his perspectives on this panel, while describing his "accidental" descent into LatCrit theory. His narrative tells how he was radicalized by a rough-and-tumble initiation into the legal academy and moved from traditional to critical scholarship with a Latina/o bent. In addition, Professor Malavet touches on the link between law, culture, and subordination.
Offering a specific example of art as praxis, Nicholas Gunia analyzes Jamaican music as a form of resistance. He places the resistance into context by describing the racial stratification in Jamaica and the religious and social movement of Rastafarianism. Like the old slave songs in the United States, this form of Jamaican music constitutes a type of resistance to subordination. Viewing art as resistance in certain circumstances sheds light on current social phenomena such as gangsta rap and gang membership.

Although radically different from art, clinical teaching holds the promise of linking theory and practice. Professor Alfredo Mirande Gonzalez, an established Chicano/a Studies scholar turned law professor, utilizes the narrative form to reflect on teaching clinic students how to put the law into practice. Attempting to follow the methodological path blazed by Derrick Bell and Richard Delgado, Professor Mirande uses fictitious field reports from a clinical placement similar to those he did as a student in Stanford's now-defunct Lawyering for Social Change Program. Through alter ego Fermina Gabriel, Professor Mirande raises questions about critical theory. His imaginary dialogue, however, fails to present a unified thread of inquiry and neglects relevant LatCrit and critical lawyering scholarship.

Most troubling, Professor Mirande's fiction lacks gender sensitivity. Work that neglects subordinations undermines the LatCrit project. Viewing art as resistance in certain circumstances sheds light on current social phenomena such as gangsta rap and gang membership.

E. International Linkages and Domestic Engagement

For many reasons, including globalization, immigration, and technological advancement, to name a few, the local and the global are increasingly intertwined. LatCrit has been central in considering the international. On the heels of LatCrit I, a LatCrit colloquium at the Hispanic National Bar Association 1996 annual conference explored international law and human rights. At the forefront, Professor Elizabeth Iglesias focused LatCrit attention on the importance of human rights to international economic law and the Latina/o condition in the United States. LatCrit III saw a discussion of "Global Intersections." LatCrit IV also focused on the international. Professor Celina Romany, the author of influential scholarship on women's rights as international human rights, offered an inspiring keynote speech entitled "Global Capitalism, Transnational Social Justice and LatCrit Theory as Antisubordination Praxis."

Because the expansion of the Spanish colonial empire shaped the evolution of Latin America, "empire" is a central concept for Latinas/os to consider in evaluating their place domestically and internationally. Reviewing Vday Singh Mehta's book Liberalism and Empire: A Study of Nineteenth-Century British Liberal Thought, Professor Tayyab Mahmud articulates his vision of the impact of empire-building and how colonialism is important to liberal thought. He contends that liberalism also calls for racial, class, cultural, and other exclusion.

Consistent with this pessimistic version of liberalism, Professor Tim Canova criticizes the claim that meaningful positive economic and social transformation for developing nations can be accomplished through the efforts of the International Monetary Fund (IMF). This criticism finds intellectual support in the longstanding critique of liberalism. Professor Canova astutely applies LatCrit teachings to the study of the international economic system. He claims categorically that "the global monetary system, and the IMF in particular, systemically subordinates entire nations of color." In making his case, Professor Canova disagrees with the relative optimism of Professor Enrique Carrasco about the IMF's transformational potential. Whatever the relative strength of his argument on the merits, Professor Canova's mode of criticism should serve as a positive role model for LatCrit theories. Admitting Professor Carrasco's laudable goal of protecting vulnerable groups in Latin America and respectfully treating his views, Professor Canova constructively questions the means of achieving that end.

Considering the domestic impacts of international developments, Professor Chantal Thomas critically evaluates the effects of the "globalization" of the world economy on the United States, marred as it is by deep and enduring racial and economic inequality. She opines that, despite the frequent trumpeting of the benefits of the emerging global economy, "without intervention, globalization may instead lead to increased socioeconomic inequality and economic volatility." Indeed, "it is . . . possible that globalization will generally entrench existing structural inequalities, and that some of these inequalities will be racial in character." Consequently, Professor Thomas asks us to consider the possible racial impacts in the United States resulting from the development of a global economy.

Professor Thomas thoughtfully demonstrates the inextricable links between the global and the local, the
overlapping nature of class and racial inequality, and the interrelationship between the subordination of various groups, especially African Americans and Latinas/os. These, of course, are central to LatCrit theory. \(n165\) The article also suggests questions for future inquiry. Importantly, by distinguishing between Latina/o immigrants and the well-established Mexican American community in the inner cities, \(n166\) Professor Thomas obliquely raises the question of how migration and labor flows into the United States, part of the globalization of the world economy, figure into her analysis. The domestic racial \(\text{[*780]}\) impact, if any, of international migration has been the subject of considerable controversy. For example, prominent labor economist Vernon Briggs has long contended that "mass migration" from Asia and Latin America has injured the African American community. \(n167\) Similarly, some commentators claim that the impoverished state of farm workers in the United States can only be improved with a clamp down on undocumented immigration from Mexico. \(n168\) These difficult issues, representing potential fault lines among subordinated communities, warrant close attention.

This ambitious cluster proposes not one, but two, important international law perspectives that require future exploration. A keen observer of the international legal scene, \(n169\) Professor Gil Gott suggests the need for a new genre of "Critical Race Globalism," which would "expressly link[] racial with international justice struggles." \(n170\) He views white supremacy as a global phenomenon, thereby requiring global solutions. Similarly, Professor Ediberto Roman advocates a Critical Race approach to international law. \(n171\) Ferment in international law has spawned many new approaches, including New Approaches to International Law, Third World Approaches to International Law, and feminist approaches to international law. \(n172\) However, the impact of race on international law generally goes unexplored. Demonstrating the inability of various methodological approaches to account for race, Professor Roman calls for an expressly race-based perspective and articulates the case for race being at the center of international discourse. \(n173\) Importantly, events in Latina/o history, such as the U.S./Mexican War and the Treaty of Guadalupe Hidalgo \(n174\) as well as the Spanish/American War and the subsequent denial of constitutional rights to racialized peoples in U.S. territories, \(n175\) need concentrated analysis with race at the forefront. This racial history continues to impact the present and therefore warrants future LatCrit analysis.

II. Future Challenges and Trajectories?

We are at a critical juncture in the evolution of LatCrit theory. In the next few pages, I identify future challenges and potential pitfalls. Importantly, although we should celebrate LatCrit theory’s early success, we must brace ourselves for growing pains, internal tensions, and external critique.

A. LatCrit Must Remain Inclusive

Critics might claim that the LatCrit movement has strayed from its Latina/o roots. The "rotating centers" concept captured in the title to LatCrit IV, however, allows us to be inclusive and to consider the subordination of other peoples of color and the relationship to Latinas/os’ status in the United States. \(n176\) As LatCrit theorists have observed, \(n177\) Latina/o subordination is related to and connected with other subordinations. To fully understand one, we must comprehend them all.

Moreover, the inclusiveness of LatCrit theory is an important source of strength that holds great promise for the future. Inclusiveness has fostered coalitions and mutual self-help. It has built good will and promoted serious scholarship in new and important ways. Inclusiveness allows the LatCrit community to engage in ongoing intellectual ferment and allows it to remain dynamic rather than static. \(\text{[*782]}\)

B. External Challenges and Internal Tensions

As LatCrit matures, we must anticipate external challenges and continuing, perhaps mounting, internal tensions. The maturation process may well subject LatCrit to attack, such as that leveled at Critical Race Theory, feminist jurisprudence, and other critical genres. \(n178\) As we prepare for external critiques, we should keep in mind that Critical Race Theory ("CRT") has been vulnerable to attack because critics have ascribed certain intellectual positions as part of CRT orthodoxy. Yet, CRT remains difficult to reduce to fundamental tenets because its fluid and eclectic approach encompasses diverse methodologies from many disciplines. \(n179\) LatCrit should retain the prerogative to define and redefine itself rather than be defined by critics. Constant self-criticism and self-definition is essential to a movement as dynamic as LatCrit.

To fend off external attacks effectively, LatCrit theorists must address internal tensions within the movement. We must support each other and be ready to respond to the future intellectual challenges. Striving to maintain unity, LatCrit theorists must resist the centrifugal pressures toward disintegration.

To this end, LatCrit must keep internal tensions in perspective and learn the lessons of the past. Importantly, LatCrit theorists cannot let the personal
dominate the intellectual and allow interpersonal antagonisms to undermine the project. Specifically, we must avoid at LatCrit conferences, the spontaneous "slash-and-burn, hold-noprisoners, hypercritical attack upon some unfortunate and often unsuspecting target." In that vein, we hopefully will never see the day when so-called "attack scholarship" focuses on each other's work.

We must nip in the bud the development of schisms along gender, class, national origin, racial, and other lines. One way to ease tensions is to recognize and encourage separate investigations of specific group histories, both inside and outside LatCrit. All of these competing strands and thoughts must continue to be included within the umbrella LatCrit intellectual community.

At the same time, we must allow dissent within our ranks. Criticism of ideas and diversity of approaches, of course, remains essential to intellectual growth. LatCrit must continue to emphasize the critical. As scholars, we should be critical of each other's work. Nonetheless, the tone and method by which we criticize is all-important. In voicing dissent and promoting sophisticated intellectual discourse, we must be sensitive to the feelings of others and attempt to offer constructive, not destructive, criticism.

An ongoing intellectual scholarly community requires sensitivity to each other, our differences, and our humanity, not a scorched earth approach to scholarship and the views of our colleagues.

In my mind, a wonderful example of constructive criticism was Professor Frank Valdes's presentation at the June 1999 LatCrit conference in Spain. He presented a provocative and devastating thesis -- that Spain should seriously consider the payment of reparations for the plunder of the grand indigenous societies of the New World to a group of Spanish legal scholars. The challenge to Spain from an American ran the risk of causing tension, discord, and hard feelings. Professor Valdes offered a balanced account of the need for an investigation of reparations by Spain for its exploitation of New World natural resources and people. We need this type of constructive and positive engagement both at the live events and in the symposium contributions.

C. Engaging LatCrit Literature

Future LatCrit scholarship must fully grapple with the breadth and nuances of the rapidly evolving LatCrit scholarship. This formidable task, which at a minimum requires engagement with a series of symposia, colloquia, and an anthology of readings, well as review of LatCrit pieces published in other venues, as well as an introduction to those interested in the field. The LatCrit web page created by Professor Pedro Malavet allows us to keep up on the growing body of literature as well as upcoming events and related LatCrit information.

In future contributions to LatCrit symposia, I hope that participants seriously engage the existing scholarship, study the literature, and acknowledge previous contributions. Ideally, each contribution to a LatCrit symposium would explain how the author's contribution fits into LatCrit theory and the existing body of LatCrit scholarship. Publication opportunities for scholarship obviously are central to the LatCrit mission. However, they cannot be the sole purpose of LatCrit theory or the movement will soon dissolve as a cohesive and distinct body of scholarship. Due to Frank Valdes's leadership and foresight, LatCrit crystallized with the formation of the annual LatCrit conferences, an event with importance that cannot be underestimated. However, the critical study of Latina/o issues did not begin in 1995. The work of the scholars from law and many other disciplines who were doing LatCrit before it became "cool" should not be marginalized or ignored.

In our scholarship, LatCrit theorists also must strive to avoid the "star system" and exclusive citation to a small group of perceived stars for legitimacy. If we do not take care, the "imperial scholar" phenomenon may well infect LatCrit scholarship as it has majority scholarship. We must be inclusive or risk the splintering of LatCrit into disgruntled factions.

To warrant intellectual respect, the LatCrit authors should always strive for high quality scholarship. The scholarship should fulfill the LatCrit mission, which requires critical analysis of Latina/o and related subordinations. All of us should be conscious of how our LatCrit scholarship contributes to this important mission.

D. The Need for Infrastructure

A LatCrit infrastructure, currently under construction, is necessary to ensure the continuity and future of the project. The legal incorporation of LatCrit and the overlapping membership of the planning committee have helped provide necessary continuity and institutional memory. This infrastructure, missing from Critical Legal Studies and Critical Race Theory, hopefully will keep LatCrit moving forward and should help LatCrits avoid getting bogged down in the same old disputes.
Because of the success of LatCrit III and IV, I firmly believe that we are beyond the time when it is accurate to refer to "the fragile and tentative nature of the LatCrit enterprise." 

FOOTNOTE-1:

n1 Francisco X. Alarcon, Tierra Prometida (Promised Land), in S. Beth Atkin, Voices from the Fields: Children of Migrant Farmworkers Tell Their Stories 95 (1993).


n3 Because of the location of the conference, a number of the symposium contributions focus on the impact of law on Chicanos/as and Latinas/os in California.

n4 Fact Sheet: LatCrit, in LatCrit Primer, unpublished materials distributed to participants at LatCrit IV (1999).


n8 Valdes, supra note 6.

n9 See generally Thomas Kuhn, The Structure of Scientific Revolutions (2d ed. 1970) (articulating theory of paradigm shifts in intellectual disciplines).

n10 See infra notes 117-19 and accompanying text.

n11 See infra notes 120-21, 141-48, 169-75 and accompanying text.


n13 See infra text accompanying notes 131-48.


n15 See, e.g., Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411 (1989); George A. Martinez, Philosophical Considerations and the Use of Narrative in Law, 30 Rutgers L.J. 683 (1999). Feminist theorists also have advocated storytelling. See, e.g., Kathryn...


n21 See Iglesias, supra note 7, at 622-29 (responding to critiques of focus on African Americans in LatCrit, including claim that this approach leaves "Lat" out of LatCrit).


n23 See Farley, supra note 20, at 174.

n24 See, e.g., Juan F. Perea, Five Axioms in Search of Equality, 2 Harv. Latino L. Rev. 231, 238 (1997) (suggesting that certain African Americans have a "possessory attitude toward civil rights"). Some have stated that the challenge to the Black/White paradigm "could be read as a criticism of African-American scholars . . . . We must remember that African Americans did not create the binary color line." Leslie Espinoza & Angela P. Harris, Afterword: Embracing the Tar-Baby -- LatCrit Theory and the Sticky Mess of Race, 85 Cal. L. Rev. 1585, 1615 (1997), 10 La Raza L.J. 499, 529 (1998); see also Mutua, supra note 19, at 1189 (objecting to "tone" of criticism of Black/White binary and emphasizing that "blacks did not invent white racism, nor do we control the primary institutions supporting racial hierarchy") (footnotes omitted).


n29 See Hernandez-Truyol, supra note 17.


n31 See Manuel G. Gonzales, Mexicanos: A History of Mexicans in the United State 4 (1999); see also Ramon A. Guiterrez, Community, Patriarchy and Individualism: The Politics of Chicano History and the Dream of Equality, 45 Am. Q. 44, 46 (1993) ("Chicanismo meant identifying with la raza (the race or people), and collectively promoting the interests of carnales (or brothers) with whom they shared a common language, culture, religion, and Aztec heritage.").


n34 See Rebecca Tsosie, Native Cultures, Comparative Values and Critical Intersections Panel Presentation at LatCrit IV (Apr. 30, 2000). Other panelists included Jo Carillo, Donna Coker, Berta Esperanza Hernandez-Truyol, and Eric Yamamoto.


n37 See generally Ignacio M. Garcia, Chicanismo: The Forging of a Militant Ethos Among Mexican Americans (1997)
(analyzing evolution of Chicano/a movement).

n38 Toro, supra note 30, at 1250 n.184 (citation omitted).


n42 146 F.3d 1075 (9th Cir. 1998), rev'd, 120 S.Ct. 1044 (2000). In this case, the Court decided the constitutionality of "special elections for trustees of the Office of Hawaiian Affairs . . . , who must be Hawaiian and who administer public trust funds set aside for the betterment of 'native Hawaiians' and 'Hawaiians,' in which only people who meet the blood quantum requirement for 'native Hawaiian' or 'Hawaiian' may vote." Rice, 146 F.3d at 1076 (footnote omitted). The Court invalidated the election scheme under the Fifteenth Amendment. See Rice, 120 S.Ct. at 1060.

n43 Yamamoto, supra note 41, at 875.

n44 See infra text accompanying notes 135-40. Law and culture have been explored in other contexts. See, e.g., Renato Rosaldo, Culture & Truth: The Remaking of Social Analysis (1993); Janet E. Halley, Sexuality, Cultural Tradition, and the Law, 8 Yale J.L. & Human. 93 (1996); Madhavi Sunder, In Fragile Space: Sexual Harassment and the Construction of Indian feminism, 18 Law & Pol'y 419 (1996).

n45 See Toro, supra note 30, at 1262-63 (raising question whether Filipinos are Latina/o).


n47 See, e.g., In re Lampitoe, 232 F. 382 (S.D.N.Y. 1916) (holding that Filipino could not naturalize because he was not "White"); Ronald Takaki, Strangers from a Different Shore 315-54 (rev. ed. 1998) (analyzing history of Filipinos in United States); Simeon E. Baldwin, The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory, 12 Harv. L. Rev. 393, 415 (1899) (stating that "the half-civilized Moros of the Philippines . . . or even the ordinary Filipino of Manila" in recently-acquired U.S. Territories did not deserve constitutional protections afforded to U.S. citizens).


n51 See Romero, supra note 49, at 846-47.

n52 See Johnson, supra note 27, at 1295-97, 209-10.


n54 See Leti Volpp, American Mestizo: Filipinos and Antimiscegenation Laws in

n56 Volpp, supra note 54, at 809-10.

n57 Id. at 810 n.59.

n58 See George A. Martinez, The Legal Construction of Race: Mexican-Americans and Whiteness, 2 Harv. Latino L. Rev. 321 (1997) (showing how, although Mexicans were classified as "white" for naturalization purposes, there were subject to discrimination and segregation).

n59 Volpp, supra note 55, at 833.


n62 Some of the comments in the following pages are based on my presentation at LatCrit IV on the panel on "Mestizaje, Identity and the Power of Law in Historical Context: LatCrit Perspectives."

n63 See Acuna, supra note 28, at 133 (summarizing coalitions between Asian and Chicano/a workers).


n67 See Loving v. Virginia, 388 U.S. 11 (1967) ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that [they are] measures designed to maintain White Supremacy.") (footnote omitted); Akhil Reed Amar, Attainder and Amendment 2: Romer's Rightness, 95 Mich. L. Rev. 203, 205 n.7 (1996) ("The social meaning of miscegenation laws was the legal enactment of racial hierarchy . . . ."). Some today hope that racial mixture will have precisely this impact. See Jim Chen, Unloving, 80 Iowa L. Rev. 145, 167-72 (1994); Alex M. Johnson, Destabilizing Racial Classifications Based on Insights Gleaned fromTrademark Law, 84 Cal. L. Rev. 887, 925-31 (1996).

n68 See, e.g., Jose Vasconcelos, Raza Cosmica (1925) (viewing racial mixture in Mexico as creating a "cosmic race" (raza cosmica)).

n69 Juan Gomez Quinones, Roots of Chicano Politics, 1600-1940, at 11 (1994).

n70 See Roxanne Dunbar Ortiz, Roots of Resistance: Land Tenure in New Mexico, 1600-1980, at 50 (1980) (A "caste system, pervaded Spanish colonial societies, little different from the racism which modern colonialism has bred wherever it has become rooted.").


n74 See Acuna, supra note 39, at 431-37; Rosales, supra note 64, at 61-63; see also Garcia, supra note 37, at 61-63 (discussing ambivalence about Catholic Church among Chicano/a activists in 1960s and 1970s).

n75 See Iglesias & Valdes, supra note 72, at 511-46.


n78 Id. at 925.

n79 Id. at 935-36.

n80 See Iglesias & Valdes, supra note 72, at 511-40.

n81 See Terry Rey, "The Virgin's Slip is Full of Fireflies": The Multiform Struggle over the Virgin Mary's Legitimierende Macht in Latin America and Its Diasporic Communities, 33 U.C. Davis L. Rev. 955 (2000).

n82 Id. at 956; see also Linda L. Ammons, What's God Got to Do with It? Church and State Collaboration in the Subordination of Women and Domestic Violence, 51 Rutgers L. Rev. 1207 (1999) (analyzing role of Christianity in subordination of women and condoning domestic violence).

n83 Rey, supra note 81, at 957-58.


n86 Id. at 974; see also Jeanette Rodriguez, Our Lady of Guadalupe: Faith and Empowerment Among Mexican-American Women (1994) (analyzing religious symbols as source of hope and power for Mexican American women).

n87 See Padilla, supra note 85, at 976-79.

n88 See id. at 987 n.72.

n89 See Valencia, supra note 72, at 451-53.


n91 See supra text accompanying note 74.
n92 See Iglesias & Valdes, supra note 72, at 535-45 (investigating liberation theology's relevance to LatCrit theory).


n101 See Rachel F. Moran, Foreword -- Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond, 8 La Raza L.J. 1, 10 (1995) (noting that Latinas/os "often have been attuned to questions of class, rather than race or ethnicity, in formulating a reform agenda"); see also Mary Romero, Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: "Where Can You Find Good Help These Days!", 53 U. Miami L. Rev. 1045 (1999) (analyzing issues of race and class implicated for Latinas in domestic service industry).

n103 Iglesias, supra note 7, at 664-72.


n107 Hernandez, supra note 105, at 1167.


n109 See Lolita K. Buckner Inniss, Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness, 49 DePaul L. Rev. 85 (1999); see also Berta Esperanza Hernandez-Truyol, Building Bridges III -- Personal Narratives, Incoherent Paradigms, and Plural Citizens, 19 Chicano-Latino L. Rev. 303, 322 (1998) (observing that Black immigration includes "not only that from many different African countries . . . , but also from the Caribbean countries. Such increased diversity increases the commonality and intersection of issues of Blacks with those facing Latina/o and Asian/Pacific groups . . . .").


n114 See Kevin R. Johnson & George A. Martinez, Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education, 33 U.C. Davis L. Rev. 1227 (2000).


n119 See Johnson & Martinez, supra note 114, at 1231-47.

n120 See Smith, supra note 18.

n121 See id. at 1130-31.


n125 See Martinez, supra note 117 (analyzing pattern of state, as well as and federal, court decisions denying civil rights to Mexican Americans).


n129 See id. at 1080-82.


n132 See Sumi Cho & Robert Westley, Historicizing Critical Race Theory's
Cutting Edge: Key Movements that Performed the Theory, 33 U.C. Davis L. Rev. 1377 (2000).

n133 See Kimberle Crenshaw et al., Critical Race Theory: The Key Writings That Formed the Movement xx-xxii (1995).

n134 See Cho & Westley, supra note 132, at 1408 n.67.


n136 See Malavet, supra note 18, at 1324-31.

n137 See id. at 1297-1306.


n141 See Kevin R. Johnson & Amagda Perez, Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory, 51 SMU L. Rev. 1423 (1998).


n144 See, e.g., Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992).


n147 See, e.g., Mirande, supra note 143, at 1355 n.10 (stating that Fermina "looks great in her Black Charra outfit").

n148 See infra note 178 (citing authorities).

n149 See, e.g., Chang & Aoki, supra note 115 (analyzing how international developments shaped the evolution of Asian American community in Monterey Park, California).


n152 Iglesias, supra note 7, at 631-46.


n156 See Tayyab Mahmud, Race, Reason, and Representation, 33 U.C. Davis L. Rev. 1581 (2000).


n159 Canova, Global Finance, supra note 157, at 1549 (footnote omitted).


n163 Thomas, Globalization, supra note 162, at 1451 (footnote omitted).

n164 Id. at 1499.

n165 See supra text accompanying notes 19, 101-30, 149-53.

n166 See Thomas, Globalization, supra note 162, at 1456-76. For analysis of the conflicts between immigrants and established U.S. residents of Mexican ancestry, see Kevin R. Johnson, Immigration and Latino Identity, 19 Chicano-Latino L. Rev. 197 (1998).


n173 See Roman, RAIL, supra note 171.


n175 See supra notes 46-47 (citing authorities).

n176 See supra text accompanying note 19.

n177 See supra note 19 (citing authorities).

n178 See, e.g., Daniel Farber & Suzanna Sherry, Beyond All Reason (1997); Matthew W. Finkin, Quatsch!, 83 Minn. L. Rev. 1681 (1999); Chen, supra note 67; Anne M. Coughlin, Regulating the Self: Autobiographical Performances in Outsider Scholarship, 81 Va. L. Rev. 1229 (1995).

n179 See Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 Cal. L. Rev. 741, 744-45 (1994).

n180 See Arriola, supra note 73, at 14 (observing that "conflicts [at LatCrit II] centered on everything from the personal to the political, and from the personal which became political") (footnote omitted).

n181 Iglesias, supra note 7, at 578.


n183 See Johnson & Martinez, supra note 22, at 1155-57 (calling for specific exploration of Chicano/a experience).

n184 See, e.g., supra text accompanying notes 157-61.

n185 See Francisco Valdes, "Criminality, Accountability and Reparations: Post-Pinochet Extrapolations," at The Spanish Legal System and LatCrit Theory: A Dialogue, Presentation at the University of Malaga, Malaga, Spain (June 30, 1999).

n186 See Latino/a Condition, supra note 2; supra note 2 (citing various symposia and colloquium).

n187 See, e.g., Iglesias, supra note 172; Luna, Agricultural Underdogs, supra note 76; HernandezTruyol, supra note 95; Montoya, supra note 95; Yxta Maya Murray, The Latino-American Crisis of Citizenship, 31 U.C. Davis L. Rev. 503 (1998); Olivas, supra note 158; Roman, Empire Forgotten, supra note 154; Symposium, Understanding the Treaty of Guadalupe Hidalgo, supra note 76; Sylvia R. Lazos Vargas, Deconstructing Homogenous Americanus: The White Ethnic Immigrant and Its Exclusionary Effect, 72 Tul. L. Rev. 1493 (1998); see
also Johnson & Martinez, supra note 22, at 1159-61 (contending that much Chicano/a Studies scholarship is relevant to LatCrit theory). LatCrit scholarship need not necessarily be published in LatCrit annual symposia or other LatCrit conferences. Rather, as the literature expands, we would hope to see LatCrit scholarship in law reviews outside the annual symposia. Similarly, although the movement was officially denominated "LatCrit" in 1995 or thereabouts, see Iglesias, supra note 7, at 673, 680-81, critical literature about Latinas/os and the law existed before that date. Careful research requires looking at literature both inside and outside the official symposia and both before and after LatCrit I in 1996.


n189 See Pedro Malavet <http://nersp.nerdc.ufl.edu/malavet/latcrit/latcrit.htm#anchorlc> (on file with author).

n190 See, e.g., Canova, Global Finance, supra note 157.

n191 See, e.g., Richard Delgado & Vicki Palacios, Mexican Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause, 50 Notre Dame Law. 393 (1975); Johnson, supra note 118; Martinez, supra note 117; Montoya, supra note 95; Moran, supra note 101.


George A. Martinez *

BIO:

* Associate Professor of Law, Southern Methodist University; B.A. 1976, Arizona State University; M.A. (Philosophy) 1979, The University of Michigan; J.D. 1985, Harvard Law School. I would like to thank Kevin Johnson for his helpful comments on a draft of this Essay.

SUMMARY: ... The U.C. Davis Law Review is an especially appropriate venue for this LatCrit Symposium. ...

[787]

The U.C. Davis Law Review is an especially appropriate venue for this LatCrit Symposium. The Law Review recognized early on the significance of legal discourse focused on Latinos and published some of the early LatCrit works. n1 It seems appropriate to acknowledge the pioneering work of law reviews, just as Kevin Johnson has suggested in the Foreword to this issue that it is important to recognize the pathbreaking pre-1996 n2 LatCrit work. n3 This cluster of essays continues the Law Review's fine work in this area and is titled: Diversity, Commonality, and Identity.

One of the major themes of LatCrit theory has been to critically scrutinize the evolution of law. n4 Leti Volpp's contribution fits nicely within this tradition. In her piece, she provides a history of the California laws that prohibited marriages between Filipinos and whites. n5 She describes how such laws were motivated by concerns that such unions would create a new type of racial hybrid -- an [*788] "American Mestizo." n6 In defending these laws in court, the attorneys for the state argued that without such laws, the United States would suffer the "evil effects" of "race mixture" that had already been experienced by Mexico. n7 The legal authorities tended to classify Filipinos as "Mongolians" and, therefore, Filipinos fell within the statute that outlawed marriages between whites and Mongolians.

Volpp's piece provides another piece of the puzzle regarding mainstream society's concern about racial mixture. Indeed, LatCrit theory has been at the forefront of addressing and analyzing such "mestizaje" or racial mixture. n8 In addition, Volpp points out that the conventional view is that Latinas/os were not covered by the miscegenation laws. With so many Mexican Americans in California, one might wonder why. The answer seems to be this. Mexican Americans were legally classified as white, largely because of the Treaty of Guadalupe Hidalgo n9 that ended the war between the United States and Mexico. n10 Thus, the miscegenation laws did not extend to Mexican Americans. Beyond this, it made good business sense for Anglos to marry the daughters of rich Mexican landowners in California. n11 Given this incentive, there were prudential reasons not to craft laws to prohibit intermarriage between Anglos and Mexican Americans.

Victor Romero also addresses the situation of Filipinos. n12 In particular, he uses the history of Filipinos to emphasize the importance of coalitions among minority groups. It is, of course, a fundamental principle of LatCrit theory that the various subordinations are interrelated in complex ways. n13 Thus, he contends that the Filipino community was shortsighted when it challenged the California statute outlawing marriages between whites and blacks or Mongolians on the ground that Filipinos were not Mongolian. n14 He suggests it would have been better for the affected minority groups to unite and attack the law's premise. He then employs narrative -- an important critical tool n15 -- to provide a contemporary example to illustrate the importance of minority coalitions. He tells a story arising out of his experience as an immigrant from the Philippines. During the immigration process, he experienced insensitivity at the hands of a Latina INS agent during his citizenship interview in 1995. As a result, he urges minorities not to treat each other as the "Other." n16 Instead, he urges them to reach out to one another and avoid "minority on minority oppression." n17 He believes that such coalitions are particularly important in light of recent efforts to roll back the gains of minority groups, such as the current attack on affirmative action.
Romero’s point that members of minority groups must establish coalitions is well taken. LatCrit theorists have consistently called [*790] for coalition building. n18 Recognizing that mainstream society often seeks to divide minority groups in an effort to perpetuate subordination. In this regard, it is important for LatCrit theorists to establish more than political coalitions, but also epistemic coalitions in order to learn the complex truth about and the interconnections among the various minority groups. n19

LatCrit theorists recognized early on, the importance of exploring the connection between Native peoples and Latinas/os. n20 In her essay, Berta Hernandez-Truyol employs narrative to explore her native heritage. n21 In so doing, she embraces her "own mestizaje." n22 At the same time, she recounts that her exploration of her native roots provoked some criticism from those who argued that "you cannot claim a tribe, the tribe has to claim you" and that "tribal existence is inextricably tied to land." n23 This unexpected response caused her to wonder whether she "was wrong to have claimed her native heritage." n24 In the end, she concludes that it is important for LatCrit theorists to continue to explore their native origins.

It seems to me that Hernandez-Truyol is certainly correct to claim that it is important for Latinas/os to acknowledge their indigenous roots. To offer formalistic slogans and barriers to doing so seems unproductive and counter-intuitive. It seems clear that [*791] one could be of native descent without knowing one’s tribal origins or being claimed by a tribe.

In her conference presentation, Rebecca Tsosie also discussed indigenous peoples. n25 She explained the significance of time and place to Native Americans. She also described the effort of Native Americans to preserve their cultures in the face of pressure to assimilate. In this regard, she explained that a tribe can preserve its right to exist as a separate political entity only to the extent that a tribe resists assimilation into mainstream society. She closed by discussing intersections between Native American identity and Chicana/o identity. She saw Chicana/o identity as a function of time and place just as with Native Americans. In particular, she noted that the mythical Chicana/o homeland -- Aztlán -- and "la Frontera," or the borderlands, are key aspects of Chicano identity. Thus, she saw "rich parallels" between the Chicana/o experience and the Native American experience. n26

To be sure, racial identity is a complex notion. n27 Nevertheless, I believe that Rebecca Tsosie is correct that there are certain parallels between Native American and Chicano experience regarding issues of identity. LatCrit theorists, for example, have discussed the importance of retaining Latina/o culture and resisting pressure to assimilate. n28 Similarly, I have argued elsewhere that there is a special connection between the American Southwest and Chicanas/os. It is there that Chicanas/os "belong." n29 Thus, in some ways Chicano identity can be connected to place. Another interesting parallel is found in the way that American courts have formulated the [*792] identity of Chicanas/os and Native Americans. In this regard, Tsosie pointed out that American courts determine whether an "Indian community" exists by reference to whether they are discriminated against by whites. n30 In Hernandez v. Texas, n31 the U.S. Supreme Court also took the position that Chicano identity is a function of whether they are the target of local prejudice. n32 Because of this legal definition, both Native Americans and Chicanos apparently would lose their legal identity to the extent that they achieved assimilation.

In his piece, Eric Yamamoto analyzes the notion of "cultural frameworks." n33 As he uses the term "cultural frameworks," which are the lens through which people understand the world. n34 He argues that cultural frameworks influence the way that judges decide cases. He suggests that such frameworks will influence the U.S. Supreme Court as it decides the important Hawaiian rights case Rice v. Cayetano. n35 He closes by suggesting that it is possible to transform cultural frameworks, for example through a hula dance program, in a way that influences legal decisionmakers in a positive way.

In my view, Yamamoto’s notion of "cultural frameworks" is useful. It seems to be consistent with what other theorists have called "mindset," n36 "conceptual schemes or frameworks" n37 or "paradigms." n38 I agree that it is possible to provoke paradigm shifts or transformation in cultural frameworks. n39

As Frank Valdes has explained, LatCrit theory seeks to produce knowledge, transform society, exhibit connections between the [*793] various subordinations, and construct coalitions. n40 The essays contained in this cluster help advance all of these goals. As LatCrit realizes these important goals, LatCrit will be in a better position to withstand any external n41 challenges that might arise.

FOOTNOTE-1:

n1 See, e.g., Kevin R. Johnson, Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States, 27 U.C. Davis L. Rev. 937 (1994); George A. Martinez, Legal Indeterminacy, Judicial

n2 The first annual LatCrit Conference -- LatCrit I -- took place in 1996.

n3 See Kevin R. Johnson, Foreword -- Celebrating LatC rit Theory: What Do We Do When the Music Stops?, 33 U.C. Davis L. Rev. 753 (2000).


n6 Id. at 809.

n7 Id. at 815.


n10 See Martinez, supra note 4, at 326.


n14 Romero, supra note 12, at 840.


n16 Romero, supra note 12, at 840-41.
n17 Id. at 841.
n19 See Martinez, supra note 13, at 221-22.
n22 Id. at 867.
n23 Id. at 868.
n24 Id.
n26 See id.
n29 See Martinez, supra note 28.
n30 See Tsosie, supra note 25.
n32 See Rice, 347 U.S. at 477-79.


n34 Id. at 881.

n35 146 F.3d 1075 (9th Cir. 1998), rev'd, 120 S. Ct. 1044 (2000).

n36 Delgado, supra note 15, at 2413.

n37 Martinez, supra note 15, at 683, 688-91.


SUMMARY: ... I reach these questions through examining the history of antagonism directed against Filipinos in the State of California in the 1920s and 30s, which, while economic in its roots, reached its most fevered pitch concerning Filipino relations with white women. ... The statute did not prohibit marriage between whites and blacks but it enslaved white women that married black men, as well as the couple's children. ... Police conducted raids on parties at which white women and Filipino men intermingled. ... "Their sexual desires were thought to focus on white women. ... In the meantime, tension over relationships between Filipinos and white women was heightened due to the Yatko case, which took place in 1925 in Los Angeles. ... Following the Robinson case, L.A. County Clerk Lampton appeared to begin to deny marriage licenses to Filipinos seeking to marry white women. ... While there was enormous uproar over miscenagenous interactions between Filipinos and white women, the uproar was nonetheless ambiguous. ... The history of antimiscegenation laws targeting Filipinos in California reveals a complicated desire to protect white women from "brown men." ... For Filipinos in California, antimiscegenation efforts seeking to regulate sexual relationships between Filipino men and white women were clearly connected to white anxiety about the concrete display of this desire in the space of the dance hall. ...

[*795]

Racial aliens may undercut us, take away our jobs, surpass us in business competition, or commit crimes against our laws, and we will be only a little harder on them than we would be on aliens from Europe of our own race. But let them start to associate with our women and we see red. n1

In 1933 the California Court of Appeals was faced with the following question: should a Filipino be considered a "Mongolian"? n2 Salvador Roldan, a Filipino man, and Marjorie Rogers, a white woman, had applied for a license to marry. Was this marriage acceptable under the state's antimiscegenation laws, which prohibited marriages between "whites" and "Mongolians"? n3

This Essay examines the legal history of prohibition of the marriages of whites to Filipinos in the State of California. In writing this history, I note that what we call "history" is in fact an interpretation of the past. n4 One does not find, or excavate history; rather, one "commits historical acts." n5 If the act of writing history is a site for the renegotiation of meanings, n6 this Essay seeks to reshape the terrain of two different areas of inquiry. The first area is the study of antimiscegenation laws. I seek to complicate how we understand antimiscegenation efforts to relate to race, gender, class, and sexuality. The second area is how we conceptualize the relationship of Filipinos to the broader identity-based rubrics of Asian Americans and Latinas/os. n7 This Essay probes what this history suggests about such relationships.

I reach these questions through examining the history of antagonism directed against Filipinos in the State of California in the 1920s and 30s, which, while economic in its roots, reached its most fevered pitch concerning Filipino relations with white women. This anxiety led to various efforts to classify Filipinos under the state's antimiscegenation statute as "Mongolian," so they would be prohibited from marrying whites. I trace these efforts through both public discourse and legal discourse, in the form of advisory opinions of the California State Attorney General and the Los Angeles
County Counsel, litigation in Los Angeles Superior Court and the California Appellate Court, and state legislation. We can understand these efforts as attempts to shift the legal entitlements [*797] bundled with the marriage contract away from Filipino men, symbolizing the desire to deny Filipinos membership in the national political community.

I want to first mark the paucity of legal writing, n8 both about the Filipina/o American community, n9 and about miscegenation laws targeting Asian Americans in general. n10 Numbers make this lack of academic inquiry especially surprising. Filipinas/os comprise the second largest community of Asian Americans; n11 and laws prohibiting Asian Americans from marrying whites were enacted in fifteen [*798] states. n12 Thus, this Essay seeks to narrate a neglected area of legal history. Due to the space limitations for contributions to this symposium, I do not attempt to do more than interpret this history and raise some suggestions for future work.

The focus for this Essay is the experience of Filipinos in the State of California, although it is important to note what occurred nationally. The first antimiscegenation statute affecting marriage was enacted in 1661 in Maryland. n13 The statute did not prohibit marriage between whites and blacks but it enslaved white women that married black men, as well as the couple's children. n14 By the time the Supreme Court finally declared antimiscegenation laws unconstitutional in Loving v. Virginia, n15 thirty-nine states had enacted antimiscegenation laws; n16 in sixteen of these states, such laws were still in force at the time of the decision. n17 While the original focus of [*799] these laws was primarily on relationships between blacks and whites, also prohibited were marriages between whites and "Indians" (meaning Native Americans), "Hindus" (South Asians), "Mongolians" (into which were generally lumped Chinese, Japanese, and Koreans), and "Malays" (Filipinos). n18 Nine states -- Arizona, California, Georgia, Maryland, Nevada, South Dakota, Utah, Virginia, and Wyoming -- passed laws that prohibited whites from marrying Malays. n19 The statutes varied in their enforcement [*800] [*801] mechanisms: some simply declared miscegenous marriages void; others punished them as felonies. n20

I. California: Asian Invasions

In 1850 California enacted a law prohibiting marriages between "white persons" and "negroes or mulattoes." n21 Twenty-eight years later, a referendum was proposed at the California Constitutional Convention to amend the statute to prohibit marriages between Chinese and whites. n22 While the so-called "Chinese problem" was initially conceptualized as one of economic competition, created by the importation of exploitable laborers without political rights, n23 the issue of sexual relationships between whites and Chinese also functioned as a prime site of hysteria. n24

Invoked were fears of hybridity. John Miller, a state delegate, speculated that the "lowest most vile and degraded" of the white race were most likely to amalgamate with the Chinese, resulting in a "hybrid of the most despicable, a mongrel of the most detestable [*802] that has ever afflicted the earth." n25 Miscegenation was presented as a public health concern, for Chinese were assumed by most of the delegates to be full of filth and disease. n26 Some argued that American institutions and culture would be overwhelmed by the habits of people thought to be sexually promiscuous, perverse, lascivious, and immoral. n27 For example, in 1876, various papers stated that Chinese men attended Sunday school in order to debauch their white, female teachers. In response to the articulation of these fears, in 1880 the legislature prohibited the licensing of marriages between "Mongolians" and "white persons." n28

The next large group of Asian immigrants -- those from Japan -- was also the subject of antagonism, leading to further amendment of the antimiscegenation laws. While the impetus for tension was, again, economic, two prime sites of expressed anxiety were school segregation n29 and intermarriage. Those who sought school segregation depicted the Japanese as an immoral and sexually aggressive group of people, and disseminated propaganda that warned that Japanese students would defile their white classmates. n30 The Fresno Republican described miscegenation between whites and [*803] the Japanese as a form of "international adultery," n31 in a conflation of race, gender, and nation. n32 In 1905, at the height of the anti-Japanese movement, the state legislature sealed the breach between the license and marriage laws and invalidated all marriages between "Mongolian" and white spouses. n33

II. "Little Brown Men"

Tension over the presence of Chinese and Japanese had led to immigration exclusion of Chinese and Japanese laborers through a succession of acts dating between 1882 and 1924. Because industrialists and growers faced a resulting labor shortage, they began to import Filipinos to Hawaii and the mainland United States. n34 Classified as "American nationals," because the United States had annexed the Philippines following the Filipino-American War, Filipi [*804] nos were allowed entry into the country. n35 On the mainland, a majority of Filipinos resided in California, with sizable numbers also in Washington and Alaska.
By 1930, the number of Filipinos on the mainland reached over 45,000. During the winter, they stayed in the cities -- working as domestics and gardeners, washing dishes in restaurants, and doing menial tasks others refused. In the summer they moved back to the fields and harvested potatoes, strawberries, lettuce, sugar beets, and fruits. Filipinos were kept segregated from other immigrant groups in an attempt to prevent the formation of multiethnic labor unions, but ended up spearheading labor organizing in Hawaii and on the mainland. Subsequently, the same economic antagonism that was at the base of the anti-Chinese and anti-Japanese movements was turned against Filipinos. But the primary source of antagonism appeared to be linked, even more dramatically, to sex.

On the mainland, ninety-three percent of all who emigrated from the Philippines were males, the vast majority between sixteen and thirty years of age. While some scholars have focused on patriarchal Asian values as the reason for early Asian migration being an almost exclusively male phenomenon, others have pointed to labor recruiting patterns and the specifics of the immigration laws themselves as restricting the immigration of Asian women. United States capital interests wanted Asian male workers but not their families, because detaching the male worker from a heterosexual family structure meant he would be cheaper labor.

The Filipinos lived in barracks, isolated from other groups, allowed only dance halls, gambling resorts, and pool rooms of Chinatown as social outlets. They led ostracized lives punctuated by the terror of racist violence. Many restaurants and stores hung signs stating "Filipinos and dogs not allowed." Anxiety about what was called the "Third Asian invasion" was expressed primarily around three sites: first, the idea that Filipinos were destroying the wage scale for white workers; second, the idea that they were disease carriers -- specifically of meningitis, and; third, the idea that they were sexually exploiting "American and Mexican" girls.

The dance halls where Filipinos could pay ten cents to dance for one minute with hired dancers -- usually white women -- were the one location where Filipinos could mingle socially with white women. Filipinos were conceptualized as sexually attractive to vulnerable girls, due to their willingness to spend their wages on their natty appearance. One active member of the movement to exclude Filipinos from the United States described them as "little brown men attired like 'Solomon in all his glory,' strutting like peacocks and endeavoring to attract the eyes of young American and Mexican girls." In response to the threat of dance halls, white male violence erupted in several locations. The most publicized of these riots took place in Watsonville, California, where a mob of five hundred white men raided nearby farms, killing one Filipino and beating several.

The tenor of the times is made apparent in the report of a trial of a Filipino man, Terry Santiago, who had stabbed Norma Kompisch, a white dance hall girl, twenty-two times. The judge hearing the case, Judge Lazarus, hurled "a vehement condemnation of dance hall operators who make white girls dance with Filipinos." Judge Lazarus referred to his desire to "bring to public attention this very real evil. I once referred to Filipinos as savages. There was never a more typical case than this to justify my statement."

Police conducted raids on parties at which white women and Filipino men intermingled. As one article reported, these parties "were brought out of the realm of conjecture into stern reality" when police arrested five Filipino men on vagrancy charges in San Francisco. The police chief instructed officers to take into custody all "white girls" seen in company with Filipinos, together with their escorts. Newspapers reported "shocking conditions" resulting from this intermingling. The concern appeared to be equally divided between the mere fact of these associations and the "trouble," in the form of shootings and knifings, that grew out of these associations.

Anti-Filipino spokesmen also raged about the evils of intermarriage. The Northern Monterey Chamber of Commerce charged, "if the present state of affairs continues there will be 40,000 half-breeds in California before ten years have passed." Two representatives from the Commonwealth Club and the President of the Immigration Study Commission warned of "race mingling" which would create a "new type of mulatto," an "American Mestizo."

There appears to have been a greater level of tension felt about Filipino male sexuality than for Chinese and Japanese. The President of the University of California testified before the House Committee on Immigration and Naturalization in 1930 that Filipino problems were "almost entirely based upon sexual passion." While Chinese and Japanese were also considered sexually depraved -- and, perhaps, more sexually perverse -- Filipinos appeared to be specifically characterized as having an enormous sex appetite, as more savage, as more primitive, as "one jump from the jungle." Their sexual desires were thought to focus on white women.
A possible reason for any sexual differentiation of Filipino men from Chinese or Japanese men was the link to Spanish colonialism. One contemporary writer referred to "the Latin attitude of Filipinos toward the opposite sex: he is assertive and possessive; she is his and his alone." n61 E. San Juan, Jr. has also argued that the myth of Filipino sexuality was a departure from the "Anglo Saxon conception of the Oriental male," which he links to the media and popular identification of Filipinos with blacks during the Filipino-American War of 1898. n62 Yet it is important to point out here [*811] that, as Ronald Takaki has documented, in the late 1800s, Chinese were also ascribed both physical attributes and "racial qualities" that had been assigned to blacks. n63 Further complicating this analogy is the fact that one contemporary observer argued that blacks, unlike Filipinos, caused less tension because they knew they were not supposed to intermarry with whites. n64

As pointed out by Bruno Lasker, writing in 1931, there appeared to be a repeating pattern of targeting immigrants as sexual threats, with a concomitant forgetting of this targeting:

When the Chinese drew upon themselves popular antagonism on the Pacific Coast, there developed a view of Chinatown as essentially an abode of vice, which is still perpetuated in our moving pictures and cheap fiction magazines. The Japanese were accused widely of taking advantage of the custom to admit picture brides to bring to this country women for immoral purposes. . . . [*812] [There was a repetition] of what was said about the Japanese, expressions of the "general feeling that those who begin in an inferior economic position should remain in it and that they are 'cocky.' . . . They frequently spend over much on dress. When they appear in up-to-date suits and possibly patent leather shoes, they at once are said to be 'cocky.'" The statement was frequently made that the presence of Japanese boys in the public schools was creating a moral problem.

Not only Orientals but many other immigrant groups have in the early stage of their residence . . . given rise to unfavorable judgments . . . . This has especially been the case when a new immigration movement was composed of young men without women of their own nationality. n65

Some contemporary writers suggested that there was greater focus on Filipino male sexuality than that of the Chinese and Japanese populations because of the skewed sex ratio in whom immigrated: with few Filipinas around, Filipino men turned to dance halls and dance girls for company. But while more Japanese women were able to immigrate to the United States, the Chinese population was also heavily male. n66

What may have been different between the Chinese and Filipino male immigrant populations was their behavior: Chinese men did not set up dance halls with white taxi dancers, perhaps reflecting a change in what hovered at the limits of tolerable behavior between 1880 and 1920, both for Asian men, and for white women. n67 Filipinos may also have spurred controversy due to a stronger sense of entitlement to their rights and a greater willingness to engage in confrontation, stemming from [*813] their identity as colonial subjects, schooled in the idea that they were "nationals" of the United States. n68

This history suggests there were and are qualitative differences in racial sexualization among Asian Americans. What is clear is that lumping diverse experiences together is too limited. The dominant contemporary discourse depicts Asian American men across time and space as solely effeminated. n69 This is clearly not the case for Filipinos -nor, as this Essay sketches, has it been the case for Chinese or Japanese men.

III. Legal Challenges

The right of Filipinos to intermarry was not seriously challenged in California until the early 1920s. As Filipino immigration increased, county clerks were faced with the question of deciding whether to issue marriage licenses to Filipinos, in essence choosing whether or not to classify Filipinos as "Mongolians." The County Counsel of Los Angeles advised in 1921 that Filipinos were not "Mongolians." The opinion reasoned that at the time of enactment of antimiscegenation legislation, there was a "Chinese problem," and that the statutory inclusion of "Mongolian" was intended to refer only to the "yellow" and not the "brown" people. n70 The [*814] opinion further noted that choosing not to classify Filipinos as Mongolians rested on the assumption that the problem under consideration involved a Filipino that belonged to one of the Malay tribes, and who was not "a Negrito or in part Chinaman." n71 This opinion letter appears to have been followed by the Los Angeles County Clerk, L.E. Lampton, in granting marriage licenses, until 1930.

In the meantime, tension over relationships between Filipinos and white women was heightened due to the Yatko case, which took place in 1925 in Los Angeles. n72 Timothy Yatko, a Filipino waiter, had married Lola Butler, a white woman, in San Diego. The couple had met at a dance hall in Los Angeles and lived together after their marriage until Butler left Yatko. She worked as a singer and a dancer in a girl show where Harry Kidder, who was white, also worked as a substitute piano player. Yatko spotted the two together and when he saw Kidder kissing his wife in Kidder's
apartment, he stabbed Kidder, who died. n73 In the murder trial, the state collaterally attacked the legality of the marriage in order to permit Lola Butler to testify against Yatko. n74 Counsel for the state contended that the marriage was void because Yatko was Filipino, and therefore "Mongolian." The court was asked to rule on the racial classification of Filipinos because there was no earlier decision on the [*815] subject. n75 Contemporary accounts referred to the antimiscegenation statute as what was, at that point in time, "an old and almost forgotten State law." n76

In arguing the point of whether or not Yatko should be considered a "Mongolian," counsel cited ethnologists, the encyclopedia, and various federal decisions in naturalization cases. Counsel for the state discussed the evil effects of miscegenation generally, and pointed to Mexico as a specific example of the effects of race mixture. "We see the result that the Mexican nation had not had the standing, had not the citizens as it would otherwise if it had remained pure." n77 This reference to purity, not surprisingly, was intended to describe the Spanish colonizers, not indigenous people, for counsel went on to state that "when the white people, or the Caucasians, came to the United States they did not intermarry with the Indians, they kept themselves pure." n78

The judge agreed. He stated:

The dominant race of the country has a perfect right to exclude all other races from equal rights with its own people and to prescribe such rights as they may possess. . . . Our government is in control of a large body of people of the insular possessions, for whom it is acting as a sort of guardian and it has extended certain rights and privileges to them . . . . Here we see a large body of young men, ever-increasing, working amongst us, associating with our citizens, all of whom are under the guardianship and to some extent the tutelage of our national government, and for whom we feel the deepest interest, of course, naturally . . . . the question ought to be determined whether or not they can come into this country and intermarry with our American girls or bring their Filipino girls here to intermarry with our American men, if that situation should arise. n79

The judge alluded several times to his long residence in the South, and shared his "full conviction" that: [*816]

The Negro race will become highly civilized and become one of the great races only if it proceeds within its own lines marked out by Nature and keeps its blood pure. And I have the same feeling with respect to other races. . . . I am quite satisfied in my own mind . . . . that the Filipino is a Malay and that the Malay is a Mongolian, just as much as the white American is of the Teutonic race, the Teutonic family, or of the Nordic family, carrying it back to the Aryan family. Hence, it is my view that under the code of California as it now exists, intermarriage between a Filipino and a Caucasian would be void. n80

Accordingly, the court allowed Lola Butler to testify. She represented Yatko "as the aggressor and Kidder as her chivalric defender." n81 Yatko was convicted and sentenced to serve a life sentence in San Quentin. n82

IV. Los Angeles Civil Cases and Legislative Response

The opinion of the judge in the Yatko case, that Filipinos, or Malays, were Mongolian, was shared by the Attorney General of the State of California, U.S. Webb. n83 In 1926 Webb authored an opinion letter stating that "Malays belong to the Mongoloid race." n84 The letter was in response to an inquiry from the District Attorney of San Diego County, who wondered whether the San Diego County Clerk should issue marriage licenses to "Hindus and white [*817] persons and to Filipinos and white persons." n85 Webb called this "more a question of fact than one of law," noted that he was unable to find any judicial determination of these questions, and proceeded to share the prevailing ethnology of the day. While "the Hindu," reported Webb, generally did not appear ethnologically to be a member of the Mongolian race, n86 "Malays" were indeed so classified. While the first "great ethnologist," Blumenback, had divided the human race into five classes (the white, black, yellow, brown and red), the "most recent and best recognized variation" reduced the classification to three divisions by combining brown and red with the Mongolian in a division generally referred to as "Mongolian-Malay or yellow-brown." n87 While Webb's letter was [*818] written to influence the action of counties, it was not binding, and the reaction of county clerks appears to have been mixed. n88

The analysis in Webb's letter was embraced by a Los Angeles superior court judge, who issued the first of five decisions on this question. These five cases appear to be the only litigation -- other than as collaterally raised in Yatko -- on this issue in the State of California. n89 In this first case, a white woman, Ruby F. Robinson, sought to wed a Filipino named Tony V. Moreno. Robinson's mother filed a suit against Los Angeles County and secured first a temporary, and later a permanent, injunction against L.A. County Clerk Lampton to restrain him from issuing a marriage license. n90 Evidence as to Moreno's race adduced by the county's counsel and by the attorneys representing the mother "ranged over the whole of anthropological literature, from Linnaeus and Cuvier in the eighteenth century down to recognized textbook writers of today."
The county argued that according to the best authorities, Filipinos are Malays, and that Malays are not Mongolians; the mother's counsel, assisted by expert testimony, argued that all the brown races are Mongolian. Judge Smith ruled in favor of Robinson's mother, that Filipinos were Mongolians. The decision was followed by protest in the Filipino community.

Following the Robinson case, L.A. County Clerk Lampton appeared to begin to deny marriage licenses to Filipinos seeking to marry white women. In 1931, Gavino Visco petitioned to marry Ruth M. Salas. Lampton denied this petition on the grounds that Visco was a Mongolian, and that Salas was white. The couple appealed, and Superior Court Judge Guerin ordered Lampton to issue a license. But the case did not turn on Visco's Filipino identity, but rather on the identity of Salas. The court held that Salas was "not a person of the Caucasian race." Salas was born in Mexico, had a mother born in Los Angeles and a father born in Mexico. As a nonwhite, Salas was not barred from marrying a Filipino, no matter whether Visco was classified as Mongolian, or otherwise nonwhite. Nellie Foster, a contemporary writer, reported that the judge asserted that he would have granted the marriage license, even if Salas had been white, which suggests that Judge Guerin did not think that Filipinos should be classified as "Mongolians."

The third and fourth cases in which this issue surfaced involved attempts at annulments of marriage. Estanislao P. Laddaran sought an annulment of his marriage to Emma F. Laddaran, on the basis that the marriage had been in violation of the law, because he was "of the Filipino race" and his wife was "of the Caucasian race." The court refused. Shortly thereafter, in the Murillo case, Judge Gould also refused to annul a marriage, this time on the wife's petition that her Filipino husband was a member of the Mongolian race.

In Murillo, Judge Gould noted that, while it was true that modern ethnologists had limited the number of racial groups to the white, the black and the yellow, "these writers warn us that there is no fixed line of demarcation, that these classifications are simply loose fitting generalizations, that the races are still differentiating, and that the race divisions are simply convenient terms as an aid in classification." The judge rejected the modern day scientific definition of Mongolian in favor of what the state legislature had in mind when it enacted the law. He asserted that if the legislators had anticipated modern scientific classifications, not only would whites be prohibited from marrying "Chinese, Japanese and Koreans (who are popularly regarded as Mongolians)," and "not only with Filipinos and Malays," but also "Laplanders, Hawaiians, Esthionians, Huns, Finns, Turks, Eskimos, American Indians, native Peruvians, native Mexicans and many other peoples, all of whom are included within the present day scientist's classification of 'Mongolian.'"

The fifth case before the Superior Court was Roldan v. Los Angeles County. Roldan, an "Illocano in whose blood was co-mingled a strain of Spanish," sought to marry Marjorie Rogers, a "Caucasian" from England. Los Angeles County Clerk Lampton refused. Ruling that neither Rogers nor Roldan were Mongolians, Judge Gates approved the marriage petition. The state appealed the case to the California Appellate Court, which in a divided opinion upheld the superior court decision, holding that there was no legislative intent to apply the name Mongolian to Malays when the statute had been enacted and amended. As in the Murillo case, the opinion, written by Judge Archbald, expressly followed not the scientific, but the common understanding of what Mongolian meant at the enactment of the anti-miscegenation statute. The opinion noted that the classification of races into the five grand subdivisions of white, black, yellow, red, and brown was commonly used in 1880 and 1905, the dates when the statute was amended to cover "Mongolians." Because Salvador Roldan was a Malay, and not a Mongolian, the L.A. County Clerk was forced to issue him a marriage license.

In most of these opinions, the judges were careful to note that they were not addressing the "social question" of these marriages, and suggested that if the "common thought" of today required, the legislature should address the issue. The legislature complied.

Nine days before the Roldan decision was issued, State Senator Herbert Jones, an exclusionist, introduced senate bills to amend the anti-miscegenation statute to include "Malays." On the same day, the Secretary of the California Joint Immigration Committee requested its sponsoring organizations, the American Legion, the Native Sons and Daughters of the Golden West, and the California State Federation of Labor, to ask members to urge adoption of the bills. Two months later, both bills passed the Senate unanimously. The only dissenting voice in the Assembly was a Los Angeles County representative whose district included a large Filipino community. In April, Governor James Rolph, a prominent member of the Native Sons, signed the bills into law, effectively retroactively voiding and making illegitimate all previous Filipino/white marriages by defining any
marriage of Caucasians with "negroes, Mongolians, members of the Malay race, or mulattoes to be illegal and void." n110

The 1934 passage of the Tydings-McDuffie Act n111 promising eventual independence to the Philippines effectively halted Filipino immigration n112 -- and indeed was successfully enacted because of the efforts of those seeking to exclude Filipinos from the United States. n113 Exclusion led to the dissipation of obsessive anxiety over Filipino sexuality. n114 While California subsequently became the first n115 and only state after Reconstruction to rule that its state's antimiscegenation laws were unconstitutional in the 1948 case Perez v. Sharp, n115 in 1948, the legislature refused to expunge the invalidated laws from the California Civil Code until 1959. n116 [*825]

V. History Lessons

What questions does this history raise? First is the question of what it tells us about the study of antimiscegenation laws, and what more complicated stories emerge about the relationship of these laws to race, gender, class, and sexuality. Second is the question of what this history reveals for the relationship of the Filipino community to other identity-based rubrics.

A. Complicating Antimiscegenation Narratives

In terms of the first area of inquiry, this history suggests that antimiscegenation efforts targeting Filipinos demonstrate a differing history of racialization. Eva Saks has described miscegenation laws legislating the sexuality of blacks and whites as functioning to govern the marriage contract, with legal implications for inheritance and legitimacy. She has also asserted that these laws created a property in white blood, and upheld the purity of the body politic, in which the human and national body stood in for each other and in which blacks were considered to pollute the pure white national body. n117 Robert Chang has suggested that miscegenation laws functioned as racial-sexual policing to discipline the transgressive sexuality of whites and people of color in order to preserve the proper racial, national, and familial order. He has argued that with regard to laws restricting Asian miscegenation, racial and economic preservation were linked so that we can see the accompanying of anti [*826] miscegenation statutes by immigration and naturalization restrictions, and alien land laws. n118

We can glimpse the trace of differing racializations relating to antimiscegenation efforts that could be described as connected to slavery, foreignness, n119 or colonization. n120 Miscegenation laws directed against excludable "racial aliens" -- whether Chinese, Japanese, or Filipino -- were sharply linked to both sex specific patterns of migration and calls for expulsion. Where racialization of Chinese and Japanese may have diverged from Filipinos is in the history of U.S. colonization. The colonization of Filipinos, accompanied by Americanization projects, may have facilitated a racialization that differentiated Filipinos from Chinese and Japanese through the perception of Filipinos as less foreign. n121 While there was enormous uproar over mixed-race interactions between Filipinos and white women, the uproar was nonetheless ambiguous. For example, certain commentators seem to have understood why some white women would see Filipinos as desirable objects of affection, which contrasts with a seemingly greater repugnance directed against Chinese and Japanese men.

Second, it is important to examine what this history of antimiscegenation laws tells us about gender. Peggy Pascoe has done significant research analyzing the manner in which the campaign to prohibit interracial marriage reflects U.S. gender, as well as racial, hierarchies. She has examined miscegenation laws that were sex-specific in their enumeration of prohibited arrangements, and has [*827] also examined gender hierarchies structured by miscegenation laws that were formally gender neutral. Pascoe has found that in the western United States, laws were applied more stringently to groups whose men were thought likely to marry white women, and less stringently to groups whose women were thought likely to marry white men. n122 Gender also inflected why individuals chose to cross racial boundary lines and get married, as well as shaped when cases would be brought. n123

The history of Filipinos in California makes vivid the gendered relationship between racial identity and the marriage contract. In addition to cases in which Filipino/white couples sought to marry and who therefore asserted that Filipinos were not "Mongolians," the racial classification of Filipinos was put at issue in the case of a mother seeking to stop her daughter's marriage, in two cases where annulment of marriage was sought, one by a white woman, the other by a Filipino man, and in one case in which a prosecutor sought to void a marriage so a white wife could testify against her Filipino husband. These parties all argued that Filipinos fell under the jurisdiction of the antimiscegenation statute, because they sought a basis on which to alter legal entitlements and to shape behavior.

We could look to the manner in which gender has historically been bound up with race through the linkages of manhood, citi [*828] zenship, and whiteness. n124 The history of antimiscegenation
laws targeting Filipinos in California reveals a complicated desire to protect white women from "brown men." This desire must be understood as being shaped by class. White women that associated with Filipino men appear to have been largely working class women -- and not women considered deserving of greater protection because of middle class status.

The scholarship writing about miscegenation law have recognized the bundle of legal entitlements associated with the marital contract that women in miscegenous relationships lost if their marriage was declared void, what has not been examined by these scholars is the relationship of interracial marriages to immigration consequences. n126 As of 1790, only whites, and after 1870, only whites and those of African descent or nativity, were allowed to naturalize to become United States citizens. n127 Thus, anyone not considered to fall within one of those two categories was considered ineligible to naturalize as a United States citizen. Filipinos were considered racially ineligible to naturalize, n128 and, as "nationals" of the United States, were not citizens.

In 1907, Congress passed the Expatriation Act, which provided that any American woman who married a foreigner was automatically denaturalized. n129 Congress partially repealed the law in 1922, but continued to require that any woman who married a man ineligible to naturalize -- in other words, one racially barred from doing so -- would lose her citizenship. This provision remained law until 1931.

n130 Thus, a white U.S. female citizen who married a Filipino could face a catch-22. If her marriage was seen as violating an antimiscegenation statute, the marriage would be void. However, if it was upheld as a legitimate marriage, that marriage could subject her to expatriation. It is not clear whether any woman who married a Filipino was, in fact, subject to denaturalization, although reportedly, the federal district director of naturalization stated this would take place. n131 [*830]

Considering the relationship of gender to miscegenation laws requires a recognition of the manner in which the control of women and their sexuality is understood as necessary to maintaining and reproducing the identity of communities and nations. n132 Women are thought to guard the purity and honor of communities. Nationalism entwines with race so that women are subjected to control in order to achieve the aim of a national racial purity. This is visible in the history described here. Filipino male sexual engagement with white women was considered a national threat, requiring the literal expulsion of Filipino men from the body politic, accomplished through the simultaneous granting of independence to the Philippines, and the revocation of "national" status which had formerly allowed Filipinos to freely travel to the United States.

Finally, we should examine the extent to which scholarship on miscegenation laws has shaped our understandings of male and female sexuality, and specifically, shaped them through the lens of presumptive heterosexuality. For example, to what extent does the lament over the all male, so-called bachelor societies in Asian communities -- communities thought to be damaged by their lack of access to women -- deny the reality and nondeviancy of same sex sociality and sexuality of various forms? n133 Along the same lines, there are few exceptions to the conflation of interracial with heterosexual in this field. n134 The bulk of contemporary legal writing on miscegenation seeks to demonstrate an analogy between prohibiting marriage on the basis of race to prohibiting marriage on the basis of sexual orientation. n135 This literature generally unreflected [*831] tively analogizes the presumptively heterosexual interracial miscegenous relationship to the contemporary same sex one. n136

B. Filipina/o Identities

A second locus of inquiry is to explore what this sketch of Filipino history tells us about identity categories. Specifically, this history raises the question of the relationship of Filipinas/os to the Asian American identity category. We have here a very real rupture of Mongolian with Malay, of East Asian with Filipino, made manifest in legal history. Does this mean anything more than antiquated notions of
ethnology? Well, yes -- this rupture is something that is continually perpetuated. n137 One critic has called the continued inclusion of Filipinas/os within the term "Asian American" a form of semiotic violence inflicted on Filipinas/os, when [*832] Asian American is translated as Chinese or Japanese American by Asian American activists or legal scholars. n138

We know that stretching identity categories is not without risk. n139 Always the increasing heterogeneity of what we put within a particular larger identity category risks obliterating the experiences of those who take up its margins and are not conceptualized at its center. n140 There are internal hierarchies within identity categories that need to be recognized. n141 Failure to recognize these risks in the form of the continued occlusion of the Filipino within the Asian American category reflects political expediency -- but may also reflect more complicated issues. Oscar Campomanes has made the point that the invisibility of the Philippines in American history reflects the constitutional and cultural difficulties posed by its annexation by the United States and the discomfort associated with the United States as an imperial power. n142 We could posit that this discomfort is mirrored in the invisibility of Filipinas/os within the Asian American identity category, which often presumes a do [*833] mestic and national, rather than an imperialist, construction of "America."

And what does this historical narrative tell us about the Latina/o identity category? The impetus for centering the experience of Filipinas/os at the Fourth Annual LatCrit conference was the suggestion of conference organizers to place Filipinas/os within the rubric of Latinas/os, primarily because of a shared legacy of Spanish colonization. If we were to consider Filipinas/os as Latinas/os, then the claim that "Latinas/os were not subjected to miscegenation laws" would be incorrect, factually. n143 But the idea of calling Filipinas/os "Latinas/os" seems primarily an interesting theoretical proposition at this point, although there may be suggestive similarities to the racialization of Filipinas/os and some Latina/o communities. n144

As important as Spanish colonialism to the Filipino experience may be the experience of U.S. colonialism. This does not deny links between Filipinas/os and Latinas/os, but merely suggests the links may be ones we have not generally recognized. One undertheorized connection is between the experience of Puerto Ricans, Filipinas/os, and Hawaiians as official colonial possessions of the United States. n145 Puerto Rico and the Philippines share histories of Spanish, and then U.S. colonialism. That these connections are [*834] undertheorized may be connected to two different factors. One is that we are still prey to the systems of racial classification propagated by the ethnographers of a previous century, which restricts the linkages we make between identity based categories. The second is the general failure to focus on the history of U.S. imperialism and the role of the United States as a colonial power. n146

Conclusion

This Essay focuses on a community whose legal history has been sorely neglected. In interpreting the history of antimiscegenation efforts prohibiting Filipinos from marrying whites in the State of California, I have sought to complicate our narration of miscegenation laws. Generalizations about miscegenation laws or about the impetus for them do not do justice to the specific histories that have impacted particular communities. For Filipinos in California, antimiscegenation efforts seeking to regulate sexual relationships between Filipino men and white women were clearly connected to white anxiety about the concrete display of this desire in the space of the dance hall. As the legislature had already forbidden marriage licenses from being granted to "Mongolians" who sought to marry whites, and had also declared such marriages void, anxiety about Filipino/white sexual relations was made manifest in legal efforts to group Filipinos under the rubric of "Mongolian." While the Attorney General of the State of California sought to control the sexual activity of Filipinos through so labeling them, many jurists resisted, looking both to ethnology and legislative intent.

Identity is central to the writing of history -- communities are named and name themselves within the narratives of the past. n147 The positioning of Filipinos as "Mongolian," or the positioning of Filipinos in opposition to Mongolians, as the ethnologically differ [*835] ent "Malay," provides a narrative within which the contemporary identity of Filipinos is created. The historical question of whether to group Filipinos with Chinese and Japanese as "Mongolian" for purposes of miscegenation laws is echoed in the contemporary quandary about positioning Filipinas/os as Asian American, when the center of that identity category is clearly occupied by Chinese and Japanese Americans.

The relationship between contemporary identity and historical narrative is not monolithic or static, but should be seen as multiple and fluid. The history presented in this Essay suggests that greater attention should be paid to the role of U.S. colonialism in shaping racialization and connections we might make between different communities. Choosing to position Filipinas/os within the rubric of Latinas/os at the LatCrit conference exemplifies the willingness to
break beyond perceived historical borders and recognize new linkages that can be made.

This history demonstrates the manner in which racial identity is created. There is nothing natural or preordained about the classification of Filipinos as "Malay" or as "Mongolian" -- or as any other identity. Racial identity is shaped in relation to other forces. Here, such forces include assumptions about racialized sexuality, colonial relations between the United States and the Philippines, the importation of exploitable laborers without political rights, and the intertwining of gender and nationalism. The legal history of the shifts in racial classification of Filipinos in California, between "Mongolian" and "Malay," underlines the manner in which race is made.

FOOTNOTE-1:

n1 Bruno Lasker, Filipino Immigration to Continental United States and to Hawaii 92 (1931) (quoting San Francisco Chronicle article written by Chester H. Rowell on Feb. 10, 1930).

n2 Roldan v. Los Angeles County, 129 Cal. App. 267, 268, 18 P.2d 706, 707 (1933). While Roldan's first name was spelled "Solvador" in the legal proceedings, his signature in the case file spells his name "Salvador."


n6 See id.

n7 Whether to use the term Asian American or Asian Pacific American is a question fraught with political significance. See J. Kehaulani Kauanui & Ju Hui "Judy" Han, "Asian Pacific Islander": Issues of Representation and Responsibility, in The Very Inside: An Anthology of Writing by Asian & Pacific Islander Lesbian and Bisexual Women 37 (Sharon Lim-Hing ed., 1994) (cautioning against irresponsible uses of "Asian Pacific" or "Asian Pacific Islander" that engulf concerns of Pacific Islanders within those of Asian Americans). Following this caution, because I am not examining the concerns of Pacific Islanders, I use the term Asian American here.

While Filipinas/os are commonly thought to fall under the Asian American rubric, identifying Filipinas/os as Latinas/os is a more novel claim. The organizers of the Fourth Annual LatCrit conference chose to make such a claim, recognizing that this is a connection newly forged, rather than one commonly perceived. The impetus for this connection was the shared experience of Spanish colonialism.

n8 I note this, both to point out that I am writing this history into what is a law review void, and to encourage others to write about what is an astonishingly fertile and interesting site.

n10 This Essay should be considered part of a larger project examining antimiscegenation laws targeting Asian Americans generally. There are a handful of articles that touch on miscegenation laws and Asian Americans. See, e.g., Robert S. Chang, Dreaming in Black and White: Racial-Sexual Policing in the Birth of a Nation, the Cheat, and Who Killed Vincent Chin?, 5 Asian L.J. 41, 44 (1998); Peter Kwan, Invention, Inversion and Intervention: The Oriental Woman in the World of Suzie Wong, M. Butterfly, and the Adventures of Priscilla, Queen of the Desert, 5 Asian L.J. 99, 102 (1998). However, there is surprisingly little that has been specifically written on this topic. Four notable exceptions are Nellie Foster, Legal Status of Filipino Intermarriage in California, 16 Soc. & Soc. Res. 441 (1932), reprinted in Asian Indians, Filipinos, Other Asian Communities and the Law 5 (Charles McClain ed. 1994), Megumi Dick Osumi, Asians and California's AntiMiscegenation Laws, in Asian and Pacific American Experience: Women's Perspectives 1 (Nobuya Tsuchida ed., 1982), UCLA Asian American Studies Center, Anti-Miscegenation Laws and the Pilipino, in Letters in Exile: An Introductory Reader on the History of Filipinos in America 63 (1976) [hereinafter Anti-Miscegenation Laws and the Pilipino], and Henry Yu, Mixing Bodies and Cultures: The Meaning of America's Fascination with Sex Between "Orientals" and "Whites," in Sex, Love, Race: Crossing Boundaries in North American History 444 (Martha Hodes ed., 1999) [hereinafter Sex, Love, Race]. Osumi's piece remains a foundational work of legal scholarship examining antimiscegenation legislation directed against Chinese, Japanese, and Filipinos in the state of California. Nellie Foster's article is also extraordinarily valuable. Writing in the 1930s, she documented information in her article from sources that at this point in time are no longer accessible. See Letter from Nellie Foster to Mr. L. E. Lampton, County Clerk of Los Angeles (Nov. 7, 1930) (in People v. Yatko microfilm file). The letter was written on the letterhead of the Inter-Racial Council of San Diego, and requests more information on particular cases.


n12 These states were Arizona, California, Georgia, Idaho, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, Oregon, South Dakota, Utah, Virginia, and Wyoming.


n14 See id. at 79.

n15 388 U.S. 1 (1967).

n16 See Note, Constitutionality of Anti-Miscegenation Statutes, 58 Yale L.J. 472, 480-82 (1949) [hereinafter Constitutionality]. The states with antimiscegenation laws were Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Washington, and Wyoming. See id. (providing specific statutory cites). Bills to prohibit intermarriage were introduced, but failed, in the District of Columbia, New York, Pennsylvania, Illinois, Wisconsin, Connecticut, and Minnesota. See Reuter, supra note 13, at 103; Irving G. Tragen, Comment, Statutory Prohibitions Against Interracial Marriage, 32 Cal. L. Rev. 269, 270 n.6 (1944) (citing Reuter, supra note 13, at 103). In the words of Edward Reuter:

The fact that a number of states have no legislation forbidding marriage between persons of different racial origin should not be taken as evidence that such unions are approved or even that there is a general popular indifference to them. The absence of such legislation is rather an expression of the fact that Negroes and Orientals are such a negligible part of the population of several states and intermarriages are so very few that the question can be ignored.
The states that still maintained antimiscegenation laws in 1967 were Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. See Loving v. Virginia, 388 U.S. 1, 7 n.5 (1967). Maryland only abandoned its antimiscegenation statute a few days before the Loving decision. See id.

Maryland only abandoned its antimiscegenation statute a few days before the Loving decision. See id.

Maryland only abandoned its antimiscegenation statute a few days before the Loving decision. See id.

Maryland only abandoned its antimiscegenation statute a few days before the Loving decision. See id.

Georgia's statute stated: "It shall be unlawful for a white person to marry anyone except a white person. Any marriage in violation of this section shall be void." Ga. Code Ann. § 53-106 (1933) (repealed 1979). The statute shifted over time, in which groups were excluded in defining a "white person," at one point mentioning those without "Mongolian, Japanese, or Chinese blood in their veins," and at another point entirely omitting these groups from the list. But at no point were "Malays" enumerated as part of this list. However, "Malay" was included on the list of groups that should register with the State Registrar of Vital Statistics, separately from "Caucasians," suggesting that in Georgia "Malays" were considered nonwhite persons. See Ga. Code Ann. § 53-312, 79-103 (1933). Section 53-312 of the 1933 Georgia code states:

The term "white person" shall include either only persons of white or Caucasian race, who have no ascertainable trace of either sic Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins. No person, any one of whose ancestors has been duly registered with the State Bureau of Vital Statistics as a colored person or person of color, shall be deemed to be a white person.

Ga. Code Ann. § 53-312. In contrast, section 79-103 stated:
All Negroes, mulattoes, mestizos, and their descendants, having any ascertainable trace of either Negro or African, West Indian, or Asiatic Indian blood in their veins, and all descendants of any person having either Negro or African, West Indian, or Asiatic Indian blood in his or her veins, shall be known in this State as persons of color.

Ga. Code Ann. § 79-103 (1929); see also 1927 Ga. Laws 272 ("The State Registrar of Vital Statistics . . . shall prepare a form for the registration of individuals, wherein shall be given the racial composition of such individual, as Caucasian, Negro, Mongolian, West Indian, Asiatic Indian, Malay or any mixture thereof, or any other non-Caucasian strains, and if there be any mixture, then the racial composition of the parents and other ancestors in so far as ascertainable, so as to show in what generation such mixture occurred.").

In Virginia, while not specifically enumerated in the statute, "Malays" were covered by the text of the statute by implication, like any other "colored person":

All marriages between a white person and a colored person . . . shall be absolutely void, without any decree of divorce, or other legal process . . . For the purpose of this act, the term "white person" shall apply only to the person who has no trace whatsoever of any blood of Caucasian sic; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasian sic blood shall be deemed to be white persons.

Va. Code Ann. § 5087, 5099a(5) (Michie 1942) (repealed 1968). The statute listed "Malay" as a separate group from "Caucasian" in the section on "Preservation of racial integrity" where the state registrar of vital statistics was to document the "racial composition" of individuals. See id. § 5099a ("The State registrar of vital statistics may . . . prepare a form where on the racial composition of any individual, as Caucasian, Negro, Mongolian, American Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasian sic strains . . . may be certified").

Arizona, California, Maryland, Nevada, South Dakota, Utah, and Wyoming had clear and specific statutory prohibitions on marriages between whites and "Malays." See Ariz. Rev. Stat. Ann. § 3092 (1901) ("All marriages of persons of Caucasian blood, or their descendants with . . . members of the Malay race . . . shall be null and void."); Cal. Civ. Code § 60, 69 (Deering 1937) (§ 60 repealed 1959, § 69 amended 1959) (prohibiting marriages between white persons and "a member of the Malay race"); Md. Ann. Code art. 27, § 365 (1935) (repealed 1967) ("All marriages . . . between a white person and a member of the Malay race . . . are forever prohibited, and shall be void."); Nev. Rev. Stat. § 6514 (1912) ("It shall be unlawful for any person of the Caucasian or white race to intermarry with any person of the . . . Malay or brown race . . . within the State of Nevada"); S.D. Codified Laws § 14.0106(4) (1939) (repealed 1959) ("The following marriages are null and void from the beginning: . . . (4) The intermarriage or illicit cohabitation of any person belonging to the . . . Malayan . . . race with any person of the opposite sex belonging to the Caucasian or white race."); Utah Code Ann. § 40-1-2 (1943) (amended 1963) ("The following marriages are prohibited and declared void: . . . (6) Between a . . . member of the malay race . . . and a white person."); Wyo. Stat. Ann. § 68-118 (Mitchie 1931) (repealed 1965) ("All marriages of white persons with Negroes, Mulattoes, Mongolians, or Malays hereafter contracted in the state of Wyoming are and shall be illegal and void.").

n20 See generally Constitutionality, supra note 16, at 472.

n21 See Act Regulating Marriages, ch. 140, 1850 Cal. Stat. 494 (codified as Cal. Code § 35 (1853)) ("All marriages of white persons with negroes or mulattoes are declared to be illegal and void."). On California's prohibitions against interracial marriage, see Tragen, supra note 16, at 269.

n22 See Osumi, supra note 10, at 5-6.

of industrialists in creating a "permanently degraded caste labor force" and the response by the labor movement in California that fostered the anti-Chinese movement. See id.

n24 See id. at 217-19. In the words of Henry Yu:

The "yellow peril" rhetoric that infused pulp magazines and dime novels did not try to rationalize unfair labor competition or overly efficient farming practices; it dwelled instead upon "Oriental" men preying on helpless "white" women. Perhaps best realized in Sax Rohmer's fictional character in Fu Manchu, pulp magazines and novels depicted "Orientals" as scheming men with long fingernails, waiting in ambush to kidnap "white" women into sexual slavery.

Yu, supra note 10, at 449-50.

n25 Osumi, supra note 10, at 6 (citing I Debates and Proceedings of the Constitutional Convention of California, 1878-79, at 632 (Sacramento State Office, 1880)).


n27 See Chang, supra note 10, at 57-58; Osumi, supra note 10, at 7.

n28 See 1880 Cal Stat. Ch. 41, Sec. 1, p. 3; Osumi, supra note 10, at 8.

n29 The San Francisco School Board in 1905 had passed a resolution classifying Japanese school children as "Mongolian" and therefore subject to segregated education facilities under state law. The resolution was never carried out after intervention by President Theodore Roosevelt and two lawsuits filed by the United States government against the San Francisco School Board, which were withdrawn after a deal was brokered, whereby the School Board would withdraw the resolution in exchange for Roosevelt's promise to work to end the immigration of Japanese laborers into California. For an excellent history of Japanese Americans in California see Keith Aoki, No Right to Own? The Early Twentieth Century "Alien Land Laws" as Prelude to Internment, 40 B.C. L. Rev. 37 (1998).

n30 See Osumi, supra note 10, at 13. Osumi has written that anti-Japanese spokesmen warned that Japanese students knew "no morals but vice, who sit beside our sons and daughters in our public schools that they may help to debauch, demoralize and teach them the vices which are the customs of the country whence they come." Id. One Republican testified before the California Assembly that he was appalled at the sight of white girls "sitting side by side in the schoolroom with matured Japs, with base minds, their lascivious thoughts . . . ." Id.

n31 Id.


n33 See Cal. Civ. Code § 60 (1906) ("All marriages of white persons with negroes, Mongolians, or mulattoes are illegal and void.")

n34 Filipinos are believed to have first immigrated to the United States during the period of the Manila Galleon Trade (1593-1815) on Spanish ships. There is evidence that Filipino sailors settled in Louisiana in the 1830s and 1840s. See Luciano Mangiafico, Contemporary American Immigrants: Patterns of Filipino, Korean, and Chinese Settlement in the United States 31 (1988).

Following this, the first wave of migration came in 1903 after United States colonization of the Philippines. Students were sponsored to study in the United States. Called "pensionados" because their expenses were paid by the colonial government, most returned to the Philippines, although some stayed in the United States and worked as unskilled laborers. See id. at 32. This was part of a broader American policy that introduced public education in English as the medium of instruction in the colony. This trained the Filipinos to be "citizens of an American colony . . . . The ideal colonial was the carbon copy of his conqueror . . . . The new Filipino generation learned of the

The recruiting of Filipino laborers also bore a relation to labor disputes with other workers. For example, the Hawaii Sugar Planters Association stepped up their recruiting when Japanese plantation workers in Hawaii went on strike in 1909. See Mangiafico, supra at 34. During the 1920s more than 65,000 men, 5000 women and 3000 children came to Hawaii under contract. By the mid 1920s Filipinos comprised half of all plantation workers in Hawaii and 75% by 1930. With the Great Depression many of these workers were repatriated to the Philippines. See id.

n35 President William McKinley, in explaining how he made the decision to approve the annexation of the Philippines, said that he had gone down on his knees to pray for "light and guidance from the 'ruler of nations'" and had been told by God that it was America's duty to "educate" and "uplift" the Filipinos. Ronald Takaki, Strangers from a Different Shore 324 (1989).

n36 Between 1910 and 1930 the Filipino population in California jumped from five to 30,470. See id. at 315.

n37 See Mangiafico, supra note 34, at 35.

n38 See id.

n39 See id. at 36.


n42 See Espiritu, supra note 41, at 17-18 (stating that United States industrialists and growers aggressively recruited male workers, while United States immigration policies barred entry of most Asian women); Sucheng Chan, The Exclusion of Chinese Women, 1870-1943, in Entry Denied: Exclusion and the Chinese Community in America, 1882-1943, at 94, 95 (Sucheng Chan ed., 1991) (stating that most significant factor in creating gender imbalance in immigration was action by American government to restrict immigration of Chinese women); George Anthony Peffer, If They Don't Bring Their Women Here: Chinese Female Immigration Before Exclusion 911 (1999) (arguing that United States immigration policies were highly significant in shaping gender ratio).

On the tendency to simultaneously overemphasize the patriarchy of Asian cultures and thus elide over other causal factors in shaping behavior and underemphasize the patriarchy of Western cultures, see Leti Volpp, Talking "Culture": Gender, Race, Nation and the Politics of Multiculturalism, 96 Colum. L. Rev. 1573 (1996), and Leti Volpp, (Mis)Identifying Culture: Asian Women and the "Cultural Defense," 17 Harv. Women's L.J. 57 (1994).

n43 See Espiritu, supra note 41, at 17 ("Detaching the male worker from his household increased profit margins because it shifted the cost of reproduction from the state and the employer to the kin group left behind in Asia."); Lucie Cheng & Edna Bonacich, Introduction: A Theoretical Orientation to International Labor Migration, in Labor Immigration Under Capitalism: Asian Workers in the United States Before World War II 32 (Lucie Cheng & Edna Bonacich eds., 1984) ("Immigration law can select for ablebodied young men while excluding all dependent populations, such as women, children, the elderly, the sick, and paupers."). A Californian grower told an interviewer in 1930 that he preferred to hire Filipinos because they were without families: "These Mexicans and Spaniards
bring their families with them and I have to fix up houses; but I can put a hundred Filipinos in that barn." Takaki, supra note 35, at 321. Note that the young single male immigrant is still seen as the ideal worker by agribusiness. See Peter Brownell, Commentary, A License to Exploit Farm Workers, Wash. Times, Sept. 23, 1998, at A17 (quoting Georgia onion grower that told Chicago Tribune that "the [foreign workers] we have now, they come and they work. They don't have kids to pick up from school or to take to the doctor. They don't have child support issues. They don't ask to leave early for this and that.").

n44 See Mangiafico, supra note 34, at 35.

n45 For an expression of these three arenas of concern, see The Philippines Reader, supra note 34, at 59-60 (quoting Resolution of Northern Monterey Chamber of Commerce). The Resolution states:

The charges made against the Filipinos in this Resolution were as follows: (1) Economic. They accept, it is alleged, lower wages than the American standards allow. The new immigrants coming in each month increase the labor supply and hold wages down. They live on fish and rice, and a dozen may occupy one or two rooms only. The cost of living is very low, hence, Americans cannot compete with them. (2) Health. Some Filipinos bring in meningitis, and other dangerous diseases. Some live unhealthily. Sometimes fifteen or more sleep in one or two rooms. (3) Intermarriage. A few have married white girls. Others will. "If the present state of affairs continues there will be 40,000 half-breeds in California before ten years have passed," -- is the dire prediction.

The Resolution continued: "We do not advocate violence but we do feel that the United States should give the Filipinos their liberty and send those unwelcome inhabitants from our shores that the white people have inherited this country for themselves and their offspring might live." Id. at 60. The author of the Resolution, Judge Rohrback, stated that this was "but the beginning of an investigation of a situation that will eventually lead to the exclusion of the Filipinos or the deterioration of the white race in the state of California." Id. at 59.

n46 See Herman Feldman, Racial Factors in American Industry 100 (1931). Feldman reports that antagonisms had arisen because of the belief that Filipinos brought meningitis into the country, a belief that was acknowledged as false by some of those who first set it in circulation. Lasker has ascribed this to a mistaken early statement of a public health officer in San Francisco, to the effect that immigrant Filipinos were responsible for the cerebrospinal meningitis epidemic of the spring of 1929, that attracted the attention of circles hostile to the Filipinos coming to the United States and was widely diffused throughout the country. See Lasker, supra note 1, at 106.

n47 See H. Brett Melendy, Asians in America: Filipinos, Koreans and East Indians 46 (1977); see also Feldman, supra note 46, at 100 ("Filipinos have in many sections offended local sentiment by appearing over-aggressive in their attention to women who are not of their race. . . ."). "American" was presumably intended to mean "white."

n48 See Melendy, supra note 47, at 68; Kevin J. Mumford, Interzones: Black/White Sex Districts in Chicago and New York in the Early Twentieth Century 53-71 (1997); The Philippines Reader, supra note 34, at 60-61; Constantine Panunzio, Intermarriage in Los Angeles, 1924-33, 47 Am. J. Soc. 690, 695-96 (1942); Rhacel Salazar Parrenas, "White Trash" Meets the "Little Brown Monkeys": The Taxi Dance Hall as a Site of Interracial and Gender Alliances Between White Working Class Women and Filipino Immigrant Men in the 1920s and 30s, 24 Americas J. 115 (1998); Ministers Protest Filipino Dance Hall, S.F. Chron., Oct. 5, 1934 at 21 (reporting protest in San Jose of dance hall allegedly threatening morals of neighborhood); see also Dancing Partners May Be Had at One Dime per Dance, L.A. Times, May 10, 1925 (describing dance halls where women dance from eight until midnight and engage in from sixty to one hundred dances each night; out of the 10-cent ticket purchased for each short whirl around the floor, "the girl receives five cents"). Women that worked as taxi dancers were largely economically struggling young women, who had come to
Los Angeles to try their chance in the movie industry. See Panunzio, supra at 696.

n49 This quote was attributed to Justice of the Peace D.W. Rohrback, a leader of the Northern Monterey County Chamber of Commerce. See Melendy, supra note 47, at 55.

n50 Anti-Filipino riots took place in Yakima, Washington in 1928, and in four locations in California: Exeter in 1929, Watsonville in 1930, Salinas in 1934, and Lake County in 1939. See Lasker, supra note 1, at 36.

n51 See Melendy, supra note 47, at 55; The Philippines Reader, supra note 34, at 61-62; Lasker, supra note 1, at 358-65. Lasker and Emory Bogardus have provided a detailed report of tensions that led up to this incident. While there was severe competition for jobs in Watsonville, that was not considered the cause for the outbreak of the violence. Rather, the immediate cause was the denunciation of Filipinos as a race by Justice of the Peace D.W. Rohrback of Pajaro township, who proposed a successful resolution to this effect adopted by the Chamber of Commerce of Northern Monterey County on Jan 7, 1930. See The Philippines Reader, supra note 34, at 59. Bogardus stated that the antecedent to the resolution was the few cases of Filipinos who had been brought into court, primarily for reckless driving of automobiles. See id. Lasker said that the resolution was founded on allegations of Filipinos interacting with young teenaged white girls. For example, there was a Filipino boy found occupying a room in a Filipino rooming house with "two little girls of German stock," 16 and 11 years old. In fact, the boy was engaged to the older girl with parental consent and was found to have harmed neither of them. See Lasker, supra note 1, at 361. Both Lasker and Bogardus have agreed that Filipinos responded to the resolution with leaflets. See id.; The Philippines Reader, supra note 34, at 60. Subsequently, Filipinos opened a club on the beach and engaged white girls to entertain as professional dancing partners. One resident told Bogardus:

Taxi dance halls where white girls dance with Orientals may be all right in San Francisco or Los Angeles but not in our community. We are a small city and have had nothing of the kind before. We won't stand for anything of the kind.

The Philippines Reader, supra note 34, at 61.

Tensions escalated, but the police failed to protect Filipinos from the local residents. Autos crowded with youths toured the district, shooting stones or bullets into passing autos which were supposed to contain Filipinos and into farm buildings supposed to house Filipinos. Mobs in the hundreds clubbed Filipinos and destroyed property. See id. at 61. Eventually, Fermin Tobera, 22, was shot and killed. See Lasker, supra note 1, at 362-63.

This incident was quickly used by Filipinos to bolster claims for Filipino independence, and by California agribusiness to call for increased immigration of Mexican labor to replace Filipinos. Filipino regional and national organizations spread the message: "Give the Philippine Islands their promised independence; and we shall go home to prevent the occurrence of such events as these." See Lasker, supra note 1, at 364. The Agricultural Committee of the Chamber of Commerce of California used the incident to repeat its plea for Mexican labor and against its further restriction. See id.

n52 Filipinos were generally characterized as criminals. The United States Commission on Law Observance and Enforcement reported the views of San Francisco authorities in 1931: "The Filipino is our greatest menace. They are all criminally minded. . . . These Filipinos are undesirable nationals because there is not one of them but who is not a potential criminal." Melendy, supra note 47, at 65-66 (citing U.S. Commission on Law Observance and Enforcement, Report on Crime and the Foreign Born, Report No. 10, June 24, 1931, at 362). This characterization persisted despite the fact that the felony conviction rate for Filipino males compared favorably with that of white males. According to the Bureau of Census of Crimes, the number of felony
commitments per thousand of the population between 1910 and 1940 was 4.4% for native whites and one percent for Filipinos. See Takaki, supra note 35, at 325.

n53 Yet he "did not blame" the Filipinos. "They are vainly attempting to adjust themselves to civilization, but haven't the training or education. They are only one jump from the jungle. It is our fault for bringing them here." Dance Halls Hit: White Girl Tells of Filipino Attack, S.F. Chron., May 17, 1936, at 3. Judge Lazarus had previously characterized Filipinos as "scarcely more than savages." Id. In response, more than 200 Filipinos adopted a resolution protesting this, forwarded to the Judge and to the Filipino Resident Commissioner in Washington, D.C. See Filipinos Protest "Savage" Statement, S.F. Chron., Feb. 22, 1936, at 16.


n55 One "white girl" testified that the social contacts of hundreds of San Francisco girls were restricted to "flashily dressed 'little brown men.'" See Filipinos' White Girls: Waitress Tells of Mixed Race Parties, S.F. Chron., Feb. 22, 1936, at 13. Judge Lazarus "blew up." Id. He noted that if a girl is of age and wanted to associate with these men, there was nothing that could be done. See id. But "girls of tender years are being ruined and led astray by the strange influence these men seem to have on women of a certain type." Id. He attributed this to the Filipinos driving flashy cars and spending money on white girls, while hundreds of "decent white youths can't find a job for love or money. . . . It's enough to make a man's blood boil, and mine is boiling at this minute!" Id. It was also alleged that Filipino men attended church for the opportunity to "meet white girls." See Church Closed by Elopements of Mixed Races: Filipino Marriages to White Girls Cause of Breach, S.F. Chron., Apr. 10, 1933, at 3 (minister closed church when he discovered "five mixed elopements between whites and Filipinos and general unconventional relations between whites and Filipinos" in congregation).

n56 See The Philippines Reader, supra note 34, at 59-60.

n57 See Osumi, supra note 10, at 18 (citing Commonwealth Club, Transactions 24, at 341 (1929), and C.M. Goethe, Filipino Immigration Viewed as Peril, Current History 353-36 (1931)). Note that in the Philippines the word mestizo has its own meaning, which is someone with Spanish ancestry.

n58 Hearings Before the Comm. On Immigration and Naturalization, 71st Cong. 35 (1930) (statement of Dr. David Barrows of the University of California), cited in Lasker, supra note 1, at 98.

Their [the Filipinos'] vices are almost entirely based on sexual passion . . . . The evidence is very clear that, having no wholesome society of his own, he is drawn into the lowest and least fortunate associations. He usually frequents the poorer quarters of our towns and spends the residue of his savings in brothels and dancehalls, which in spite of our laws exist to minister to his lower nature. Everything in our rapid, pleasure-seeking life and the more or less shameless exhibitionism which accompanies it contributes to overwhelm these young men who, in most cases, are only a few years removed from the even, placid life of a primitive native barrio.

Id.

n59 Melendy reports that the prevalent white view was that Filipinos were savages, not far removed from the tribal state. See Melendy, supra note 47, at 59. He notes that the reports of missionaries, who recounted primitive conditions of rural tribes furthered public apprehension of Filipinos, thought of as "cannibalistic" and "savage-like." See id. at 59-60. The President of the Immigration Study Commission stated: "These men are jungle folk, and their primitive moral code accentuates the race problem even more than the economic difficulty." Takaki, supra note 35, at 325-26. One contemporary observer has queried:

But what of these people, whom we have placed beneath the Stars and Stripes, both by the right of capture and purchase of their land? . . . Most persons know very
little of them, except that they are a half-
civilized lot of people, at best, and the
lowest order of barbarians, at worst.

And this general impression is almost
correct; civilization is at a very low ebb in
the Philippines. Of course, the Spaniards
who have settled there, the Europeans who
carry on business dealings on the islands,
some of the Chinese merchants, and even
some of the high-caste natives, are people
of culture; but the great overwhelming
mass of residents on the island are in low
stages of savagery.

Alden March, The History and Conquest
of the Philippines and Our Other Island

n60 See Free Blames Sex in Filipino Row,
S.F. Chron., Sept. 16, 1930, at 3. Representative Arthur Free of San Jose
explained that resentment against Filipinos
in California was not because they worked
for lower wages, but because "the aliens
mix with white women. . . . Most of them
come here without their women, and the
real cause for resentment against them is
that they attract white girls to their club
houses and other places of resort." Id.

n61 See Melendy, supra note 47, at 69.

n62 See E. San Juan, Jr., Configuring the
Filipino Diaspora in the United States, 3
Diaspora 117, 120 (1994) [hereinafter San
Juan, Jr., Configuring the Filipino Diaspora]. This racialization is evident in
temporary reports of the Filipino-
American War, described by one participant as "a hot game of killing
niggers." See E. San Juan, Jr., From Exile
to Diaspora: Versions of the Filipino Experience in the United States 20 (1998)
[hereinafter San Juan, Jr., From Exile to Diaspora]; see also George Lipsitz,
"Frantic to Join . . . the Japanese Army": The Asia Pacific War in the Lives of
African American Soldiers and Civilians, in The Politics of Culture in the Shadow of
Capital 324, 328 (Lisa Lowe and David
Lloyd eds., 1997). Lipsitz notes that white
American soldiers called Filipinos "niggers," "black devils," and "gugus." See id.
Filipinos fighting the United States
occupation made explicit appeals to Black
troops on the basis of "racial solidarity,"
offering posts as commissioned officers to
members of the rebel army who switched
sides. See id.; see also Mumford, supra
note 48, at 63, 68 (describing perception of Filipinos as black); Tanya Kateri
Hernandez, The Construction of Race and
Class Buffers in the Structure of Immigration Controls and Laws, 76 Or. L.
Rev. 731, 737 (1997) (describing congressional debate on citizenship status of Filipinos and concern that Filipinos had
African attributes). One representative
described them as "physically weaklings of
low stature, with black skin, closely
curling hair, flat noses, thick lips, and
large, clumsy feet"; another said "How
different the case of the Philippine Islands.
. . . The inhabitants are of wholly different
races of people from ours -- Asiatics,
Malays, negroes and mixed blood. They
have nothing in common with us and
centuries can not assimilate them." Id.

White workers referred to Chinese people
as "nagurs," Chinese features were
described as "but a slight removal from the
African race," and as described by Ronald
Takaki, the "'Negroization' of the Chinese
reached a high point when a magazine
cartoon depicted them as a bloodsucking
vampire with slanted eyes, a pigtail, dark
skin, and thick lips." Id. at 219.

The blurring of Chinese with blacks was
also apparent in a 1854 case where
Chinese people were prohibited from
testifying against whites under a statute
that provided that "no Black, or Mulatto
person, or Indian, shall be allowed to give
evidence in favor of, or against a White
man." People v. Hall, 4 Cal. 399 (1854).
The court's rationale was twofold:
the word "Indian" referred to "not alone
the North American Indian, but the whole
of the Mongolian race," and "the word
'Black' may include all Negroes, but the
term 'Negro' does not include all Black
persons." Id. at 402-03. "Black" meant
"every one who is not of white blood" and
"White" excluded "all inferior races." Id. at
403, 404.

n64 See Takaki, supra note 35, at 330. A
letter to the Dinuba Sentinel stated:
"Negroes usually understand how to act,"
but "these Fils" think they have "a perfect
right to mingle with the white people and even to intermarry." Id.

n65 Lasker, supra note 1, at 96. He also noted that Greek and Russian immigrants to the United States and West Africans in English port cities had been similarly described. See id. at 97.

n66 See Chan, supra note 41, at 103-09. In 1890, the sex ratio among Chinese immigrants was 27:1 and continued to be skewed into the mid-1920s. Among the Filipinos, the sex ratio in 1920 was roughly 19:1. Among the Japanese, however, the sex ratio in 1910 was 6.5:1 and the disparity had lessened further by 1920. See id. The 1908 Gentlemen's Agreement halting Japanese immigration had exempted family members and wives from exclusion. See Takaki, supra note 35, at 337.

n67 Ronald Takaki asserts that men from the Philippines seemed to seek out white female companionship and to be attractive to white women, to a greater degree than men from China, Japan, Korea, and India. See Takaki, supra note 35, at 328.

n68 I am indebted to Rachel Moran for this suggestion.


n70 Foster, supra note 10, at 448. "In this opinion, Edward T. Bishop, assistant county counsel, advised L.E. Lampton, County Clerk, as to 'classifying the Filipino under the proper one of the four races mentioned in Section 69 of the Civil Code.'" Id. at 447. He stated that "an examination of seven or eight authorities, encyclopedias, etc., reveals that scientists are not agreed upon the divisions of mankind into races," and concluded:

While there are scientists who would classify the Malayans as an offshoot of the Mongolian race, nevertheless, ordinarily when speaking of "Mongolians" reference is had to the yellow and not to the brown people and we believe that the legislature in Section 69 did not intend to prohibit the marriage of people of the Malay race with white persons. We are further convinced of the correctness of our conclusion when we regard the history of the situation. In 1880 Section 69 was amended so as to prevent the marriage of a white person with a Negro, mulatto, or Mongolian. It was about this time that there was a Chinese problem in California. . . . At that time the question of the marriage of white persons with members of the brown or Malay races was not a live one, and there was no call for a solution. . . . We are assuming that the problem under consideration involves a Filipino who belongs to one of the Malay tribes. If, as is not at all impossible, he be a Negrito or in part Chinaman, another question is presented and another answer given.

Id. at 447-48. The County Counsel opinion was written at a time when the number of Filipinos in the United States was small, fewer than 6000.

n71 See id. at 448. It is important to point out here that Filipinas/os are a diverse community formed through mixing of different "races." See, e.g., Napoleon Lustre, Conditions (an unrestricted list), 24 Amerasia 111 (1998) (describing racial mixtures that make Filipinos). Jurists and county officials were attentive to this fact in choosing to label Filipinos as Mongolian when they were part Chinese. See id.

n72 See Foster, supra note 10, at 444-45 (citing California v. Yatko, No. 24795, Superior Court of Los Angeles County, May 11, 1925); Filipino Pleads Unwritten Law in Murder Case, L.A. Times, May 4, 1925, at 18 [hereinafter Unwritten Law]. Foster's article contains significant material not contained in the Los Angeles County records of the case.

n73 See Unwritten Law, supra note 72, at 18.

n74 See Old Law Invoked on Yatko, L.A. Times, May 6, 1925, at 5 [hereinafter Old Law]; Unwritten Law, supra note 72, at 2.

n75 See Old Law, supra note 74, at 5.

n76 Id.
n77 Foster, supra note 10, at 445.
n78 Id.
n79 Id. at 446.
n80 Id. While mention was made of the fact that Yatko's paternal grandfather was half Chinese, in other words, that Yatko was one-eighth Chinese, this did not lead the judge to rule on that basis that Yatko was "Mongolian." See id. at 445-46.
n81 Unwritten Law, supra note 72, at 2. Counsel for the state had called attention to the homicidal mania of Malays, called "running amuck," which he stated was a "neuropathic tendency imbuing them without any reason or motive to kill persons of other races." See Foster, supra note 10, at 445.
n82 See Foster, supra note 10, at 444; Life Sentence to Be Imposed on Yatko Today, L.A. Times, May 11, 1925, at 17; Life Term for Filipino Slayer, L.A. Times, May 9, 1925, at 2. Yatko appealed his conviction, principally on the grounds of the decision to allow Lola Butler to testify. The appeal was denied. See Deny Filipino New Trial in Kidder Murder, L.A. Times, May 12, 1925, at 5.
n83 Webb subsequently testified for Filipino exclusion in 1929 Commonwealth Club forums and the 1930 Congressional hearings. See Osumi, supra note 10, at 18.
n84 Letter from Attorney General U.S. Webb to the Honorable C.C. Kempley, District Attorney of San Diego County 6 (June 8, 1926) [hereinafter Letter from Webb] (on file with author).
n85 See id.
n86 Webb noted that the term "Hindu" was somewhat misleading because it was generally used to describe a native of India, which was inhabited by seven races. See id. Of these seven, two were "mongoloid": the Mongolo-Dravidian type of Bengal and Orissa, and the Mongoloid type of the Himalayas, Nepal, Assam, and Burma. See id. These individuals would not be permitted to marry white persons in California, so there would be a question of fact in each case to determine to which race the specific native of India belonged. See id. How "Hindus" (or South Asians) were understood in relation to California's miscegenation laws is another site for further inquiry. While South Asian immigrants to California -- predominantly Sikhs from Punjab -- were not in a class enumerated under the state statute, there were nonetheless instances where county clerks refused to issue marriage licenses when there was "too much" differentiation in skin color between bride and groom, when she was labeled "white," and he was labeled "black" or "brown." This raises the important point that how race is understood, acted upon, and also created often diverges from what is presented as the official classification of race. There was little opposition to South Asian men marrying Mexican women, who were usually judged to be racially similar, and there were an estimated 500 such marriages. For a description of how South Asians were classified under California's miscegenation laws, and the development of the Mexican-Punjabi community in Imperial Valley, California, see Bruce La Brack, The Sikhs of Northern California, 1904-1975, at 172-76 (1988), and Karen I. Leonard, Making Ethnic Choices: California's Punjabi Mexican Americans 62-78 (1992).
n87 Webb noted that Ales Hrdlicka, "probably the best known and ablest anthropologist in the United States," had testified at a hearing before the House of Representatives in 1922 that Filipinos and Malays belonged to the "mongoloid race." Letter from Webb, supra note 84. Webb also noted that the population of the Philippines, according to the Encyclopedia Britannica, is "7,635,626 of which 7,539,632 belong to the Malay race, 42,097 yellow of which 97.5% are from China; 24,016 blacks; 14,271 whites and 15,419 mixed, chinese with malays and spanish with malays." See id. His conclusion that the Filipinos, being Malays, were properly classed as Mongolians, included an exception for "the inhabitants belonging to the black race and the whites constituting a negligible proportion of the population." See id. Presumably, the "inhabitants belonging to the black race" would also be prohibited
from marrying white persons in California under the statute. See id.

n88 Confusion among county clerks on this issue was the norm. Bruno Lasker reported that:

Sometimes the Filipino's status in a California county changed over-night as new county clerks were appointed whose anthropological ideas differed from those of their predecessors. Thus in Santa Barbara, county clerk D. F. Hunt, several years ago, decided that Filipinos were Mongolians and has consistently held to this decision in the face of heated arguments and of the fact that many couples which first presented themselves before him later secured marriage licenses in some other county. . . . The majority of officials seem, without any recourse to science at all, to have married Filipinos indiscriminately with white and with Japanese and Chinese girls, thus exposing themselves to the possible charge that if Filipinos should through some court decision be declared to be white, then their marriages to the Asiatic girls would be illegal.

Lasker, supra note 1, at 118.

n89 See Foster, supra note 10, at 448-52; Racial Divorce Plea Rejected: Judge Rules Law Needed to Bar Filipino Weddings; White Girl Denied Freedom on Skin Color Basis, L.A. Times, Oct. 11, 1931, at 5 [hereinafter Racial Divorce Plea Rejected].

n90 See Foster, supra note 10, at 448 (describing Petition for Writ of Prohibition, Robinson v. Lampton, No. 2496504, Superior Court of Los Angeles County). Unfortunately, the case number Foster gives, cited by other scholars, is incorrect, and I was unable to locate the decision. Happily, the decision was excerpted in contemporary newspaper reports. As Rhacel Salazar Parrenas has written, the Robinson case signifies the loss of community and alienation from their families that white women faced for their involvement with Filipino men. See Parrenas, supra note 48, at 129.

n91 Lasker, supra note 1, at 118.

n92 See id. at 119.

n93 See S.F. Filipinos Oppose Ruling, S.F. Chron., Feb. 27, 1930 at 6. The article reported that four Filipino representatives were interviewed, all of whom emphatically declared they were Malayans and not Mongolians. But they differed on the "ethics" of intermarriage with whites: one representative, while agreeing that the Filipinos were not of the Mongolian race, backed Judge Smith's ruling, stating that "all the recent race trouble was directly due to Filipinos aspiring to marry white girls." Id.

n94 See Foster, supra note 10, at 449 (citing Visco v. Lampton, No. C319408, Petition for Order of Alternative Mandamus (June 3, 1931), Superior Court of Los Angeles County, Judge Walter Guerin).

n95 See id.

n96 While not apparent from the record of the case proceedings, Foster asserted that Salas was classified as a Mexican Indian. See id.

n97 See id. ("The judge stated he would have decided in favor of Mr. Visco had Miss Salas been a white person."). In advance of the Visco decision, circulars had been distributed in the Filipino community to garner support. The circular read, in part:

The fundamental issue involved in this case is, that Filipinos are not Mongolians.

Are you willing to stand and defend your right UNDER GOD-GIVEN PRINCIPLE OF MARRIAGE AND HAPPINESS? Or shall we allow ourselves to be restrained by laws motivated by unjust discrimination, in defiance of the laws of God and reason?

NOW, FILIPINOS, DO YOU WANT TO BE CALLED MONGOLIAN? IF YOUR ANSWER IS "NO" SUPPORT THE FIGHT OF GAVINO C. VISCO BY SUBSCRIBING TO HIS LEGAL FUND LIBERALLY.

Foster, supra note 10, at 450 (quoting Filipino Home Club Circular).

n98 See Foster, supra note 10, at 450 (discussing Petition for Annulment of Marriage, Laddaran v. Laddaran, No.
D95459 (Los Angeles Super. Ct. 1931)). The complaint stated that "plaintiff is of the Filipino race and as such is prohibited from marriage with Defendant who is of the Caucasian, or white race." Complaint for Annulment of Marriage at 2, Laddaran v. Laddaran, No. D95459.

n99 See Foster, supra note 10, at 450.

n100 See id. at 451 (discussing Murillo v. Murillo, No. D97715 (October 10, 1931), Superior Court of Los Angeles County, Judge Thomas C. Gould).

n101 Id.

n102 Id.; see also Racial Divorce Plea Rejected, supra note 89, at 5. The Judge also noted that the court was aware that the federal naturalization bureau included Filipinos and Malays generally in its general classification of "Mongolian Grand Division." See Murillo v. Murillo, No. D97715 (1931); Foster, supra note 10, at 451.

n103 See Foster, supra note 10, at 452.


n105 See id. at 268-69. Ian Haney Lopez has documented a general shift from consideration of scientific evidence to common-sense understandings of race in naturalization cases. This shift coincided with the growth of scientific evidence supporting the idea that groups such as Indians, Persians, and Armenians should be considered "Caucasian," and therefore eligible to naturalize under the law. Shifting towards the "common sense" understanding allowed courts to deny these groups citizenship in the United States. See generally Ian F. Haney Lopez, White by Law: The Legal Construction of Race (1996).

n106 See Roldan, 129 Cal. App. at 272-73, 18 P.2d at 708-09. In concluding that a Malay is not a Mongolian, the judge relied heavily on the definition of a "Mongolian" from the encyclopedia and on the original legislative intent of enacting laws restricting marriages between whites and Mongolians. The decision concluded by stating:

In 1880 . . . there was no thought of applying the name Mongolian to a Malay; . . . the word was used to designate the class of residents whose presence caused the problem at which all the legislation was directed, viz., the Chinese, and possibly contiguous peoples of like characteristics; . . . the common classification of the races was Blumenbach's, which made the "Malay" one of the five grand subdivisions, i.e., the "brown race," and . . . such classification persisted until after section 60 of the Civil Code was amended in 1905 to make it consistent with section 69 of the same Code.

Roldan, 129 Cal. App. at 272-73, 18 P.2d at 709. Attorney General U.S. Webb and Los Angeles County Counsel Everett Mattoon petitioned for a rehearing before the State Supreme Court, which was denied on March 27, 1933. See Supreme Court Removes Ban on Filipino, White Marriages, S.F. Chron., Mar. 30, 1933, at 1.

n107 See, e.g., Roldan, 129 Cal. App. at 273, 18 P.2d at 709 (deferring to legislature).

n108 See Osumi, supra note 10, at 20; see also Bill Opposes White, Filipino Marriages, S.F. Chron., Mar. 14, 1933, at 1 (noting that Senate Judiciary Committee reported that two bills voiding marriage between Malayan and white will likely pass Senate).

n109 See 1905 Cal. Stat. 104 (amending section 60 of Civil Code to read: "All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void"); 1905 Cal. Stat. 105 (amending section 69 of Civil Code to read: "no license must be issued authorizing the marriage of a white person with a negro, mulatto, Mongolian or member of the Malay race"); Osumi, supra note 10, at 20 (recognizing that amended statute included Malays); Bill Forbids White, Filipino Marriages, S.F. Chron., Apr. 1, 1933, at 1 (stating that Assembly committee approved the bills introduced by Senator Jones). The San Francisco Chronicle reported the marriage of one couple, Magno Basilides Badar and Agnes Regina Peterson -- described as "an attractive blonde" -- who would probably
be among the few couples of Caucasian and Filipino nativity to be married in California, because they slipped between the window of the Roldan decision and the new law. See White Girl, Filipino Ask Permit to Wed, S.F. Chron. Apr. 6, 1933, at 1.

n110 See Cal. Civ. Code § 69 (1937) (amended 1959 to exclude race as a criterion for legal marriage); Cal. Civ. Code § 60 (Deering 1937) (repealed 1959); see also Osumi, supra note 10, at 20-21; Recent Decisions: Marriage: Miscegenation, 22 Cal. L. Rev. 116-17 (1934) (criticizing passage of legislation); White Girl, Filipino Ask Permit to Wed, supra note 109. Filipino-white couples could still go to neighboring states to be lawfully married. See People v. Godines, 17 Cal. App. 2d 721, 723, 62 P.2d 787-88 (1936) (holding that Filipino-white marriage in New Mexico, where it was legal, was also valid in California). The ability of couples to travel to another state where Filipino-white marriages were permitted obviously depended on their financial situation, something made more difficult by the Great Depression. Because of agitation about the practice of couples traveling to other states for this purpose, the California Assembly and Senate passed a resolution requesting Utah to prohibit Filipino-white marriages, which Utah did in 1939. South Dakota, Nevada, Arizona, and Wyoming had already done so. See Osumi, supra note 10, at 22.

n111 Tydings-McDuffie Act, Pub. L. No. 73-127, 48 Stat. 456 (1934). As increasing concern about competition from the Philippines arose in the 1920s, the independence movement in the United States started to gain support. By the late 1920s, the anti-Philippine sentiment was strongly articulated by dairy organizations, general farm groups, domestic sugar producer and cordage manufacturers; in 1932 Congress approved the Hare-Hawes-Cutting Act. The Hares-Hawes-Cutting Act provided for a 10-year transitional period of free trade, imposition of quotas on Philippine products, immigration restrictions limiting entry of Filipinos to 50 persons a year, and presence of permanent American military bases in the Philippines. The Philippine legislature or a constitutional convention had to agree to the act for it to take effect. It was slightly amended, eliminating the reference to permanent military bases, except naval stations, and was approved as the Tydings-McDuffie Act in 1934. It is generally understood that the Filipinos agreed to the terms of the Tydings-McDuffie Act because they believed the act was the best possible at the time and implied future review of the provisions. See id.; The Philippines Reader, supra note 34, at 56-58; H. Brett Melendy, The Tydings-McDuffie Act of 1934, in Asian Americans and Congress: A Documentary History 283-96 (Hyung-Chan Kim ed., 1996).

n112 Even after the Tydings-McDuffie Act was passed, there was unabated pressure from labor groups, so in 1935 Congress passed the Repatriation Act, providing free transportation for Filipinos returning home -- but with the catch that re-entry was subject to the new annual quota of 50. Only a small minority agreed. See Mangiafico, supra note 34, at 37.


n114 E. San Juan has suggested that this obsessive anxiety only temporarily lived an underground existence, but metamorphized into anxiety over G.I. brides at the end of WWII, and now has manifested in anxiety over the so-called mail-order bride syndrome. See San Juan, Jr., Configuring the Filipino Diaspora, supra note 62, at 120. I am indebted to Sherene Razack for the point that this anxiety should not really be considered a generalized anxiety about Filipino sexuality, but that it has differently gendered roots and trajectories. We can see the contemporary anxiety about "mail-order brides" as described in Peter Kwan's work on the film Priscilla, Queen of the Desert, in which the Filipino woman character is presented as a grotesque sexual figure, motivated solely by her desire to sexually perform. She is referred to by others in the film as a "mail-order bride," even though she is not one. See Kwan, supra note 10, at 106-07. Often, Filipina is
equated with a "mail-order bride," even though many women involved in the "mail-order bride" business are not Filipina. It is important to point out here that "mail-order bride" is considered by many to be a derogatory term. See Leti Volpp, Working with Battered Immigrant Women: A Handbook to Make Services Accessible 8 (1995). I would argue that there are significant similarities between some relationships that are formed through the "mailorder" bride business and the everyday United States practice of placing and answering personals ads. A similar point could be made about comparing the United States practice of using personal ads with arranged marriages. What leads, in part, to the failure to understand the significant similarities between what "they" do and what "we" do is the prevalent conceptualization of United States dating and marriage as purely romantic, in contrast to what is conceptualized as the unromantic nature of family members or written advertisements facilitating marriages or the unromantic idea of finances playing a role in marriages.

Describing the Australian context, Jan J. Pettman writes that "many Filipinas married to Australian men bitterly resent those who see them as 'mail-order brides,' a stereotype that encourages their treatment as exotic and available Asian women or as passive victims." Jan J. Pettman, Worlding Women: A Feminist International Politics 194-95 (1996). Some women did enter Australia as part of the trade in wives, in order to make what they could of their options, leading to arrangements that sometimes ended satisfactorily but sometimes did not, due to the situation of acute dependence that can result. See id. Since 1980, 18 Filipina women and four children have died at the hands of Australian men, and four women and one child have disappeared in Australia. See id.

In the United States, there has also been violence directed against women that came to the United States through these mechanisms. Timothy Blackwell of Seattle, Washington, shot and killed his pregnant Filipina wife, Susana Blackwell, whom he met and married through a matchmaking service, while she sat outside the courtroom that was to determine whether there should be an annulment of marriage or a divorce. See Thomas W. Haines & Neil Gonzales, Third Shooting Victim Dies, Seattle Times, Mar. 3, 1995, at A1.

n115 32 Cal. 2d 711, 198 P.2d 17 (1948). In Perez, a divided majority agreed the statute was unconstitutional. Roger Traynor and two other justices wrote a lengthy opinion asserting that racial categories regarding marriage are irrational and violate the equal protection clause. A separate concurrence called antimiscegenation laws unconstitutional because they were color conscious. Finally, an additional concurrence stated that the freedom of religion is one of the liberties encompassed in the Fourteenth Amendment and the antimiscegenation statutes were too vague and uncertain to regulate a fundamental right.

n116 I will note here that Alabama currently still has, as part of its constitution, an antimiscegenation provision. See Ala. Const. art. IV, § 102. The proposal to eliminate the antimiscegenation provision was approved by the House in April 1999 and by the Senate in June 1999 without dissent. The proposal was expected to be on the ballot on October 12, 1999, when Alabama voters were to cast ballots for two other statewide referendums. However, due to the failure of the legislature to pass a resolution setting the antimiscegenation issue for the October ballot, the expected amendment may have to wait until the general elections in November 2000. See Alabama Interracial Nuptial Ban Nears End, L.A. Times, June 3, 1999, at A13; Phillip Rawls, Goof Keeps Interracial Marriage Issue Off Oct. 12 Ballot, Associated Press Newswires, June 18, 1999, at 03:06:00. In November 1998, South Carolina voters approved an initiative to remove the ban of interracial marriages from their state constitution. Although this has been reported as a victory, it is important to note that the repeal was opposed by 38% of those who voted. See Richard Reeves, Editorial, Jefferson's Pessimism Proved Wrong, Star-Ledger (Newark N.J.), Nov. 20, 1998, at
See Eva Saks, Representing Miscegenation Law, 8 Raritan 39, 40-42, 64 (1988). The Yale Law Journal reported in 1949 that evidence deduced in support of the statutes consisted largely of biological reports of "Negro mental and physical inferiority" and "the allegedly disastrous results of miscegenation," namely "race crossing" leading to inferior progeny, and sociological considerations that miscegenation occurs among the "dregs of society" and that miscegenous marriages "increase animosity towards racial minorities." See Constitutionality, supra note 16, at 473-79. While the note describes all of the existing antimiscegenation laws, its focus is on miscegenation between whites and blacks.


While Vietnam and Korea were, unlike the Philippines, not official United States colonies, another question that should be contemplated is the manner in which the experiences of war and colonialism or neocolonialism have shaped the racialization of communities such as Vietnamese Americans and Korean Americans. For examples of this work, see generally Watermark: Vietnamese American Poetry & Prose (Barbara Tran et al. eds., 1998), and JeeYuen Lee, Toward a Queer Korean American Diasporic History, in Q & A: Queer in Asian America, supra note 5, at 185.

Kevin Mumford suggests that Filipinos were probably less stigmatized than Chinese and Japanese men, and that they were seen as more like whites, perhaps because of the history of Spanish colonialism. See Mumford, supra note 48, at 67.

See Peggy Pascoe, Race, Gender, and Intercultural Relations: The Case of Interracial Marriage, 12 Frontiers 5, 7 (1991). She has put Chinese, Japanese, and Filipinos in the former category and Native Americans and Hispanics into the latter. The differing understanding of miscegenation regulation depending on whether the prohibited relationships involved white men or white women, has been furthered by the work of Adrienne Davis. She has argued that shifting the focus from miscegenation regulation of black men and white women to that of white women and black men changes the understanding of what miscegenation regulation sought to accomplish. While regulation of the black man/white woman is correctly understood as prohibitory and repressive to both sides of the dyad, regulation of the white man/black woman must be understood as operating within the context of laws and norms of slavery that intervened to provide systematic access to black women's sexuality, trumping formal antimiscegenation statutes. See Adrienne Davis, Loving and the Law: The History and Jurisprudence of Interracial Sex (unpublished manuscript on file with author); see also Angela Davis, Women, Race, and Class 172-201 (1983) (arguing that access of white men to women of color was never blocked with threat of lynching or ability of women of color to testify against whites in court).

In her article, Pascoe found that cases were frequently ex post facto attempts to invalidate interracial marriages in order to take what had been a white man's estate away from the inheritor, who was a woman of color. See Pascoe, supra note 122, at 7-8.

Emily Field Van Tassel has examined this relationship in the context of the post-Civil War South, which sought to maintain an economy of racialized dependency. See Emily Field Van Tassel, "Only the Law Would Rule Between Us": Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War, 70 Chi.-Kent L. Rev. 873, 878-905 (1995). I agree with her criticism that as an explanation for white antipathy towards interracial marriage "racial purity" or the maintenance of
"white supremacy" as explanation does no more than rephrase the question. See id. at 926.

n125 See Parrenas, supra note 48, at 116, 124-28. For example, academic Emory Bogardus is so identified. See id.

n126 For a discussion of these consequences, see generally Candice Lewis Bredbenner, A Nationality of Her Own: Women, Marriage, and the Law of Citizenship (1998).

n127 Act of March 26, 1790, ch. 3, 1 Stat. 103; Act of July 14, 1870, ch. 255, section 7, 16 Stat. 254.

n128 See, e.g., Morrison v. California, 291 U.S. 82, 85-86 (1934) ("White persons' within the meaning of the [Naturalization Law of 1790] are members of the Caucasian race, as Caucasian is defined in the understanding of the mass of men. The term excludes the Chinese, the Japanese, the Hindus, the American Indians and the Filipinos."); see also Toyota v. United States, 268 U.S. 402, 410-12 (1925).

n129 Act of March 2, 1907, Pub. L. 193, ch. 2534, section 3. This provision was upheld as constitutional in Mackenzie v. Hare, 239 U.S. 299, 311-12 (1915), in which the Supreme Court upheld the power of Congress to expatriate a female United States citizen that obtained foreign nationality by marriage to a foreign national during the period of coverture because such action was a "necessary and proper" implementation of the inherent power of sovereignty in foreign relations.


n131 In 1930, a Salinas Superior Court Judge ruled that a German immigrant who married a Filipino man was not entitled to naturalize. See Takaki, supra note 35, at 342 (mentioning case involving Mrs. Anne Podien-Jesena, married to Basalico Jesena, and decision of Monterey Superior Court Judge H.C. Jorgenson). Following this ruling came the statement of the district director that United States citizen women marrying Filipinos would be denaturalized. See id.; see also Anti-Miscegenation Laws and the Filipino, supra note 10.

n132 On the relationship of nationalism, gender, race, and sexuality, see generally Leti Volpp, Blaming Culture for Bad Behavior, 12 Yale J.L. & Human. 89 (2000).

n133 See generally Shah, supra note 26 (asking this critical question).


n136 I recognize that, in this literature, the interracial miscegenous relationship is presumptively heterosexual, because what is at issue is legal marriage. Nonetheless, there is a manner in which many authors frame the inquiry as if same sex relations are never interracial, and as if interracial relationships are always heterosexual. For exceptions to this, see Mumford, supra note 48, and Shah, supra note 26. Nayan Shah's research into the way that the Chinese were identified as lepers and deported at the height of the Congressional Inquiry into Chinese immigration in 1876, amidst growing public hysteria about contagion to whites through sex with Chinese, allows us to see the importance of the relation of sexuality and disease to antimiscegenation legislation. At the inquiries, physicians offered stories of young white boys that had become infected by leprous Chinamen that shared their beds. Leprosy was analogized to syphilis; both were thought to originate in Chinese
bodies. This necessitated the social and sexual isolation of Chinese lepers from other races. Health officials emphasized the devastating health consequences of illicit interracial sexual relations and identified Chinese lepers as inhuman, calling for the removal of these creatures from society in an attempt to prevent the United States from becoming a nation of lepers. The presumption of Chinese as potential lepers was used to isolate the population and make their integration into American society impossible. Shah explains how the narratives of the transgression of racial boundaries were the material and metaphorical symptoms of the unhealthy fluidity and dangerous freedom in the cities. See generally Shah, supra note 26. Historical research like this, which provides a finely grained analysis of specific sites, pushes our knowledge much further.

n137 As an example of the bifurcation between "Asian American" and "Filipino," Peggy Pascoe listed states with miscegenation laws that "mentioned" Asian Americans, and those that "mentioned" Malays. Her "Asian American" is fully occupied by Chinese, Korean, and Japanese Americans, with no room for Filipino/a Americans. See Pascoe, supra note 18, at 485 n.13.

n138 See San Juan, Jr., Configuring the Filipino Diaspora in the United States, supra note 62, at 117.

n139 See Lisa Lowe, Immigrant Acts: Asian American Cultural Politics 68 (1996) (arguing for Asian American necessity to organize, resist, and theorize as Asian Americans, even while being cognizant of risks of cultural politics that rely on construction of sameness and exclusion of differences).

n140 An example of this is the numerous "Asian American" or "Asian Pacific American" civil rights and other organizations that are entirely staffed or led by Chinese and Japanese Americans. There are, of course, exceptions to this; for example, Bill Tamayo was Managing Attorney of the Asian Law Caucus in San Francisco for many years.

n141 For example, Yen Le Espiritu examined bibliographies and publications for the period from the 1970s to the 1980s and determined the number of studies for specific Asian American groups: Japanese, 514; Chinese, 460; Filipinos, 96; South Asian, 53; Korean, 32; Pacific Islander, 8; Southeast Asian, 6. See Yen Le Espiritu, Asian American Panethnicity: Bridging Institutions and Identities 37 (1992).

As Oscar Campomanes has pointed out, this uneveness can be explained in part by the vagaries of academic production, changing immigration policy and specific demographics. Nonetheless, it is imperative to examine what internal hierarchy is replicated in the name of a politically efficacious Asian American panethnic identity. See Oscar V. Campomanes, New Formations of Asian American Studies and the Question of U.S. Imperialism, 5 Positions 523, 528-29 (1997).

n142 See Oscar V. Campomanes, Filipinos in the United States and Their Literature of Exile, in Reading the Literatures of Asian America 49, 53 (Shirley Geok-lin Lim & Amy Ling eds., 1992).

n143 See Rachel Moran, What If Latinos Really Mattered in the Public Policy Debate?, 85 Cal. L. Rev. 1315, 1320 (1997). Moran cites Pascoe, supra note 122, as stating that antimiscegenation laws did not cover Latinos. Thinking about who is placed within the Latina/o rubric raises the important question as to what other communities are elided over in the claim that Latinas/os were not subjected to the reach of miscegenation laws. The claim replicates the longstanding problem of the disappearance of both Indian and Black identity within what we conceptualize as Latina/o (not to mention East Asian) -- all groups subjected to the reach of miscegenation laws. See Pascoe, supra note 18, at 464-65 (describing specific case where Indian identity of man we would call "Latino" brought him under purview of Arizona's antimiscegenation law); supra notes 10-13 and accompanying text (enumerating communities subjected to miscegenation laws).

n144 Linking factors might be the experiences of conquest, the Spanish
language, and presumptions about heterosexual gendered relationships, for example, the Filipino as a "Latin lover."


n146 This is no doubt connected to the image of the origins of the United States as freedom-fighting subject seeking liberation from a colonial power.

n147 See Stuart Hall, Cultural Identity and Diaspora, in Identity, Community, Culture, Difference 222, 225 (Jonathan Rutherford ed., 1990). The cases demonstrate Filipinos arguing both that they were and that they were not "Mongolian." See, e.g., Roldan v. Los Angeles County, 129 Cal. App. 2d 267, 268, 18 P.2d 706, 707 (1933) (arguing that Filipinos were not Mongolian); Laddaran v. Laddaran, No. D95459, (Sept. 4, 1931) (arguing that Filipinos were Mongolian).
As the United States becomes more and more nonwhite, we (the nonwhite community) must ensure that we do not mimic the same behaviors, paradigms, and traps that we accuse the white majority of engaging in, perpetuating, and setting for us. n1 This is not an easy task. From the perspective of the Latina/o community alone, there are many that view the group not as a unified whole, but as a composite of many smaller communities -- Mexican Americans, Puerto Ricans, Cubans, Dominicans, to name but a few. n2 Added to [*838] the mix of nonwhite Latinos we have Asian Americans, Native Americans, and African Americans, and we run the risk of forgetting our common bond as part of the current racial, and often powerless, minority group in U.S. society.

Indeed, the problems of miscommunication and noncooperation across different peoples start at the smallest units of ethnicity. For example, Kevin Johnson writes that many long-time Mexican Americans look down upon new arrivals from Mexico, despite their shared heritage. n3 This intragroup animosity is evident in the fact that twenty-five percent of all Latina/o voters voted for Proposition 187, the notorious California initiative that denied public benefits [*839] for undocumented immigrants. n4 If Mexican Americans turn their noses up at immigrant Mexicans, what hope do we have for coalition building not only within the Mexican community, but within the Latino community at large, or the nonwhite community of Latina/o, Asian, Native, and African Americans?

While I appreciate that there are legitimate differences in agendas between factions within a racial group as well as between groups, causing both intra-and intergroup conflict, I want to focus on ways in which communities of color can use common misperceptions to their advantage as a bridge to building a larger community. As the projected largest minority population in the next millennium, Latinas/os have a unique opportunity to provide leadership in this area by charting a course toward harmony rather than discord.

Let me explain the problem of what I will term "minority on minority oppression" [*837] by using one historical and one contemporary example of ways that we people of color sometimes help perpetuate negative racial stereotypes that separate us rather than unify our communities. ... While I have always thought that the INS should have as its mission the assistance of immigrants as they work their way towards citizenship, I have been an unfortunate witness to the indignities suffered by many immigrants on a daily basis at the hands of the INS and, sometimes, the people of color that work for that agency. ... As there are more and more attacks against people of color -- from the backlash against affirmative action, to the passing of Propositions 209 and 187, to Initiative 200 in Washington and the Hopwood litigation -- communities of color must seek to coalesce rather than pull apart. ...
Filipino community to take action, albeit not in the
test one would have hoped. Instead of calling for the
repeal the law, the Filipino Home Club, a local
organization, distributed leaflets appealing for funds to
support a lawsuit challenging the ban against Filipino
mixed marriages by arguing that Filipinos are not
Mongolians and therefore not subject to the law. Part
of the offensive literature distributed by the group read
as follows:

The fundamental issue involved in this case is, that
Filipinos are not Mongolians.

Are you willing to stand and defend your right
UNDER GODGIVEN PRINCIPLE OF MARRIAGE
AND HAPPINESS? Or shall we just allow ourselves
to be restrained by laws motivated by unjust
discrimination, in defiance of the laws of God and
reason?

NOW, FILIPINOS, DO YOU WANT TO BE
CALLED MONGOLIAN? IF YOUR ANSWER IS
"NO" SUPPORT THE FIGHT OF GAVINO C.
VISCO BY SUBSCRIBING TO HIS LEGAL FUND
LIBERALLY.

REMEMBER THIS DOES NOT ONLY AFFECT
GAVINO C. VISCO, BUT AFFECTS EVERY
FILIPINO IN THE STATE OF CALIFORNIA. n8

What a shortsighted petition! Could not the Filipino
Home Club have had the foresight to declare the
California law a blight not only affecting all Filipinos,
but all people of color? What of the Chinese, Korean,
and Japanese inhabitants of California who more
clearly (at least in the eyes of the judges of the time) fit
the ethnological description of "Mongolian"? n9

Should not the Filipino Home Club have reached
across to their Asian brethren -- the [*841] Chinese,
Japanese, and Koreans (not to mention the
Indochinese, the Malays, the Indians, and the
Pakistanis) -- to seek an end to this law that, as their
own flier so eloquently stated, denied every person
rights protected under the "Godgiven principle of
marriage and happiness"? n10 Instead of breaking
down barriers between people, the Filipino Home
Club's actions arguably erected new ones between
themselves and other Asian groups.

As the old adage goes, history repeats itself. This
intra-Asian conflict I have just described is echoed
today between Latina/o groups who voted for
Proposition 187, and their largely Mexican brothers
and sisters adversely affected by the denial of certain
benefits their Latina/o American counterparts take for
granted. n11

My second, more contemporary example of "minority
on minority oppression" comes from my own personal
experience. I write about immigrants' rights. My
interest in this field stems from my experiences as a
Filipino immigrant in this country, having once
negotiated the often confusing maze of rules known as
the Immigration and Nationality Act en route to U.S.
citizenship. The agency charged with primary
enforcement of the immigration code is the
Immigration and Naturalization Service ("INS"). While
I have always thought that the INS should have as its
mission the assistance of immigrants as they work their
way towards citizenship, I have been an unfortunate
witness to the indignities suffered by many immigrants
on a daily basis at the hands of the INS and,
sometimes, the people of color that work for that
agency.

Let me share with you my recollection of my
citizenship interview in 1995. After having received
my appointment notice in the mail, I carefully gathered
and reviewed the documents that the INS requested
that I bring and went to the local office in downtown
Los Angeles for my interview, the last step before
actually being sworn in as a citizen. I handed my
papers to the clerk and took a seat among the many
others, the white, black, brown, and yellow faces, some
with lawyers, some without, waiting patiently for their
names to be called. When I got up to stretch my legs, I
overheard one of the INS clerks say to another in
disgust, "Can you read this? Can you believe some of
these names?," implying that it would have been much
easier if everyone had an "American" name like "Mike
[*842] Smith" or "John Jones," rather than "Guillermo
Rodriguez" or "Lee Jee Yoon." n12

Finally, my name was called (and thankfully,
pronounced correctly) and I was led in to talk to an
INS officer who, as best as I could tell, n13 was
Latina. After I had completed the citizenship test, the
examiner reviewed my documents. Because I had
obtained my immigrant status through my marriage to
a U.S. citizen, the papers I brought were supposed to
show that we were still legally married. I made sure to
bring copies of my bank account statements and other
documents the INS notice requested. The Latina
inspector took one quick look at my papers and said:
"None of these show that you are married to your wife
today. Do you have any documentation to prove that
you are married to her today?" I told her that I brought
what the notice said I should but that I could very
easily call my wife to come over because her office
was only a few minutes away. "No," she replied,
rejecting my suggestion with a huff, "we will not do
that."

Trying to keep my composure, I searched my wallet
desperately for some piece of information that might
satisfy the officer. I produced a State Farm auto
insurance card with both my wife's and my name on it and feebly handed it over to the officer. "This will work," she said. Before I knew it, she turned to me with a smile and said, "Congratulations!" as if nothing had happened. As I left the INS office in a daze, my citizenship certificate in hand, I thought to myself sarcastically, "Well, Victor, welcome to America!"

Looking back at that experience, why could not that Latina INS officer have been more sympathetic to me? Why could she not have thought about her own ancestors and many of her Latina/o brothers and sisters, who like me have to deal with "La Migra" every day, often under much more stressful and unpleasant circumstances? Why would she treat me as the "other" after I had played by all the rules, after I had carefully reviewed the documents her agency had required of me and had brought them to the interview? Did she take steps to make sure that the other clerks did not look down upon those with "foreign sounding names" or try to help them understand that America should be a celebration of different names, cultures, and peoples? Just as the Filipino Home Club failed to reach out to other Asians and people of color to fight California's ban on interracial marriages almost a century ago, my Latina friend neglected to reach out and make me welcome as I tried to do my best to be worthy of being granted full citizenship.

How do we help correct these instances of "minority on minority oppression"? How do we get different groups to reach out to each other? How do we take advantage of the growing Latina/o population to create a generation of intergroup leaders in the next century? Fortunately, studies in social psychology help us answer these questions. Social psychologists tell us that outsiders are outsiders because they can be classified as such. Once the in-group realizes that the outsiders are really no different from the insiders, they will begin to embrace the latter. n21

In the immigration context, much has been written about how earlier immigrant groups to the United States would mistreat later arrivals until the latter groups assimilated into American society -- the English oppressed the Irish; the whites oppressed the Chinese and the Mexicans. n20 As the earlier immigrant groups began to realize that, despite differences in appearance or skin color, they shared common values with the later arrivals, the former began to embrace the latter. n21

This history of gradual acceptance should come as no surprise. In two studies conducted in 1994 and 1996, Gregory Maio, David Bell, and Victoria Esses of the University of Western Ontario tested the attitudes of Canadians toward immigration. n22 Maio, Bell, and Esses found that the study participants were more likely to favor immigration when they were told the proposed immigrant group possessed character traits and values that the participants viewed as positive, such as friendliness, desire to work hard, and honesty. Not surprisingly, the natives were less receptive to the influx of foreigners when they could perceive the latter as different, which occurred when the subjects were given less positive character information about the potential immigrants. n23

This breaking down of barriers between the in-group and outgroup has worked in the judicial context in instances where experienced counsel have been able to assist juries to overcome their inherent prejudices by helping the jurors walk in the shoes of the accused. The famous lawyer Clarence Darrow once successfully defended several black men tried before an all-white jury through the power of the following closing argument:

"I haven't any doubt but that every one of you is prejudiced against colored people. I want you to guard against it. I want you to do all you can to be fair in this case, and I believe you will . . . .

Here were eleven colored men, penned up in the house. Put yourselves in their place. Make yourselves colored for a little while. It won't hurt, you can wash it off. They can't, but you can; just make yourself black for a little while; long enough, gentlemen, to judge them, and before any of you would want to be judged, you would want your juror to put himself in your place. That is all I ask in this case, gentlemen. n24

But what relevance do Darrow's exploits and Maio, Bell, and Esses' studies have in contemporary society? While certainly dramatic, the opportunity to be a Clarence Darrow and sway what might otherwise be a blatantly racist jury might not come along as often these days. Nor is the current relevance of Maio, Bell, and Esses' experimental findings readily apparent to the average person. n25

However, there are opportunities daily to turn perceived notions of commonality into bridges for building community. Let me share but two examples from my own experience. As a Filipino with a Hispanic surname and an Asian appearance, I sometimes cause confusion among people that do not know me. My Spanish surname, "Romero," is a legacy of Spanish colonialism, as the Philippines was a colony
of Spain for over three hundred years. n25 Because of this history, in many ways the Philippines is much more like the Commonwealth of Puerto Rico than an East Asian or Southeast Asian country like Japan, China, or Singapore. The Philippines and Puerto Rico were Spanish colonies that then came into American possession. n26 Both are predominantly Catholic, and both are currently populated by many people with Spanish-sounding surnames. It should come as no surprise, therefore, that I occasionally am mistaken for Latino by people that read my name but have yet to meet me. I can recall many a conversation over the phone where the caller might want to speak Spanish with me upon learning my last name is "Romero." I am the recipient of much Latina/o-focused mail as well. I receive solicitations from Latina/o groups as divergent as the Hispanic Bar Association of Massachusetts and the Columbia House mail order CD group, "Musica Latina," all because I share this Hispanic last name.

I experience a different response when I meet people face to face without telling them my last name. I remember once on the bus to downtown Los Angeles, I started speaking Tagalog n27 to one of the other passengers, thinking she was Filipina. Fortunately, I guessed correctly! She shared with me later that she thought that I -- dressed in a suit and tie, horn-rimmed glasses framing my almond-shaped eyes -was Japanese! My Asian phenotype has been the source of both happiness and sorrow. At my home school, Penn State's Dickinson School of Law, I have found that the Asian students feel comfortable relating to me, in part, perhaps, because I look like them and share their geopolitical perspective. n28 Yet, the one time my wife and I were harassed because of our interracial marriage, our white assailants' racial slur of choice was "you Japanese sonofabitch!" n29

What does any of this have to do with Latina/o leadership and my desire that we all seek to build bridges across communities? My experience as this socially constructed Latina/o Asian (or Asian/Latino) person suggests that there are people out there who, operating on stereotypes, assume that I have more in common with them than I might. The Latina/o groups that want me to join their organizations or buy their products, as well the Asians who feel a shared bond because of my appearance, believe that I belong to their communities. This is a good thing! While one might argue that these persons are acting on not much more than a stereotype -- for example that all "Romeros" must be Hispanic or all persons with almond-shaped eyes must be Japanese -these misperceptions provide the misidentified me with an opportunity to build bridges between communities. The stereotypes provide me with an entry into societies that might not have otherwise considered reaching out to me. This provides the base for building bridges -- in my case, between the Asian and Latina/o communities.

And building bridges between communities of color is important. As there are more and more attacks against people of color -- from the backlash against affirmative action, to the passing of Propositions 209 and 187, to Initiative 200 in Washington and the Hopwood litigation -- communities of color must seek to coalesce rather than pull apart.

Given demographers' predictions that Latinas/os will soon become the dominant population in the United States, Latinas/os are in a unique position to take a leadership role in seeking to forge coalitions where possible. Let me share with you just one recent example of coalition building that moves forward the agenda of all peoples of color. Recently, a broad coalition of civil rights groups sued the University of California at Berkeley claiming, among other things, that its admissions policy discriminates against certain minority groups by favoring candidates that have taken advanced placement courses. The plaintiffs contended that many high school students of color attend impoverished school districts that do not offer advanced placement courses, and are therefore disadvantaged by the policy. The civil rights groups involved span several ethnic and racial groups -- Latino, black, and Asian. The Mexican American Legal Defense and Education Fund, the NAACP Legal Defense and Educational Fund, and the Asian Pacific American Legal Center of Southern California all jointly filed the suit on behalf of several deserving minority students. n30

The Berkeley suit gives me hope. It is a shining example of how different ethnic and racial groups can work together to challenge a practice that many be taken for granted as valid without realizing its discriminatory impact. n31 Unlike the Filipinos who distanced themselves from, rather than fighting to repeal, the California antimiscegenation law close to 100 years earlier, the three groups in this present California lawsuit have banded together to reach across racial differences to work toward a common goal, forcing us to think about the validity of the preference for advanced placement courses and its pernicious effect on hard-working students of color.

The lead plaintiff in the suit, Jesus Rios, the son of immigrant farm workers from rural Hollister, California, said that he was stunned when U.C. Berkeley denied him admission despite his perfect high school grade point average. As quoted in the New York Times, Rios said, "I thought if you do the right things, you get what you want." n32
Perhaps we should take our cue from Jesus Rios and realize that "to do the right things" and "to get what we want" takes more than individual effort. It takes a community of leaders, that is Latina/o, African, Asian, and Native Americans, acknowledging and celebrating their similarities and working together to challenge society's complacency. With perseverance, perhaps we can meet happily in the middle, where our interests converge, and stop perpetuating the "minority on minority oppression" that we have learned from the majority culture.

**FOOTNOTE-1:**

n1 I subscribe to Charles Lawrence's assertion that we are, at some level, all influenced by the majority racist culture and need to be wary of that. See Charles R. Lawrence, III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 322 (1987). Professor Lawrence has provided:

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists.

Id. However, I believe, as Jody Armour argues, that we can affirmatively fight through our prejudicial tendencies by consciously appealing to shared notions of the equality of all people. See Jody Armour, Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit, 83 Cal. L. Rev. 733, 772 (1995). Professor Armour has stated:

As Professors Lawrence, Johnson, Davis and others have pointed out, we are all prone to stereotype-congruent or prejudice-like responses to blacks (and members of other stereotyped groups), especially in unguarded moments. But research and experience suggest that, in some circumstances, it is possible to resist falling into the discrimination habit. Further progress in eliminating discrimination will require a deeper understanding of the habitual nature of our responses to stereotyped groups and the development of strategies for helping people inhibit their habitual and activate their endorsed responses to these groups.

Id.

n2 See Rodolfo O. de la Garza et al., Latino Voices 39 (1992) (reporting that Latinas/os are more likely to self-identify in national origin terms -- Mexican American-- than to use pan-ethnic designations such as Latino, Hispanic, or Spanish American); see also Max J. Castro, Making Pan Latino: Latino Pan-Ethnicity and the Controversial Case of the Cubans, 2 Harv. Latino L. Rev. 179, 196 (1997) (describing difficulties in seeking Cuban American participation in pan latino identity project); Laura E. Gomez, Constructing Latina/o Identities, 19 Chicano-Latino L. Rev. 187, 190 (1998). Professor Gomez noted:

At the same time, LatCrit scholars are wary of homogenizing varied experiences under a single "Latino" or "Hispanic" rubric. Even as we embrace an expansive Latino political coalition and recognize points of shared history and contemporary experience, LatCrit scholars should seek to problematize pan-Latino identity. Specifically, we must continue to engage in unpacking differences among those we label "Latinos" in the United States. This involves sensitivity to differences related to such crucial factors as time of immigration/migration, country of origin, and different levels of bilingualism. We also must do more to document the differential access to legal services as well as experience of discrimination of Latinos of diverse social class locations.


Latinos in the United States can trace their ancestry throughout Latin America. Despite this fact, political efforts in recent
years have tended to homogenize the Latino experience. Pan-Latino coalition building, however, often confronts national origin allegiances that trump any collective “Latino” identity. Tensions among and between various Latino groups at times run high. Some are political in nature. For example, Cuban-Americans are often said to be more politically conservative than other Latinos. Some tensions are more class-driven, but with a national origin overlay. Because the income distribution of persons of Mexican, Puerto Rican, and Cuban ancestry in the United States varies substantially, one is not surprised to learn of differences in political views among the groups.

Id.

n3 See Johnson, Immigration, supra note 2, at 201-02 (describing tension between Mexican Americans and recent Mexican immigrants).

n4 See id. at 201 (explaining that not all Mexican Americans favor open borders with Mexico); see also Kevin R. Johnson, An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race, 70 Wash. L. Rev. 629, 658-59 (1995) (reviewing exit poll data).

n5 This term is not unlike the phrase "black on black crime." See, e.g., James W. Clarke, Black-on-Black Violence, Soc'y, July/Aug. 1996, at 46 (describing causes and effects of black-on-black violence); Julie Deardorff, Mentoring Program Targets Black Boys, Chi. Trib., Dec. 26, 1996, at 1 ("You hear black-on-black crime. Well, we have to reverse it and have black-on-black love.").


n7 Compare State v. Yatko, No. 24795 (Los Angeles Super. Ct. 1925), in Asian Indians, supra note 6, at 8-12 (nullifying Filipino-white marriage on ground that "Filipino is a Malay and that the Malay is a Mongolian"), and Robinson v. Lampton, No. 2496504 (Los Angeles Super. Ct. 1930), in Asian Indians, supra note 6, at 12 (refusing to grant marriage license to Filipino-white couple), with Laddaran v. Laddaran, No. 095459 (Los Angeles Super. Ct. 1931), in Asian Indians, supra note 6, at 14 (denying annulment of Filipino-white marriage as not illegal under Cal. Civ. Code § 60).

n8 Visco v. Los Angeles County, No. 319408 (Los Angeles Super. Ct. 1931), in Asian Indians, supra note 6, at 14.

n9 As one judge noted: "Under this division [the older five classifications of race] the yellow, or Mongolian race, included the Chinese, Japanese and Koreans, while the native Filipinos, with the exception of the few Negroid tribes, belonged to the brown, or Malay race."

n10 See Asian Indians, supra note 6, at 14 (quotting Visco case).

n11 See supra text accompanying note 4.

n12 Much has been written about the perpetual foreignness of Asians and Latinas/os that immigrate to the United States and become citizens. See, e.g., Neil Gotanda, Asian American Rights and the "Miss Saigon Syndrome," in Asian Americans and the Supreme Court: A Documentary History 1087, 1096 (Hyung-Chan Kim ed., 1992) (noting that, unlike blacks or whites, Asians are presumed to be foreigners); Natsu Taylor Saito, Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law, 76 Or. L. Rev. 261, 295 (1997) (stating that Asian Americans are confronted daily with presumptions of foreignness).

n13 I am well aware that I may have been mistaken about this assumption. Indeed, I agree with Ian Haney-Lopez that "races are not biologically differentiated groupings but rather social constructions." Ian Haney-Lopez, White by Law: The Legal Construction of Race xiii (1996). In a recent memoir, law school dean Greg Williams shared his own experiences...
walking the color line between white and black. See Gregory Howard Williams, Life on the Color Line: The True Story of a White Boy Who Discovered He Was Black (1995). Professor Kevin Johnson has done the same, describing his experiences growing up both white and Mexican. See Kevin R. Johnson, How Did You Get to Be Mexican? (1998).


"La migra" is a well-known southwestern colloquialism among Spanish-speaking Chicanas/os and Mexicanas/os referring to the INS. Mention of the term can instill tremendous fear among undocumented workers who fear losing their jobs and being sent far away from their homes. Thus, an employer who knows the impact of the term "la migra" can use it as an effective device for controlling workers' behavior and attitude about wages, terms, and conditions of employment.

Id.

n15 See, e.g., Orhorhaghe v. INS, 38 F.3d 488, 492 (9th Cir. 1994) (holding that arrest of noncitizen based solely on his foreign-sounding name was egregious violation of Fourth Amendment); Joseph J. Migas, Note, Exclusionary Remedy Available in Civil Deportation Proceedings for Egregious Fourth Amendment Violations, 9 Geo. Immigr. L.J. 207, 207-11 (1995) (analyzing Orhorhaghe).

n16 See Gregory R. Maio et al., Ambivalence and Persuasion: The Processing of Messages About Immigrant Groups, 32 J. Experimental Soc. Psychol. 513, 514 (1996) [hereinafter Maio et al., Ambivalence] (discussing ambivalence toward minority groups); Gregory R. Maio et al., The Formation of Attitudes Toward New Immigrant Groups, 24 J. Applied Soc. Psychol. 1762, 1772 (1994) [hereinafter Maio et al., Formation] (observing that more favorable attitudes are formed when positive information about minority group is provided); see also Jody David Armour, Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in America 115-53 (1997) (arguing that individuals must consciously confront their own racial stereotypes); Armour, supra note 1, at 772 (arguing that it is possible to resist falling into discrimination habit). On the nature of prejudice generally, Professor Gordon Allport's treatise on the subject is a classic. See Gordon W. Allport, The Nature of Prejudice 4 (1954) (explaining that all people are fettered to respective cultures and are bundles of prejudice).

n17 See, e.g., Donna Kato, It's Only Rock 'n Roll Despite What Adults Think, Study Shows Music Doesn't Damage Kids, Buffalo News, Feb. 2, 1998, at A9 ("While rap is most popular among urban, African-American boys, there's a curious phenomenon with rap's crossover popularity among some white suburban boys."); Neil Strauss, Word up! Rap Rules: Juggernaut Genre Grows, Patriot Ledger (Quincy Mass.), Oct. 23, 1998, at 18 (observing that Soundscan found that "nearly three-quarters of rap albums are sold to white fans").


n19 Growing up in the Philippines, I remember that there was a famous singer (of course, I've forgotten his name now) whom the popular press had dubbed "the Elvis Presley of the Philippines." My faint recollection is that aside from his hair, girth, and singing voice, he really did not look much like "the King"!


n21 See, e.g., Romero, supra note 20, at 9-10 (describing assimilation of non-English whites over time).

n22 See Maio, Ambivalence, supra note 16; Maio, Formation, supra note 16.

n23 See Maio, Formation, supra note 16, at 1772 (observing that more positive information about foreigners' emotions, personality traits, or values helps to form favorable attitude in natives).

n24 Armour, supra note 1, at 762-63 (citation and text omitted).

n25 See Teodoro A. Agoncillo, History of the Filipino People 102 (8th ed. 1990) (noting that Filipinos resisted Spanish occupation from moment of first permanent settlements in 1565 up until end of Spanish rule in 1898).

n26 See Winfred Lee Thompson, The Introduction of American Law in the Philippines and Puerto Rico 1898-1905, at 23-24 (1989) (describing cession of Puerto Rico and Philippines from Spain to United States under Treaty of Paris); see also Agoncillo, supra note 25, at 212 (observing that Treaty of Paris provided that Spain would cede Philippines to United States for payment of $20,000,000 from United States).

n27 See Agoncillo, supra note 25, at 551 (stating that Tagalog is language of capital region of Philippines and surrounding provinces).

n28 I should also note that the Latinas/os feel close to me because I share a certain Hispanic cultural heritage with them. See supra note 25 and accompanying text (showing common background for Spanish colonialism).

n29 See Victor C. Romero, Broadening Our World: Citizens and Immigrants of Color in America, 27 Cap. U. L. Rev. 13, 31 (1998) (detailing my experience regarding this particular racial slur about my interracial marriage). In the interest of full disclosure, I have also been mistaken for a variety of other ethnicities including Eskimo, Chinese, Nepalese, and Thai.


n31 This phenomenon of affirming exclusionary practices as valid because "we've always done it this way" has been termed by one set of commentators as "history without evaluation." Leslie Bender & Daan Braveman, Power, Privilege, and Law: A Civil Rights Reader 266 (1995).

n32 Nieves, supra note 30, at A9.
LENGTH: 8816 words

CONSTRUCTING LATCRIT THEORY: DIVERSITY, COMMONALITY, AND IDENTITY:
LatIndia II -- Latinas/os, Natives, and Mestizajes -- A LatCrit Navigation of Nuevos Mundos, Nuevas Fronteras, and Nuevas Teorias

Berta Esperanza Hernandez-Truyol *

* Visiting Professor of Law, University of Florida Levin College of Law, Professor of Law, St. John's University School of Law.

I wish to darle las gracias a my dear friends and colleagues who helped me process the experiences I relate in this essay: Jo Carrillo, Guadalupe Luna, Maria Ontiveros, Celina Romany, and Francisco Valdes.

SUMMARY: ... The plot for these musings is a cultural voy age in which this viajera embarks to live and comprehend the meaning of mestizaje in a personal quest for identity location; the stage is LatCrit IV. ... With the interdependent and interrelated goals of LatCrit in mind -- "the production of knowledge," "the advancement of transformation," "the expansion and connection of struggle(s)," and "the cultivation of community and coalition" -- I will remember and relate the story about the nuevas fronteras I discovered, nuevos viajes I embarked upon, y nuevos mundos I encountered in LatCrit IV. ... [851]

Sangre llama a sangre. n2
You don't pick your tribe; the tribe picks you. n3
Some villages did not survive. n4

Preface: In Search of LatCrit Praxis

This Essay is a journey that will elucidate a personal exploration of LatCrit's trinitarian goals of engagement of identity interrogations, community building, and self-critical analysis. It will reflect personal travels and travails, bumps in the road and epiphanies, theory and practice. The plot for these musings is a cultural voy age in which this viajera embarks to live and comprehend the meaning of mestizaje n5 in a personal quest for identity location; the stage is LatCrit IV.

My interrelated trips are chartered in three parts. Part I, Nuevos Mundos: Traveling LatCrit Community, presents the historical background of, contexts for, and evolutions of personal identity explorations in which I have engaged in the past utilizing the vehicle of LatCrit. As will become evident, that vehicle is a complex and changing one. But at its core, LatCrit philosophizes inclusiveness in light of diversity, support in light of difference, community in light of conflict. These foundational elements imbue the personal, political, and academic/intellectual aspects of the LatCrit movement. As my observations and experiences reveal, such an environment absorbs the shocks of stresses and conflicts and transmogrifies potentially disruptive energy into transformation and growth.

Part II, Nuevas Fronteras: LatCrit IV Crossings, relates my personal journey through our fourth LatCrit encounter. In so doing, it illuminates, by re/presenting a lived experience, several locations of stress points among our communities. Specifically, this Part, largely a narrative of my presentation at LatCrit, my participation in the "circle," and the events surrounding those two experiences, unearths possible tensions in the interrogation of identities and in claims to mestizaje as well as the potential conflicts such interrogation may engender. [853]

The last section, Part III, Navegando Nuevas Teorias (Traveling/Navigating New Theories) seeks to unravel the discord that surfaced as this Essay exposes in Part II. It seeks to unbundle the positive and transformative potential of tension and strife. This exploration does not deny, indeed it recognizes and accepts, the existence of stress, and, suggests how, by utilizing its force and redirecting it towards constructive projects, it can move us towards accomplishing the LatCrit goals of producing knowledge, connecting communities, and building coalition.

I. Nuevos Mundos: Traveling LatCrit Community

This viaje's (travel's) map is not wholly unchartered. Rather it has various significant signposts discovered and documented in earlier journeys that commenced even before I understood the concept of world traveling. Some of them, the gateway for which is the cultura latina, date to my early childhood; others have

[^851]
[^852]
[^853]
emerged from the cultural differences experienced within the United States borderlands.

The first signpost is the location that marks the realization of otherness within the comunidad Latina by virtue of women's second class citizenship because of their sex. n6 The "otherness," which persists within me today, resulted from being a girl growing up in Puerto Rico, a machista society where women are supposed to be deferential to, sacrifice for, and serve all the men in their lives -- from fathers to husbands to younger brothers. I would later learn that the "heteropatriarchy" n7 that drove this hierarchy was embedded in the majority culture within the estados unidos as well. n8 [*854]

Another signpost marks my early recognition and embrace of the pan-ethnicity and heterogeneity of this comunidad Latina n9 notwithstanding majority society's conflation of these delicately complex and diverse peoples into a monolithic category. We have some shared histories of ancestry, common language(s), similar foods, strong ties to familia, and the dislocating experiences of colonization and migrations, although the specific patterns in all of these categories vary greatly. n10 My realization of the comunidad Latina's diversity and similarities continue to inform and direct my travels.

A third signpost designates a later epiphany -- one that resulted from the travels that located me for the first time within the fronteras estado unidenses. This new geographical setting commenced my educational voyage through the muddy marshes of racial paradigms within the estados unidos de américa -- paradigms that are greatly divergent from those of and, therefore, are little understood by, persons in the cultura Latina. n11 There is no doubt that this startling realization continues to map the course of my current and continuing journeys.

These knowledge informed my understanding of otherness, in a much different way than knowledge about my own community as my early realizations about my otherness based on sex had. These new understandings occurred in the context of a majority community the dominance of which resulted in its master narrative n12 defining the boundaries, contents, and context of normativity. n13 I [*855] learned that in this country ethnicity, n14 nationality, n15 and even religion n16 are racialized for purposes, and with the effect, of othering. The roadmap of these borderlands designated me an "other" simply because I am Latina -although all my life that has been my normativity.

The fourth signpost is one that is under construction, and this Essay is part of the work of drafting its mapping. Recently, I encountered a disarming interrogation of identity -- one that goes to the heart of my passionate and conscious identification as a Latina within these borderlands. This challenge can be traced to the LatCrit II meeting in San Antonio, Texas in which scholar and activist Luz Guerra questioned how we could embrace the term Latina/o without a serious interrogation of its colonialist underpinnings. She emphasized that to address the histories of the indigenous peoples of this hemisphere within a "Latino/a" context . . . with [*856] out having critically examined the term Latino/a and its relationship to Native history is impossible." n17

Her exhortation caught me completely off guard. Amazingly, I had done just that in my early decision to embrace the term Latina. To be sure, much deliberation went into my decision on naming, a process I believe is critical in finding out who we are, our location in life, and our place in the scheme of things. n18 But my considerations, I realize, were underinclusively limited to the location of the Latina/o vis a vis the majority forces within the estados unidos.

In those first stages of interrogation, I rejected the term "Hispanic" as an ethnic label that was imposed by the master. That term is the "product of a decision by the Office of Management and Budget (OMB) in 1978 to operationalize the labels as 'a person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race'." n19 Rather than embrace "colonization by naming," I selected the Latina appellation, n20 in large part because of its decolonizing effect - [*857] the rejection of the master's naming -- as well as its inclusiveness -racial and national. In adopting that term, however, I identified and rejected the potential for gender subordination because of the thencommon use of masculine Latino as universal. Because I also aspire to gender inclusiveness, I have insisted on the use of the term Latina/o in spite of its cumbersomeness. After all those linguistic acrobatics, I feel comfortable with Latina as it re/presents me -- a woman who is a member of a particular ethnic group -- all in one word.

Significantly, in my sociocultural explorations I have been aware of, and sensitive to, Latinas/os with native roots. Indeed, even before Guerra's admonishment, I had commented on the University of Florida's recently adopted ethnic/racial classification of Hispanic/Black and Hispanic/White. n21 On the one hand, the adopted classifications recognize some of the racial diversity among Latinas/os. On the other hand, as neither category reflects or recognizes native heritage the classifications wholly render invisible and
consequently "others" those in the comunidad Latina with indigenous roots.

Notwithstanding these conscious observations about our native roots, the conquista and the identity of latinidad were two dots I had failed to connect. Only with Luz Guerra's challenge did I realize that I fell into the trap that she has so poignantly articulated:

We have been indoctrinated into adopting the old imperialist ways of conquering and dominating, adopting a way of confrontation based on differences while standing on the ground of ethnic superiority. . . . External oppression is paralleled with our internalization of that oppression. They have us doing to those within our own ranks what they have done and continue to do to us -- Othering people. . . . The internalization of negative images of ourselves, our self-hatred, poor self-esteem, makes our own people the Other. n22

Anzaldua's eloquent analysis has made me rethink the naming. Since her original challenge, I have journeyed in search for knowledges about the native origins of Latinas/os, specifically the native origins of cubanas/os, and more particularly my own native roots. n23 In those travels I learned much about conquests and silences. Those explorations and my acquired knowledge led me to coin the term LatIndia -- a combination of Latina and India -- as one that can embrace both latinidad and native roots. I felt a sense of accomplishment, a praxis, of having practiced LatCrit theory.

Yet the peace I found in that voyage was short-lived. The disruption of the intellectual tranquility in having practiced what I preached came without notice during LatCrit IV. I will share these discomfitures in the following Part, which represents another stage in the construction of the fourth signpost.

II. Nuevas Fronteras: LatCrit IV Crossings

In this Part, I will elucidate what I mean about the discomforts, both personal and intellectual, that I experienced at LatCrit IV. This is not easy to write, to remember, to relive. But it is through disquiet that we learn. It is by being thrown off balance that we seek to reconstitute our foundation so as to find equilibrium, temporary as it may be, and in that search for groundedness we must interrogate our fabric, our footing, our groundwork, indeed our roots.

This Part, comprised of a partial voyage of LatCrit IV through my lens, my memory, my feelings, is part of the process of mapping the fourth signpost. This version, by necessity, is the story as viewed by me, with all of my indivisible and interdependent identities informing my cuentos (stories): the lawyer, the hija (daughter), the hermana (sister), the alien, the profe de derecho (law professor), the amiga (friend), the lover, the writer, the mujer (woman), the nacida en cuba (Cuban born) exile, criada en puerto rico (raised in Puerto Rico) cubarriquena -- a Latina in the estados unidos, the outsider, the normativa, the LatIndia, the "other." I am the amalgamation of those tongues, experiences, knowledges, geographies, is that time, and space. Those are my mundos, the worlds I journey every day, variably exposing race, color, ethnicity, gender, nationality, culture, sexuality, and language fronteras -fronteras that constitute the daily navigations I call life.

With the interdependent and interrelated goals of LatCrit in mind -- "the production of knowledge," "the advancement of transformation," "the expansion and connection of struggle(s)," and "the cultivation of community and coalition" n24 -- I will remember and relate the story about the nuevas fronteras I discovered, nuevos viajes I embarked upon, y nuevos mundos I encountered in LatCrit IV.

* * * * *

My LatCrit IV journey commenced in Madison, Wisconsin, where I was spending my research leave during the spring of 1999. Even though I had to wake up at the crack of dawn to catch a plane to Reno and then a couple of shuttles to the Sierra Conference Center in Tahoe, I was brimming with excitement. Given my recent explorations into identity, the theme of the conference, Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections, was particularly alluring. As I have shared with friends, if there were only one conference a year that I could attend, LatCrit would be it. I love its diversity, am energized by it. So at 6:00 a.m. in the cab on the way to the airport I started imagining the lively conversations, provocative exchanges, and intellectual feast that I was about to inhabit. I had spoken nothing but English for months, except when mami y papi would call. In anticipation I was savoring the different Spanish acentos I was about to celebrate, the incredible stories I was going to hear, the good traguitos, vino, and food that we would share.

Of course, the first part of my journey is somewhat blurred; nothing works very well for me before noon. So in the first part of the flight, from Madison to Minneapolis, the 6:50 a.m. to 8:00 a.m. leg, I dozed off, expecting that I should save up as much sleep as I could to be prepared for the late nights that have become part of our emerging LatCrit customs. n26

There was an hour and a half wait in Minneapolis, a layover that I was dreading as I was ready to get on with the business of visiting with and learning from old
colleagues and friends as well as meeting new and exciting scholars. But my first fabulous sorpresa arrived during the layover. I ran into Guadalupe Luna, whom I had not seen since our last reunion and we soon went off to get a cafe con leche -- well, at least the airport's attempt at it -- and sat down to chismear.

n25 During this catch-up session I was delighted to learn that we were on the same flight to Reno -- we had plenty of time to chat. And we used the time wonderfully.

We carried our cafecitos on to the plane and, because it was not full, we managed to sit in aisle seats across from each other. Although we were both intent on working -- reading the pieces we were to comment on during the conference -- our attention spans were, at best, minuscule. We'd read a page and visit. We'd share parts of the different papers with each other and help craft useful comments for the authors. Aaaaah, I thought to myself while still en el avion, this is academic life as it should be lived: not even at the conference yet and already sharing stories, work, and play.

Needless to say the flight seemed much shorter than I had anticipated because throughout the trip Guadalupe and I engaged in interesting conversations and friendly banter. I must say, it was comforting to start traveling between ingles and espanol in trabajo and chisme. I should also note that we got more than our fair share of nasty looks and scornful sighs as we moved between our worlds of language.

Al fin we arrived in Reno, where, just walking off the plane we started running into friends. The first group upon which we came -and it is we because Guadalupe and I were now traveling juntas -- was a crew from Miami: Frank, Lisa, Nancy, and this huge entourage, which included among others, Nick, who made a presentation during one of the plenaries that I am sure will be transformative. But now I am getting ahead of myself.

The Miami bunch had rented a car. Guadalupe and I were going to take a shuttle. After collecting her bags, we realized that the shuttle would not leave for an hour so we sniffed out a place to eat where we continued our visit over tragos (drinks) and lunch. By the time we needed to go to the shuttle, we ran into Pedro Malavet, who had rented a car and, in LatCrit spirit, offered us a ride. So off we went to explore the road to Tahoe.

The ride in the mountains made me nostalgic for nuevo mexico, that land of enchantment where I had once lived. The warmth of the Southwest surrounded me.

While Pedro negotiated the winding roads, we continued catching up. Now Pedro shared with us his need to get to Tahoe early -- he had been on the organizing committee for the conference and had to make sure things were progressing smoothly. We made sure we stopped before we arrived at the conference center so that we could buy some vino tinto to keep en el cuarto -- una copita o dos (a glass or two) is the perfect end to an exciting and exhausting day. It was good we did not break the bottles open right away though; the road up to the lodge was quite an adventure -- small, narrow, eroded by the snow -treacherous by any standard. But we laughed. Pedro and I reminisced about the similar narrow, winding mountain roads in Puerto Rico -roads adorned with crucifixes indicating locations of deadly accidents.

When we arrived at the conference center we joined others; we were all chortling or muttering about the incredibly awful ride. But the grumblings were in community. Interspersed with the commentaries were the hugs and kisses hello, the warm greetings of friends who have not seen each other for some time and are happy to meet again.

The reunion progressed as was now habitual. Lively conversations warmed every corner of the rooms, the nature paths, the hallways. After the opening panel -- a moderated focus group discussion on Reclaiming Equal Opportunity for Latinas/os, and Others in Legal Education -- we retreated to watch the Danzantes Aztecas, an impressive performance group that showed our mestizaje -- crossing boundaries of race, sex, ethnicities, languages, and religions. Dinner and more conversations followed, with the usual late night visits over traguitos at Frank's room.

The next day, as every day, was packed. However, it was the day when I was "on" -- the day for my presentation on the panel named Native Cultures, Comparative Values and Critical Intersections -- a panel that, in my expectations, would expand the considerations of nonessentialism, the intersectionalities, multidimensionalities, and interconnectivities we were considering in LatCrit discourse since its beginnings -- focusing on native identities and heritages.

I was particularly apprehensive about this talk not only because it chartered a new course in my identity journey, but also because I was at a presentation with two people who are very special to me. One, Jo Carrillo, who was the chair of the panel, had been my student the first year I taught at New Mexico. With her incredible scholarship and generous intellect, however, I see Jo as my friend and teacher rather than as a former student. The other is one of my oldest academic
friends, Eric Yamamoto, whose continuous and [*863] continued support inspire as much affection as his intelligence causes intimidation.

The panel proceeded as planned. I was the third speaker - seated between Jo and Eric I felt both comfort and incredible fear. But the time came for me to speak. Here is the story I told:

In March of 1998 I was scheduled to take the first trip to my birth country since my family had left in 1960. I was traveling to Cuba for a human rights conference. My travel would be in association with Madre, a nongovernmental organization ("NGO") that focuses on the well being of mothers and children. Madre representatives travel to Cuba to take medicine for the cubanas/os who have as dire a shortage as they have a need and school supplies, for children and teachers - items allowable under the almost forty year-old embargo against trade with Cuba that the estados unidos has imposed. I was joining the NGO to attend the conference as personal, professional, and recreational travel to Cuba from the estados unidos and by ciudadanas/os estado unidenses is also prohibited by the embargo.

In January, Madre had collected the necessary information from all of us who were traveling under its auspices so that it could obtain the necessary travel visas from both the United States and Cuba. I had been quite desirous of visiting my birth country for some time, but being Cuban born I wanted to ensure that both countries granted the necessary permission for my being there. Should anything go wrong, I wanted the full weight of my U.S. passport for my protection. This human rights conference presented an ideal opportunity to visit my land.

Mami y papi were as excited about my trip as I was. We talked about family I would visit; friends I would call; photos that I would take -- prominent among these were a million or so shots of the home we left behind. In preparation for meeting my family anew, and for the displacement and anxiety I felt as the trip closed in on me -- I would be going to my land where I would be an "other" because I left, traveling from my new land where I am an "other" because I came -- I asked mami y papi to prepare a genealogical tree for me so I could have a sense of the location of my culture, my dangling roots. Bless them, they took the task to heart. I suppose it was even fun and interesting to fill my recently retired papi's time. They called tias y tios, primas y primos, amigas y amigos from both sides of the family to obtain information and fill out the [*864] branches of our existence. They taped piece of paper upon piece of paper so that not one name would be lost or misread. The product was an impressive one indeed.

As direct travel to Cuba was all strictly prohibited at that time (now there are direct charter flights from New York and California, although this is a very recent development) my connections would have to be through either Nassau or Mexico. My plan was to join a group of Madre representatives in Nassau. But as all connections to Nassau went through Miami, where mami y papi live, I decided to visit them at home for several days before I traveled to Nassau as the gateway to mi isla. This was an exciting development for all of us. We would be able to study the tree together, as well as call family and friends to plan for my arrival. As you can well imagine, my time as a conference participant was diminishing in direct proportion to the number of persons contacted.

My plans were set. I would travel to Miami on Wednesday after I taught my last class, I would stay until Sunday when I would leave for Nassau. I would return through Miami and spend one day with mami y papi debriefing. Taking a 9:30 p.m. plane from Kennedy airport on Wednesday, I would land in Miami at midnight just in time for a nightcap with the folks.

Well, as the saying goes, las personas proponen pero dios dispone (persons propose but god disposes) -- things got terribly messed up. The Monday before I was to leave I received a call from Cuba -- something about a problem with my visa. I immediately called Madre. We quickly solved the mystery. For some incomprehensible reason whomever handled the Cuban visa paperwork for the trip forgot to report that I was Cuban born, which entails an entirely different processing of information. It was not a good sign. However, Madre contacted the travel agency, which then went to work with the Cuban government to see if my visa could be timely issued.

Even mami y papi got involved in my visa-obtaining project. Some of the necessary information was the name of the hospital in which I was born, my addresses in Cuba, and the precise addresses of anyone in Cuba whom I would visit. I did not know the answers to any of the questions. Fortunately, mami y papi bailed me out.

Although the visa issue had not been resolved by the time of my scheduled flight to Miami, I went anyway. The worst that could happen (which did happen, although I did not learn about it until [*865] Saturday) was that I would visit mami y papi even if I could not go to Cuba.

After my arrival, mami, papi, and I had a late night - charlando until the wee hours. But the next morning we got up and went to the Versailles for cafe con leche y pastelitos -- my favorite breakfast, and one that is only readily available in Miami. After that we returned
a casa to get ready for my trip -- we had calls to make, and a genealogical tree to study. I was particularly interested in seeing the family tree so I went right to it. I laid out the project on the floor of the family room and carefully studied it. Surprised at first, but getting increasingly agitated, I just had to ask mami about my tatarabuelita - my great-great grandmother. "Como se llama?" (What is her name?) I asked mami. I learned nobody knew her name. Her designation on this otherwise plush tree was simply "la India."

At that very instant, I decided I needed to learn more about the nameless, invisible people in my familia. My tio Miguel, who is the one who does most of the tree-building work, told me that la India's last name was Villalon -- the name of the Spaniard who was granted an encomienda n29 (parcel) that included the right to the Indians who were on that land. n30

Because my trip to Cuba never materialized, I was unable to do the research on the familia that I intended to do. But that could not keep me from the books, and I learned what I could from the available resources. I learned that indocubanas/os were gentle, [866] peaceful peoples n31 who shared the agricultural lifestyle of their South American ancestors. n32 They had a community way of life n33 and did not have the same gender hierarchies and segregations that the conquistadores saw as normative. n34

The conquista decimated the poblacion indocubana -- it was virtually annihilated or assimilated within three decades of Spanish "discovery," although documentation exists confirming the existence of some survivors in the second half of the sixteenth century. Estimates reveal that the native population that numbered approximately 112,000 at the time of conquest was reduced to 19,000 by 1519 and that by 1556 there were less than 3000 Indians remaining on the island. n35 At the end of the eighteenth century only three identifiable communities of indocubanas/os remained in the province of Oriente. n36

The indocubanas/os simply could not survive the different way of life, difficult labor, and assault on their cultural and religious beliefs. Indocubanas/os died from the abuse and from the diseases and illnesses the conquistadores brought to the "new world." Various villages committed mass suicide as a form of resistance or simply as a way out. n37 Some, like the Cacique Hatuey, presented an active resistance to the death. n38

I wanted to recognize this native heritage and honor it. I no longer could have it be invisible, and the naming LatIndia was my way of claiming my mestizaje: Sangre llama a sangre. My aspirations: [867] that claiming the LatIndia will help with the goals of producing knowledges, advancing transformation, finding interconnections among communities, and building coalitions.

Notwithstanding these objectives, I recognized some fault-lines. One, I am in the estados unidos where the native population has, simultaneously, a similar and different history of conquista and struggles. Some of their villages survived; some did not. There are complex issues of sovereignty, citizenship, and freedom about which I know academically but with respect to which I do not have the emotional history of lived oppression. With respect to these I want to interconnect with the native struggle as part of the antisubordination project. And while, in this regard, I can claim being LatIndia, I recognize my separation from the native peoples of the estados unidos and respect their struggles, locations, and ideals. I want to build coalition, not appropriate, fetishize, or exoticize my raizes indigenas.

Another fault-line is the establishment of a relationship to the native struggles in america Latina. Those, too, are different struggles and histories than mine, of which I am respectful and supportive - another location for interconnection and building community. But in this space, I have to realize that the problem is with the way the conquerors, now identified as Latinas/os, have continued to subordinate the indigenous populations. This causes tension because it is the history of oppression carried out by those with whom I share my latinidad that effects subordination. Yet I cannot cease being Latina.

In the end, my hope is that by embracing my native roots, I can obtain knowledges about traditions and histories that will better locate my place in the scheme of things. Embracing my own mestizaje is not only literal, but also a metaphor for LatCrit practice and praxis as it has led me down new paths of learning about histories, plaiting their interconnections, changing my own location to encompass previously invisible and silenced parts of the self, all creating the ability to better understand the complex of beings in our world, thus assisting with the architectonic task of building community and coalitions.

** * * * *

That had to be one of the most exhausting and emotionally draining presentations I have ever made. I was relieved when, at the conclusion of the panel and the question and answer period, [868] both Eric and Jo in their habitual, generous manner, gave me warm hugs and said they had enjoyed the journey with me. That peace was not to last.

We all left the room to take a break and allow time for the redesigning of the chairs for the next project -- a
could bring me enveloping me. Not even the breathtaking landscape for LatCrit, but did not lift the cloud of confusion with Celina and Guadalupe reminded me of my love reflective of my sentimientos. The trip back to Reno of our last day being all too appropriate for and I left Tahoe in a fog, the snowy, gray, misty weather rather than "other" and clash?

What do those assertions mean with respect to my existence is inextricably tied to land. I felt dislocated. My dislocation did not stop there. Later that evening, long after the circle was broken, while having tragos at Frank's, the challenge to my work took a direct and aggressive turn. I was accused of romanticizing my tatarabuela. The validity and authenticity of my research was simultaneously challenged and dismissed. Having recognized my mestizaje as something positive, I was now questioning whether I was wrong to have claimed my native heritage. Were the assertions made at the circle, the accusations leveled at my work, and my disorientation in the midst of this environment, made me feel that I was living what I had only before imagined when I read Gloria Anzaldúa's words:

Because I, a mestiza, continually walk out of one culture and into another, because I am in all cultures at the same time, alma entre dos mundos, tres, cuatro me zumba la cabeza con lo contradictorio.

I was shaking. For the first time in my life, I cried in English. I was truly distraught. Perhaps LatCrit had outlived its sense of community. Maybe it was time for me to move on. I questioned the very values I had worked so hard to design, develop, and transform. Having recognized my mestizaje as something positive, I was now questioning whether I was wrong to have claimed my native heritage. Were the challenges to the authenticity of my identity, not to mention research, valid? Was I (mis)appropriating native roots? Was it not sangre llamando sangre? Weren't we all, after all, trying to build interconnections between communities, and was this not a link that could be used to learn and embrace rather than "other" and clash?

I left Tahoe in a fog, the snowy, gray, misty weather of our last day being all too appropriate for and reflective of my sentimientos. The trip back to Reno with Celina and Guadalupe reminded me of my love for LatCrit, but did not lift the cloud of confusion enveloping me. Not even the breathtaking landscape could bring me calm. I was agitated, disjointed, and dazed, and the discomfite did not end quickly. For months I analyzed and re-analyzed what I experienced, battling with myself as to whether I should give up and move on. Ultimately, I emerged from my daze and confusion, transformed but determined not to lose my way, or be detoured from my journey. I decided to practice the LatCrit that I preach: learn and grow from the experience, use it to strengthen myself and my community, to produce knowledge and advance transformation, to plait interconnections and build coalitions against subordinations. The months of critical self-doubt and self-examination helped to foment a nascent understanding -- more questions than answers -- as I slowly and cautiously began, again, to construct the fourth signpost. In the next section, I will try to explicate my preliminary understandings.

III. Navegando Nuevas Teorias

The assertions made at the circle, the accusations leveled at my work, and my disorientation in the midst of this environment, made me feel that I was living what I had only before imagined when I read Gloria Anzaldúa's words:

...
marginalization of indigenous peoples by mestizos/mulattos, different from and/or similar to those referring to white-on-color subordination? Do categories of "indigenous" as distinct from "mestizos/mulattos" or "Latinos" or "ladinos" have theoretical integrity? Can LatCrit facilitate coalitions with indigenous peoples in and out of the U.S. (or how does Samuel Ruiz mediate on behalf of the Zapatistas) without compromising their objectives of self-determination and self-expression? Does the hard work of a Bishop Ruiz building schools and health clinics to address the material needs of oppressed communities suggest a LatCrit approach? Don't sociolegal explorations of identity clarify individual and group claims within democratic systems in order to attenuate the interlocking forces of white supremacy, globalized state power and corporate capitalism? n40

My questions might have resonated those asked before, but never had I experienced such intellectual disorientation, such emotional displacement, such foreignness, such a feeling of being alien and alone. I thought for a long time about what I could do. [*871]

After much traveling, I concluded that I would live LatCrit. Here is what that means. It means that I opted for knowledge over ignorance, community over isolation, and coalition over strife. Having reached this stage in building the fourth signpost, I had to figure out how to get off my LatCrit theoretical derriere and put theory into practice. n41

That road has been rewarding, though rough. But the value I have derived from my travels more than makes up for the scarred knees. I learned that traveling LatCrit practice to achieve praxis is to undertake a difficult journey. That journey entails unearthing information that can cause tensions in existing paradigmatic traditions because it can unbalance the ostensibly stable existing narratives. It forces us to find new ways of archiving the discoveries and makes us accept that those explorations can have a disruptive or destabilizing effect on existing patterns.

We have to find nuevas teorìas to locate our different hybridities in the scheme of things. As Margaret Montoya has artfully articulated:

The disruption of hegemonic tranquility, the ambiguity of discursive variability, the cacophony of polyglot voices, the chaos of radical pluralism, are the desired by-products of transculturation, of mestizaje. The pursuit of mestizaje, with its emphasis on our histories, our ancestries and our past experiences can give us renewed appreciation for who we are as well as a clearer sense of who we can become. n42

For example, what does it mean to be LatÍndias/os? I must confess that I do not know the answer, as this part of my voyage is still under construction. However, some things appear right and those preliminary ideas bring to the fore the coexistence of universalisms -in this case native heritage -- with particularities -- in this regard the epistemic stance of the individual embracing her/his roots. Much will depend on the individual and his/her personal history. A Hernandez raised on a reservation within the fronteras estado unidenses, or raised with tribal affiliation within these borderlands has had a tradition and history vastly different from mine. In turn, our respective histories and traditions will differ from the [*872] indigenas en america del sur. Similarly, our Chicana/o brothers and sisters with native roots have experienced a different history altogether. Our struggles -- racial, ethnic, gendered, sexual, linguistic -- have unfurled in different cultural contexts, and these cultures have molded the plots for our lives.

Yet, we have the struggles in common. We have experienced colonization both within and outside these fronteras; we have been subordinated peoples. These commonalities are valuable assets for the production of knowledge, which in turn will better prepare us for the transformations that are prerequisites for liberation. These shared struggles can be a location in which to commence valuable coalitional work and community building.

By engaging each other's histories, cultures, languages, traditions and locations in the scheme of things we will be able to participate in multilingual, multicultural, multiracial discourses within ourselves and between and among our various and varied communities. These many-layered conversations will enable our understanding of each other. Such border crossings will permit us to work within and outside of our cultural, racial, gender, sexuality, ethnic, and religious differences with a goal of strengthening and respecting all the pertinent communities.

Intellectual analysis should reflect our mestizajes and be grounded in all of our worlds not only part of them. Rather than seeking to silence and subordinate some peoples and citizenries in favor of the existing hegemonic hierarchical paradigm, we need to join forces across cultural fault lines to fight all subordinations.

If we engage in each other's life plots, we can and will learn from each other's issues, struggles, and successes rather than permit these differences to cause schisms between or among our communities. With a broad harmonious perspective we can seek to globalize solutions, answers, and clarifications in order for the collective interpretations and resolutions crafted, designed, and executed to benefit not only all of our
communities within these borders, but global communities that might face similar dilemmas as well.

The allure of LatCrit's particular strand of critical work lies in its foundation of inclusiveness. Issues of race, gender, sexuality, class, nationality, culture, language, and religion have been part of the movement since its inception -- albeit with different temporal focus to develop knowledge of the various concerns. Native heritage and identity is one of the many roads we need to navigate with the purpose of learning how we can integrate valuable native traditions into our lives. The circle experience itself, stressful as it was, presented invaluable lessons. The circle's norms taught me a completely different way of listening, of waiting for my turn to talk -- a significant model for anyone who cares about what others think, and wants to learn.

Another priceless lesson that surfaced at the circle was its method of operation. In tribal application the circle continues until consensus is reached, a process that can take hours or days. That and the waiting one's turn can promote harmony and teach patience, a valuable learning in any setting, particularly precious in this adversarial system of laws we inhabit. I am certain that there are many other native traditions that would be of immense value in building community and promoting harmony. Native heritage and traditions, thus, could be transformative and central to building community and coalitions.

I also have discerned, as the story about my traveling LatCrit IV exposes, that each location of culture is a possible fault line. That discovery, unbalancing as it is when experienced, can be the source of the very basis of understanding, forming community, and forging coalition that LatCrit espouses. Unearthing discord, exposing voids in knowledge and understanding, discourse on conflicting, varying, or simply different world views, and living the tension and stress resulting from and accompanying those intellectual and emotional experiences can be used for development of new knowledges, liberation and promotion of the social justice agendas we propound. They offer locations in which to engage in self-critical analysis and to engage in a process in which we keep firmly planted holds on all defining aspects of identity and community, in which the sources of knowledge and meaning of identity components/community are "collective, interactive, intersubjective, and networked." These combined approaches allow intellectual and spiritual growth of individuals and communities alike, affording the necessary space for learning, changing, and forging alliances against all of our diverse and varied subordinations.

V. Conclusion

This work's objective and aspiration is that different and diverse persons and communities reading my meditations will be able to engage, analyze, translate and pronounce, in turn and in myriad voices, my hope to form emancipatory cross and multicultural alliances that can and will result in a harmonious and thriving coexistence among us. I am confident my difficult and painful navigation of LatCrit IV in the context of my interrogation of latindad and native origins has identified a location that needs further exploration. To be sure, that fourth signpost remains under construction.

I am also optimistic that my journey can help me, together with other like-minded persons in pursuit of a social justice agenda, design yet another bridge for us to traverse in our search for knowledge, transformation, interconnection, and community. I am confident that by identifying, navigating, and jointly resolving stresses of difference between and among our cultural plots, we can continue harmoniously to grow together as a diverse and inclusive community that will be better poised to implement LatCrit's antisubordination vision.

FOOTNOTE-1:

n1 Author's translation: New Worlds, New Borderlands/ Frontiers, New Theories.

n2 Jeanette Rodriguez, Sangre Llama a Sangre, Cultural Memory as a Source of Theological Insight, in Hispanic/Latino Theology, Challenge and Promise 117, 117-18 (Ada Maria Isasi-Diaz & Fernando F. Segovia eds., 1996). I thank Guadalupe Luna for this reference, which she translates as blood cries out to blood. As Professor Luna has noted, the expression "connotes something in the blood that allows one to access the affective, 'intuitive level.'" Guadalupe Luna, Gold, Souls, and Wandering Clerics: California Missions, Native Californians, and LatCrit Theory, 33 U.C. Davis L. Rev. 921 (2000). My turn of this phrase involves the callings experienced both in our search for our identities -- what Paula Gunn Allen has called knowing our mothers and our LatCritical goals of creating and practicing community and building coalitions. See Paula Gunn Allen, The Sacred Hoop 209 (1986).

n3 Christine Zuni, Remarks at LatCrit IV Circle: On Mestizaje and Contemporary Latina/o Identities: Current Problems in


n5 See generally Gloria Anzaldua, Borderlands/La Frontera: The New Mestiza (1987) (noting that mestiza refers to woman whose identity is product of at least two cultures); see also Margaret E. Montoya, Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse, 17 Harv. Women's L.J. 185, 217 & n.114 (1994). In explaining the value of the word mestiza/o, Professor Montoya provided:

When we attempt to understand the full range of connotations of our racial terminologies, we are forced to reexamine the unconscious linguistic roots of racial prejudice and to face the fact that language predetermines perception. This is why a word like metis or mestizo is most useful: it derives etymologically from the Latin mixtus, "mixed," and its primary meaning refers to cloth made of two different fibers, usually cotton for the warp and flax for the woof: it is a neutral term, with no animal or sexual implication. It is not grounded in biological misnomers and has no moral judgments attached to it. It evacuates all connotation of "pedigreed" ascendance, unlike words like octoroon or half-breed.

Id.


n7 See Francisco Valdes, Unpacking Hetero-Patriarchy: Tracing the Conflations of Sex, Gender & Sexual Orientation to Its Origins, 8 Yale J.L. & Human. 161, 207 (1996) (arguing that current EuroAmerican system is heteropatriarchal).

n8 See Hernandez-Truyol, Borders (En)Gendered, supra note 6, at 912-14 (noting parallelism of "woman-as-the-second-sex" norms in majority culture and cultura Latina).


n10 See id. (discussing varied demographics and migration patterns in comunidad Latina).

n11 See Hernandez-Truyol, Borders (En)Gendered, supra note 6, at 897-902 (discussing different racial paradigms for comunidad Latina and majority culture within United States and noting how those differences are confusing).


note 12, at 64 (describing "stories . . . told by the ingroup . . . that provide it with a form of shared reality in which its own superior position is seen as natural"); Richard Delgado, Norms and Normal Science: Toward a Critique of Normativity in Legal Thought, 139 U. Pa. L. Rev. 933, 93759 (1991) (critiquing dominant school of normative jurisprudence); Richard Delgado, Shadowboxing: An Essay on Power, 77 Cornell L. Rev. 813, 814-19 (1992) (discussing dominant culture preference for "objective" norms because they are of benefit to empowered as they define meaning of rules); Linda S. Greene, Multiculturalism as Metaphor, 41 DePaul L. Rev. 1173, 1175-78 (1992) (arguing that Supreme Court's "normative vacuum" results in failure to enforce equality and inclusion); Hernandez-Truyol, Borders (En)Gendered, supra note 6, at 901-02 (noting that because knowledge is socially constructed, normative paradigm's dominance creates definition of normal, including identity characteristics and knowledge base); Robert A. Williams, Jr., Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination, 8 Ariz. Int'l & Comp. L. 51, 67-68 (1991) (observing that American Indians comes from medieval European tradition and law of colonization brought by Columbus and seeks to legitimate cultural racism).

n14 See generally Hernandez-Truyol, Borders (En)Gendered, supra note 6, at 904 (arguing that dominating group translates race into "other"); Berta Esperanza Hernandez-Truyol, The Latinx and Mestizajes: Of Cultures, Conquests, and LatCritical Feminism, 3 Iowa J. Gender, Race & Justice 63 (1999) [hereinafter Latinx I].

n15 See Immigration from Countries of the Western Hemisphere, 1928: Hearings on H.R. 6465, H.R. 7358, H.R. 10955, H.R. 11687 Before the House Comm. on Immigration and Naturalization, 70th Cong. 28 (1928) (statement of Rep. Box of Texas) (referring to Mexicans as "little brown peons" who are members of different race), cited in Gary A. Greenfield & Don B. Kates, Mexican Americans, Racial Discrimination and the Civil Rights Act of 1866, 63 Cal. L. Rev. 662, 698 (1975). Courts' references to other nationality/national origin categories as racial categories -- the Puerto Rican, Cuban, and Mexican races, for example -- confirm their conflated view of race and ethnicity/national origin. See Hernandez v. Texas, 347 U.S. 475, 479 (1954) (observing confusion with respect to different classifications of race, ethnicity, and national origin and concluding that petitioner met burden of proof for group discrimination claim by establishing that persons of Mexican descent were separate class from "whites").

n16 See Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987) (concluding that "Jews and Arabs were among the peoples then considered to be distinct races" and protected by § 1981); St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (finding that § 1981 protects against racial discrimination, which includes "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics").


n18 See Allen, supra note 2, at 209 (discussing importance of naming your own mother to enable other "people to place you precisely within the universal web of your life").


n20 See Hernandez-Truyol, supra note 9, at 370 & n.2. As is widely known, there is ongoing discourse within the Latina/o community regarding what the appropriate appellation is -- the Latina/o versus Hispanic debate. As a Latina I feel comfortable with that term as it is me -- a woman who is a member of a particular ethnic group -all in one word. The term Latino, currently the preferred label for the group, presents a problem to me because it
is not gender-neutral. The term Hispanic is troubling because it is a label imposed on the group by outsiders rather than a self-selected name. The use of the gendered "Latino" would reinforce the notions of normativity that this Essay rejects; using a gender-neutral term like Hispanic is not consonant with my goal to urge a replacement of existing false assumptions of normativity imposed linguistically by the group in power. This author's view is that Latinas/os will struggle for a while in the course of appropriating the power to decide what the "right" name ought to be. In any event, a label ought to be flexible and able to adapt to shifting socio/economic/legal/historical concerns, e.g., negro to black to African-American. So, at the outset, I confess that for purposes of inclusion I will use the term Latina/o. I apologize to the readers because I realize this term is cumbersome. Notably, there is a large selection of literature on the naming issue, e.g., the Hispanic vs. Latina/o debate. See, e.g., Marin & Marin, supra note 19, at 20; David E. Haynes-Bautista, Identifying "Hispanic" Populations: The Influence of Research Methodology Upon Public Policy, 70 Am. J. Pub. Health 353, 355 (1980) (finding term Hispanic is misleading and stereotypical); Alfred Yankauer, Hispanic/Latino -- What's in a Name?, 77 Am. J. Pub. Health 15, 15 (1987) (explaining that prejudice and discrimination cause term "Hispanic" to apply to diverse groups of immigrants); The Politics of Ethnic Construction: Hispanic, Chicano, Latino?, Latin Am. Persp., Fall 1992, at 1 (giving comprehensive analysis and critique of various labels); see also Manuel del Valle, National Origin and Alienage Discrimination, in Employment Discrimination Law and Litigation 29-31 (Merrick T. Rossein ed., 1993).

As part of this naming process, I also confronted what to call the "majority" group. "White" is inaccurate as it, again, a term that excludes, e.g., Latinas/os. "Anglos" I find inaccurate as gendered and underinclusive -- it was not only the English (and those of English descent) that colonized, settled, and became the "insider" group in this country; that group also included the French, German, and Dutch, just to name a few. So I use the term non-Latina/o white (NLW) to refer to the so-called normative/majority group.

n21 See Email from Pedro Malavet, Professor, University of Florida, to the author (Sept. 18, 1997) (on file with author).

n22 Gloria Anzaldua, Recognizing, Accepting, and Celebrating Our Differences, in Making Face, Making Soul/Haciendo Caras 142, 143 (Gloria Anzaldua ed., 1990).

n23 See infra Part III (providing account of travels); see generally LatIndia I, supra note 14.


n25 A literal translation of the word chisme would be "gossip" but that is not accurate. Chisme is a positive, light exchange. A more accurate translation of the meaning would be "catch up" which is what we did.

n26 The concept of essentialism suggests that there is one legitimate, genuine universal voice that speaks for all members of a group, thus assuming a monolithic experience for all within the particular group -- be it women, blacks, Latinas/os, Asians, etc. Feminists of color have been at the forefront of rejecting essentialist approaches because they effect erasures of the multidimensional nature of identities and also collapse multiple differences into a singular homogenized experience. See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, in Critical Race Feminism -- A Reader 11, 11 (Adrien Katherine Wing, ed., 1997) (hereinafter Reader) (stating that "We the People' seems in danger of being replaced by 'We the Women' . . . and in feminist legal theory, as in the dominant culture, it is mostly white, straight, and socio-economically privileged people who claim to speak for all of us"); Celina Romany, Ain't I a Feminist, in Reader, supra, at 19 (noting that "the feminist narrative
deployed as a foundation with its monocausal emphasis on gender falls short of the liberation project feminists should be about”).


openness, interactivity, flexibility and adaptability with connectivity thus serving as the predicate for inter-connection . . . and simultaneously signifying what is, as well as what can be; it both denotes capacity -- that which is -- and delineates potential -- that which can be thereby . . . the term describes at once both the actual and the possible.

Id.

n28 See Homi K. Bhabha, The Location of Culture 4 (1994) (suggesting that "interstitial passage between fixed identifications opens up the possibility of a cultural hybridity that entails difference without an assumed or imposed hierarchy"); see also Margaret Chon, Acting upon Immigrant Acts: On Asian American Cultural Politics by Lisa Lowe, 76 Or. L. Rev. 765, 769 (1997) ("By 'hybridity,' I refer to the formation of cultural objects and practices that are produced by the histories of uneven and unsynthetic power relations; for example, the racial and linguistic mixings in the Philippines and among Filipinos in the United States are the material trace of the history of Spanish colonialism.").


n30 Encomienda labor was not viewed as slavery, but a form of serfdom; slavery of Indians also existed. However, effectively, not much difference existed in the practices. See Ronald Sanders, Lost Tribes and Promised Lands 128-32 (1978) (explaining that grants of encomienda consisted of parcels of newly conquered land and right to use labor of indigenous people living on them); 4 La Enciclopedia de Cuba 34 (Vicente Baez ed., 2d ed. 1975) [hereinafter Enciclopedia] (noting that ill-treatment and enslavement of indigenous population at hands of Spaniards resulted in their extinction); id. at 42 (describing capture and sale of Indians); id. at 44 (describing punishment of Indians that refused to work as slaves); id. at 50 (explaining that serfdom was for gentle Indians and slavery for rebellious ones in early Spanish colonies in Americas); id. at 51 (noting that encomendados were serfs of the encomenderos and stating that justification for enslavement of Indians was their attack of Spaniards); id. at 52 (noting that slavery of Indians predated slavery of Africans); 1 Levi Marrero, Cuba: Economia y Sociedad 127 (1972).

n31 See Enciclopedia, supra note 30, at 19 (noting that Colon perceived indocubanas/os as gentle, timid peoples, who wear no clothes and had no weapons or law).

n32 See id.; Guerra, supra note 29, at 7; Marrero, supra note 30, at 54-55; Perez, supra note 29, at 14-16 (describing history of Ciboney indians).

n33 See Guerra, supra note 29, at 9-11; Marrero, supra note 30, at 51, 57.

n34 See Enciclopedia, supra note 30, at 30 (noting that women played important role
in society); Guerra, supra note 29, at 13 (noting that in family and in social order women did not occupy position inferior to men).

n35 See 2 Marrero, supra note 30, at 352-53 (noting total disappearance of indocubanos/as after first decades of Spanish occupation and some documentation of small presence in latter half of sixteenth century); Perez, supra note 29, at 30 ("The number of Indians dwindled from an estimated 112,000 on the eve of the conquest to 19,000 in 1519 to 7,000 in 1531. By the mid-1550s, the Indian population had shrunk to fewer than 3,000.").

n36 See 1 Marrero, supra note 30, at ix.

n37 See Perez, supra note 29, at 28-30 (describing maltreatment of Indians, dispossession of their lands, "overwork, malnutrition, and melancholia," which weakened population, epidemics of diseases brought by conquerors, and suicide as form of protest); see also Enciclopedia, supra note 30, at 25.

n38 See Amalia Bacardi Cape, Cronicas de Santiago de Cuba 83 (1972); Enciclopedia, supra note 30, at 42-43; Guerra, supra note 29, at 27.

n39 Anzaldua, supra note 5, at 77.


n41 Thanks to Rob Williams for that turn of a phrase.

n42 Montoya, supra note 5, at 220 (advocating using discursive formats for Latinas to reinvent themselves).

n43 I have called this process polilocal hermeneutics. See Hernandez-Truyol, Building Bridges III, supra note 6, at 310 (articulating notion of polilocal hermeneutics). With this phrase I am varying and borrowing from Boaventura de Sousa Santos, a Portuguese sociologist and human rights activist. See generally Boaventura de Sousa Santos, Toward a Multicultural Conception of Human Rights, 18.1 Zeitschrift für Rechts-Soziologie 1 (June 1997). De Sousa Santos suggests that in instances of cross-cultural dialogue, an exchange occurs not only among different knowledges, but also among various cultures, i.e., between different universes of meaning, which consist of strong "topoi" or "overarching rhetorical commonplaces of a given culture." Id. at 8-9. "To understand a given culture from another culture's topoi," we need to engage in "diatopical hermeneutics," a concept "based on the idea that the topoi of an individual culture . . . are as incomplete as the culture itself." Id. at 9. Thus, the objective is "to raise the consciousness of reciprocal incompleteness to its possible maximum by engaging in the dialogue . . . with one foot in one culture and the other in another." Id.

n44 Santos, supra note 43, at 12.
We start with a story of indigenous Hawaiians.

I. Rice v. Cayetano

At this writing, the Court is in the process of deciding Rice v. Cayetano, probably the most important Hawaiian rights case ever. Rice puts at risk all of the federal and state Native Hawaiian programs designed to repair continuing harms to the Hawaiian people resulting from the now acknowledged, U.S.-aided, illegal overthrow of the sovereign nation of Hawai‘i in 1893. This illegal overthrow led to the confiscation of Hawaiian land and the destruction of Hawaiian culture. Rice raises issues of: (a) political status contrasted with racial status (in applying equal protection doctrine); (b) historical acuity versus historical myopia in multiracial settings; (c) legal norms of self-determination vis-à-vis equality; (d) international human rights rather than domestic civil rights, and; (e) colonialism and conquest vis-à-vis sovereignty and liberation. By raising issues of political status, historical consciousness, self-determination, human rights and colonialism, Rice plays out in compelling fashion socio-legal themes central to foundational LatCrit theory.

So, who has a stake in this "Hawaiian" case? Certainly the indigenous Hawaiian communities have a stake, particularly those struggling to deal politically as well as socially with the consequences of U.S. colonialism, including Hawaiians' highest rates of poverty, unemployment, incarceration, serious illness, and homelessness in their homeland. Also Native Americans have a stake because they perceive that Rice-supporters, such as amici Robert Bork and Abigail Thernstrom, are endeavoring to fry bigger fish, including all nontribal American Indians, especially those that are beneficiaries of government programs. Latinas/os and LatCrit theorists -- those linking contemporary legal strategies concerning immigration, language, citizenship and political participation with earlier anticolonial, Chicano self-determination movements in the U.S. -- also have a stake.

This Essay explores "cultural performance" and legal process. More particularly, the Essay speaks to legal advocates not about crafting doctrinal arguments but about some of the problems and possibilities of shifting the cultural frameworks of decisionmakers -- frameworks that color how those decisionmakers understand hard evidence and social context in cases. In doing so, this Essay weaves a layered story of a pending United States Supreme Court case into an account of a multifaceted Hawaiian hula dance performance, tying both to a developing LatCrit praxis.
"retreat from justice" in law and politics have a stake in Rice.

The Rice case is about a white American rancher's efforts to invalidate a Hawaiians-only election of trustees to the Office of Hawaiian Affairs ("OHA"). n10 OHA is an entity created by the Hawai'i Constitution (through an amendment in 1978) to represent Hawaiian people in dealings with the state and its control as trustee over "ceded lands." n11 Ceded lands comprise roughly one-third of the entire lands of Hawai'i. They are former Hawaiian government and royal lands taken by the U.S. upon annexation of Hawai'i as a territory in 1900 following illegal overthrow of the Hawaiian government in 1893 by U.S. military-backed American businessmen. n12 Upon statehood in 1959, the U.S. turned over most of the ceded lands to the new state in trust. One of the five classes of trust beneficiaries, set forth in the federal statehood act and in the [*878] Hawai'i Constitution, is "native Hawaiians." n13

OHA was created in 1978 to represent Hawaiians' previously ignored legal interest in the ceded lands trust and the revenues it generated. n14 OHA's assets now exceed one-half billion dollars, and OHA's trustees spend that money on programs addressing social, economic, and cultural needs of Hawaiian people. In addition to these functions, some Hawaiian communities view OHA as a transitional entity toward some form of Hawaiian sovereignty. n15 Indeed, the state, as a result of its breach of fiduciary duties, is currently negotiating with OHA for the transfer of lands and over $300 million as reparations (and legal settlement). The transfer and settlement will generate land and additional monetary assets, in the eyes of some, for Hawaiian self-governance. n16

Rice, the American rancher plaintiff, is arguing that Native Hawaiian is purely a racial category and that OHA's Hawaiian-only voting restriction is subject to invalidation under the encompassing strict scrutiny equal protection standard of review for racial classifications as set forth in Adarand Constructors, Inc. v. Pena. n17 Further, Rice is contending that Hawaiians cannot claim the Native American exception from strict scrutiny, recognized by the Court in Morton v. Mancari, n18 because Hawaiians are not a formally recognized "Indian tribe." In 1974, Mancari deemed Native American to be a "political" designation (reflecting a special sovereign-to-quasi-sovereign relationship), rather than a "racial" one, even though race clearly was integral to the designation. The Court located federal authority for that special relationship in the Constitution's [*879] enumeration of federal power over "Indian tribes." n19

Both the federal district court for Hawai'i n20 and the Ninth Circuit n21 unequivocally rejected Rice's arguments. They recognized that, even without formal tribal status, indigenous Hawaiians are similarly situated to Native Americans. Both are first peoples in the U.S., both suffered forms of colonial/imperial conquest, and both are now the beneficiaries of a special trust relationship with the government because of this "political" status. Therefore, the lower courts held that Hawaiians, like Native Americans, should be considered "political" minorities in the U.S. for purposes of equal protection analysis. n22 Pursuant to Mancari, both courts recognized that the rational basis rather than strict scrutiny standard of review applies and upheld the OHA voting restriction.

During the pending appeal, OHA supporters are developing additional arguments grounded in critical theory. They are maintaining that through entities such as OHA, Hawaiians are not asserting civil rights (to be deemed equal to others in the U.S.). Rather they are asserting international human rights: not the right to be equal but the right to self-determination; not a right to [*880] monetary compensation, but a right to reparation in order to reconnect spiritually with land and culture; not a right to full participation in the U.S. polity, but some form of governmental sovereignty. n23

So why did the Court grant certiorari? Why did the conservative Center for Equal Opportunity support the certiorari petition and Bork, Thernstrom, and several other conservative groups file amicus briefs? Why did the U.S. Solicitor General, after much discussion, file a strong brief in support of OHA's position? n24 And why did the U.S. Department of the Interior, recently, in connection with the case, formally acknowledge a special trust relationship between the federal government and Native Hawaiians? n25

Given this Court line-up, two questions emerge: what members of the Court might be key to the Rice decision? And through what cultural lens will they process "facts and context"?

The first question reaches beyond simple vote counting or identifying swing votes along a liberal-conservative continuum. It speaks to who, through powers of insight and conviction, might persuade others on the Court and in the public. The second question is epistemological, and it sharpens the first. It asks how the decisionmakers' cultural framework might shape their understandings of Hawaiian political history and, more importantly, contemporary Native Hawaiian claims and government responses. In terms of LatCrit praxis, n26 the second question asks how a decisionmaker's cultural framework might appropriately be tweaked, and perhaps transformed,
through and beyond the legal process, to generate new understandings of "facts and context" relevant to [*881] cases. To explore these questions, we begin by considering cultural transformation and legal process.

II. Culture and Legal Process

Some attorneys in Rice identify Justices O'Conner and Kennedy as likely swing votes. Others look at Justice Ginsburg as a potentially key persuader. These are, of course, surmises. No one, even Court insiders, can safely predict how justices will cast their vote. "Objective, value-neutral" doctrinal analysis leading to "inevitably correct" answers is rarely possible, because complicated social and political value judgments usually are pivotal. n27

At the same time, merely assessing decisionmakers "values and interests" often leads to fuzzy conclusions. Broad ideological labels, like liberal and conservative, are at best crude analytical shortcuts. Often they are misleading. Indeed, Cass Sunstein's assessment of recent Court decisionmaking concludes that constitutional cases tend to be decided more on the particulars than overarching principles. n28

Another reason for the difficulty of prediction is that so many factors interact in judicial decisionmaking, including how judges interpret hard evidence, assess credibility and construe prior case holdings. An individual judge's acts of interpretation, assessment and construction do not occur in a vacuum or according to fixed mental processes. Rather those acts are affected significantly by the decisionmaker's "cultural framework" -- that amalgam of perceptions, beliefs and practices that psychologists and anthropologists tell us serve as a lens through which people process (and come to understand) information about their social and political world. n29

Culture is not simply shared practices or values. It is a "system of inherited conceptions expressed in symbolic forms by means of which [group members] communicate, perpetuate, and develop their knowledge about attitudes toward life." Although in crucial [*882] respects multidimensional, shifting, and regenerating, a group's culture "provides the framework, the anchor, in which a range of choices and values can be considered and evaluated." n30

That framework, forged in social settings, "shifting and regenerating," is susceptible to continual change as cultural conditions change. Those changes in framework and their influence on perceptions and actions often occur subconsciously. For "culture transmits beliefs and preferences not as explicit lessons but as what seems to be a part of a person's rational ordering of society. In most instances, people fail to recognize the influence of cultural experience on racial beliefs or the ways those beliefs shape their actions." n31

For the pending Rice appeal then, a threshold praxis inquiry is what cultural lens (or framework), what amalgam of perceptions, beliefs and practices, will likely shape justices' understandings of Hawaiian history and contemporary conditions and government responses to historical injustice? Or, more specifically, what cultural framework will likely influence whether the Court deems Native Hawaiians a "political" rather than "racial" minority for purposes of equal protection analysis? While this latter question is of paramount legal import, the inquiry it generates is heavy in social and historical interpretation, assessment and construction.

If, through their cultural lens, in good faith, decisionmakers see Hawaiians as just another brown group, no different from any other racial group save for skin color, then Rice prevails and, very likely, OHA and other Native Hawaiian government programs fall. n32 If their cultural framework enables decisionmakers to turn a blind eye to Hawaiian history (and the significance of the loss of Hawaiian nationhood) or to reduce race to an abstraction ("we are all one race -American"), the material conditions of Hawaiian life will be profoundly and adversely impacted. n33 Similarly, if decisionmakers see Hawaiians and think only of "lovely hula hands and white sand beaches," if they look with jaundiced eyes at Hawaiians' enduring struggles to reclaim land, reinvigorate spirituality, and restore self-governance and see nothing resembling Native American experiences, then OHA and its voting limitation will likely be trivialized as "racial preferences" that discriminate against white Americans like Rice. n34

But what if the Justices interpret, assess, and construct through a different cultural lens, a lens that highlights the present-day consequences of the loss of nationhood n35 and that allows deep appreciation of connections between Hawaiian land, culture and governance? If we assume, as I do for this Essay, that such a lens might significantly, and appropriately, help shape decisionmakers' understandings of "facts and context," then new praxis questions arise: How do non-Hawaiian, nonindigenous American justices acquire that cultural framework? More particularly, what kind of cultural transformations might be needed and how might those transformations be engendered?

I have no sweeping answers to these complex questions. Indeed, each situation for each person will likely be different. Nevertheless, in the remainder of this Essay, I begin to unravel some of those complexities and open up transformational possibilities. This brings us to our second story.
III. Jurists-in-Residence: Experiencing Kaho'olawe

My law school has the good fortune of having a Justice visit the school for a week every other February. A different Justice spends the week as the Jurist-in-Residence, teaching law classes, meeting with faculty and students and talking with judges and other members of the state bar. The Justices talk about judicial decisionmaking, past Court decisions, lawyering ethics, and, sometimes, personal history. The students, in return, engage in rigorous exchanges and often share something special of Hawai'i's many cultures. This coming year Justice Scalia will participate in the program. Justices Ginsburg, Kennedy, and Stevens participated in the recent past. n36

What does any of this have to do with the Rice case? Nothing directly. The Court accepted certiorari in Rice long after the last Jurist-Residence program two years ago. And the justices do not discuss federal or state cases even potentially appealable to the Court. No one at the school, and no one in the state bar or judiciary, ever attempts, or has attempted, through the program to influence a pending case.

Yet justices, as most people, live as members of society. Electronic media, journalism, popular culture, arts, literature and social interactions, and personal experiences affect, in part, their cultural frameworks. Those frameworks, I have suggested, help shape how they interpret hard information, assess credibility and construe ambiguous concepts, how they perceive and order a complex, dynamic social and legal world. Writing of the linkage of legal justice to judicial understandings of African American experiences, Wendy Scott Brown put it eloquently:

Resolving factual issues and doctrinal inadequacies [or ambiguities] does not rest solely on the strength of evidence or the persuasiveness of argument. The lack of knowledge and appreciation for the concrete experience of the powerless and oppressed hinders the judiciary's ability to construct just solutions . . . . Resolution, therefore, requires border crossing to begin the process of uncovering and then reforming judicial cultural biases. n37

Consider the border crossing possibilities, the transformative potential, of a multifaceted hula dance program performed by a multiracial group of law students and faculty during the Jurist-in-Residence program two years ago. n38 The students chose the songs, choreographed the hulas, wrote the narration, rehearsed, sewed outfits, made flower and leaf leis, and performed hulas to ancient Hawaiian chants and contemporary Hawaiian songs. n39 And they did so with a spirit of generosity, as an act of cultural sharing. Yet, this simple act was experienced on many levels by performers and audience in the music auditorium. n40

To feel some of what brought tears to students eyes, animated smiles on Justice Ginsburg's and Judge Myron Bright's faces and prompted the school's dean to say that this "is one of my proudest moments," I share with you a bit of the actual hula performance. That performance blended chanting, singing, guitars, dances, flowers, and narration. Its theme was Kaho'olawe. Sense as you read.

* * * *

You just heard Koa Paredes (hula teacher and law student) open with a traditional oli ho'okipa, or welcoming chant, that gives greetings. Now, Halau Kaleipaukupua'enaikala would like to present ho'okupu or gifts of lei to the justice and judge. Koa will accompany this ho'okupu presentation with a traditional oli lei, or lei chant. [Leis presented].

[Narration with Hawaiian guitars playing and thirty dancers walking silently on stage and taking their dance positions]. Centuries ago, when the first canoes of Polynesian explorers arrived from Tahiti and the Marquesas Islands, they landed at Kaho'olawe, the smallest of eight main islands in the Hawaiian archipelago. These first Hawaiians dedicated the island to Kanaloa, god of the sea. Kaho'olawe was viewed as the physical embodiment of Kanaloa, and the god's mana, or spiritual power, was held within the island's rich soil. Also known as Kohemalamalama, or "shining birth canal," the island has been a center of religious, cultural, historical -- and now political -- importance to Native Hawaiians.

For hundreds of years the island was fruitful and supported thriving Hawaiian communities that were adept at astronomy, navigation, fishing, and adz-making. During the 1800s, after Europeans and Americans began settling Hawai'i, the island's population dwindled and private ranching became dominant.

Through a lease with the Kaho'olawe Ranch Company, the U.S. military began its use of Kaho'olawe as a practice target for aerial bombs in the 1920s. Subsequently, during World War II, the U.S government took control of the island, banned all civilian access, and closed fishing areas. In a 1953 executive order, President Eisenhower set the island aside for massive target practice by navy bombers. The bombing of Kaho'olawe continued unabated for half a century, causing untold damage to the hundreds of cultural sites and fragile environmental resources.
During the 1970s, a group of young Native Hawaiians from the islands of Moloka'i and Maui started an organization dedicated to stopping the bombing and reclaiming Kaho'olawe for Hawaiian people. They formed the "Protect Kaho'olawe 'Ohana (family)," or PKO. As an integral part of the Hawaiian political and cultural "Renaissance," this passionately committed group began a campaign to raise awareness about the destruction of their sacred 'aina (land). In January 1976, nine set foot on the island, engaging in a act of peaceful civil disobedience.

Although the Coast Guard quickly escorted the protestors to nearby Maui and eventually cited several for trespassing, PKO continued its landings on Kaho'olawe's shores. The controversy escalated. An archeological survey of the island found thirty sites eligible for the National Register of Historic Places, and PKO filed a federal lawsuit against the Navy alleging violations of environmental and historic preservation laws.

But the bombing continued, and the protest intensified.

In early 1977, PKO leader George Helm, along with Kimo Mitchell, returned to the island to search for two others. Attempting to paddle-surf back to Maui seven miles away, Helm and Mitchell were lost at sea. Their deaths marked a critical point in PKO's struggle to reclaim Kaho'olawe, and the Navy's bombing of the island.

Three years later, the PKO and Navy settled the lawsuit. The Navy agreed to survey Kaho'olawe's resources, to begin clearing unexploded ordnance, and to allow PKO limited island access for religious and cultural activities. It also granted PKO stewardship over part of the island and agreed to diminish Navy bombing. In 1990, President Bush halted altogether the bombing of Kaho'olawe. Five years ago, on May 7, 1994, the U.S. transferred title to Kaho'olawe to the state and established a joint venture among the federal and state governments and PKO to oversee restoration of the island. The lengthy multimillion-dollar restoration process is underway. And the island is visited regularly by Hawaiian cultural practitioners and by multiracial groups, supervised by PKO, to work on restoration of religious, cultural, and natural sites.

Koa chose this story as the theme for today's performance to share this unique part of Hawai'i's history with our visitors and as a way to express our hope for Hawai'i's future.

[Narration at the beginning of the first hula segment]. To begin our hula performance, the halau (hula group) will perform a hula kahiko - a dance in the ancient style -- that was written for a ceremony celebrating the return of Kaho'olawe to the people of Hawai'i in 1994. The chant tells of the origin and beauty of Kaho'olawe, as well as its desecration by military bombing. This chant calls to the island, the "shining birth canal," to begin its rebirth. [Thirty dancers move powerfully and gracefully to Koa's reverberating chant and the pounding beat of a single ipu (gourd drum)].

[Narration at the beginning of the second hula segment]. The second hula will be a hula 'auana, or modern hula, entitled, "Aloha Kaho'olawe," performed by law students Arleen Watanabe and Kanoe Kunishima. Then, the men of the halau will perform an old Hawaiian favorite entitled "Kaho'olawe." This song is a love story that compares the beauty of Kaho'olawe to a loved one. The women will follow with "Mele o Kaho'olawe, a much-loved mele aloha 'aina, or song that speaks of one's spiritual love for the land. This mele was composed by Uncle Harry Kunihhi Mitchell, a respected leader in the protect Kaho'olawe movement, whose son Kimo was lost at sea.

He aloha no Kaho'olawe (A loving tribute to you, Kaho'olawe). [Hula to three songs follow accompanied by Hawaiian guitars and singing in Hawaiian language].

Closing. The hula is one important way we can all deepen our understanding of and appreciation for Hawai'i, its history, land, and people. Mahalo. Thank you for allowing us to share our love of hula with you today. We leave you with a special treat -- a final song entitled "Kupa'a" danced by Koa. The song calls to us all, "E kupa'a kakou ma hope o ka 'aina!" We must all stand firm on the land.

IV. Transformation?

What impact might this deeply engaging cultural performance have had on a justice and judge's cultural lenses for understanding "facts and context" years later in a case not then contemplated? Perhaps none at all. Yet, might the performance have begun or furthered an altered or expanded way of knowing about "being Hawaiian" - influencing how decisionmakers might more meaningfully (or accurately) interpret, assess and construct? Might it have stimulated a continuing process of cultural translation? Later, through a refocused lens, might history and contemporary conditions reveal Native Hawaiians as indigenous peoples in the U.S., whose struggles and government treatment are most aptly characterized as "political" rather than "racial"? Answers are speculative. But these and other questions themselves yield insights.

Did you, as reader, without experiencing the sights, sounds and smells, find the hula performance
engaging? As presented here in very limited fashion, did the performative acts collectively in some small way open your senses, your perceptions, to a broader, deeper understanding of Hawaiian history (and indeed Hawaiianness) and the stakes in Rice -- an understanding you may have missed from a straight informational lecture or traditional legal brief? Can you imagine if you had been present, the potential for some kind of cultural transformation, beyond intellect, at a visceral level, that might later help shape how you interpret, assess and construct? Possibly. If so you, why not others? Why not justices and judges?

* * * *

So what praxis insights might we draw about the salience of inter-cultural film, poetry, song, dance, language, literature, fine arts, spiritual meditation and historical storytelling in crafting larger legal strategies? In what settings? For what audiences? Over what periods of time? With what limitations, risks, and transformative potential?

Consider, in a very different setting, the efforts in Germany to employ "music as a force for healing wounds of the Holocaust and of the Middle East today." Monetary reparations by the German government and Swiss banks for Holocaust survivors and their families have been, for some, significant steps toward atonement. Yet, for many Jews, the wounds remain deep and complex. What, beyond money, might help people to feel things in a different way, to see one another in a somewhat brighter light, and maybe even to help transform buried anger and distrust? In August 1999, 170 musicians from the Bavarian State Orchestra and the Israeli Philharmonic -- including Palestinians, Lebanese, Syrians, Israelis and Germans -- played a path-breaking joint concert beneath the hill of Buchenwald, the former Nazi concentration camp. They played Gustav Mahler's Symphony 2, the "Resurrection," just hours after many of them together visited the Buchenwald site. The concert followed days of post-rehearsal discussions about history, identity and communication facilitated in part by Palestinian scholar and musician Edward Said.

For a violinist from Lebanon, "the first two days it was rather tense, because I think we all had stereotypes about the other nationalities . . . But as we talked and played, these ideas tended to fade." For others the process was about transforming relationships broken by history. "This concert was about the past . . . . It was about showing that even the past symbolized by Buchenwald can be overcome, and the Germans whose forebears murdered Jews can sit now with Israelis and play the music of Bohemian-Jewish-Austrian-German composer." And for still others, the larger question was not whether, but how, we reconcile? "The issue, in the end, in the Middle East, is how to be together." How do we accept and then move beyond the history, the words of apology and even monetary reparations to transform the spirit? As the director of the Berlin State Opera said, "music is an ideal form."

Consider also Sharon Hom's LatCrit III presentation about and demonstration of a multilayered cultural performances. She encouraged us, and by extension decisionmakers, in contemplating the potential and problems of "human rights" rhetoric and practice across differing cultures, to hear, literally and figuratively, in differing registers. And she encouraged us not so much by telling us as by impelling us to listen in that way. She played a protest-rock recording of a Chinese rock star, sung in Mandarin, with unusual (to western ears) chord patterns and melody lines, while she voiced over her interpretation and insights in English, all backed visually by Chinese lyrics on a large overhead screen. That translating, head-and-spirit, border-dissolving performance both challenged and touched people in the room. A profoundly different way of knowing about "rights" and what it means inter-culturally to be "human." Transformative? Perhaps, for some. Openings for transformation? I think so, for many.

So, with these cultural performances in mind, we end where we began, with questions informed by a developing LatCrit praxis. How might cultural justice performances strategically (and ethically) be deployed throughout the legal process to create openings for transformation? How and when might they contribute to altering decision-makers' and potentially larger society's cultural lenses for assessing, for judging? And, in acting strategically, how can we critically recast the role of cultural performance in practically reframing rights?

E kupa'a kakou ma hope o ka 'aina.

* * * *

Coda I

After I submitted this Essay for publication, the Court heard oral argument in Rice. Many Native Hawaiians, including several OHA trustees, traveled from Hawai'i to Washington D.C. to attend. Set forth below are two excerpts from the official hearing transcript. (The transcript does not list the questioning Justices' names, but it is clear from context that Justice Ginsburg is the speaker in the second excerpt.) The questions and comments of the Justices appear to reflect more than simple differences of opinion. They appear to suggest significantly differing cultural lenses for processing and comprehending complex facts and context.
One Justice posed a hypothetical to illustrate that OHA's voting requirement unlawfully discriminated on the basis of race. It addressed ostensible Hawaiian discrimination against Tahitians. The framing and language of the hypothetical suggested a cultural lens blind to history and present-day political and social conditions, including a lack of recognition of how racial categories, like political ones, are socially constructed. n44

QUESTION: May I ask on the racial discrimination point, supposing there is a citizen of Hawaii who has the same racial makeup as the native Hawaiian, he came, however, from Tahiti or some place else, and is a citizen of the State, has exactly the same race as the others, but he's denied the vote. Would he be denied the vote on account of race? n45

The second justice's comments reflected a sharply contrasting cultural lens, one that appreciated the complex history of American colonial expansion, land confiscation and cultural destruction as well as the significance of current efforts to restore aspects of lost nationhood. The comments responded to Rice's argument that technically Hawaiians should not be considered a Native American "tribe" and, therefore, could not be accorded "political minority" status, like American Indians under Morton. n46

QUESTION: One part of it I don't understand. Hawaii wasn't organized into many tribes, but it did -- it was a kingdom. It was a sovereign kingdom, with its language and culture, and even cuisine, and the United States had a large hand in destroying that sovereignty, and indeed Congress passed this Remorse Resolution [1993 Hawaii Apology Resolution] recognizing that the United States was in large measure responsible for the destruction of the sovereignty of these people. So if the idea of tribal sovereignty, restoring some of the dignity that was lost as a result of what this Nation did, works for Native Americans, I don't understand why it doesn't also work for people who were a sovereign nation, who were stripped of their sovereignty, whose land was taken without their consent and without any compensation. The analogy seems to me quite strong. n46

Quite strong, indeed.

Coda II

As this Essay was going to press, the Supreme Court decided Rice v. Cayetano, n47 reversing the lower courts and declaring OHA's Hawaiians-only voting requirement violative of the Fifteenth Amendment's ban on racial discrimination. As feared, it also opened the door to suits to invalidate all government-connected Native Hawaiian programs. From the perspective of many, the Court majority, led by Justice Kennedy, just did not "get it." n48 The majority's view of the history of Native Hawaiians is highly selective and sanitized. It views OHA's voting requirement simply as a racial preference for Native Hawaiians.

As I commented elsewhere with Chris Iijima:

The Court's decision grossly distorted the history of Hawai'i. Nowhere did it mention U.S. colonialism in 1898, in Hawaii or in the Philippines and Puerto Rico. Nor did the Court acknowledge the destruction of Native Hawaiian culture through the banning of Hawaiian language, or the current effects of Native Hawaiian homelands dispossession: high rates of poverty, homelessness, and incarceration . . . . The Court never specifically referred to whites, even though Rice's claim was implicitly one of "reverse discrimination" against whites. And nowhere did the Court discuss the vibrant Native Hawaiian sovereignty movement that gave birth to OHA.

Perhaps most astonishing was the Court's dismissive treatment of two hugely significant facts. First, there was little mention of the extraordinary U.S. Congressional Apology Resolution of 1993, in which the U.S. government acknowledged its complicity in the illegal overthrow of the Native Hawaiian government in 1893 and committed the U.S. to future acts of reconciliation. Second, the decision failed to mention that OHA and its voting limitation were created by an overwhelming vote of Hawaii'i's multiracial populace.

What emerges from the Court's historical account is a simple story of "reverse racial discrimination" against Freddy Rice. In this view, Hawaiians had a rough go of it, as did immigrant groups, but the playing field now is pretty much leveled. U.S. colonization supposedly left no scars; therefore "privileges" for Native Hawaiians are not only undemocratic, they are illegal. n49
In their dissent, Justices Ginsburg and Stevens excoriated the majority for this distortion of history -- for its failure to get it:

The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application to the compelling history of . . . Hawai'i. When that history is held up against the manifest purpose of the Fourteenth and Fifteenth Amendments, and against two centuries of this Court's federal Indian law, it is clear . . . that Hawai'i's election scheme should be upheld. n50

Reflecting Justice Ginsburg's insightful comments at oral argument, and underscoring the importance of the viewer's cultural lens for seeing and making sense out of social "facts," the dissent concludes:

It is a painful irony indeed [for the majority] to conclude that native Hawaiian people are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government -- a possibility of which history and the actions of this Nation have deprived them. n51

The tensions in the Court's opinions highlight the significance of this Essay's thematic questions: How might cultural justice performances strategically be deployed throughout the legal process to create openings for transformation? When might they contribute to altering decision-makers' (and potentially larger society's) cultural lenses for assessing, for judging? The search continues.

FOOTNOTE-1:

n1 See Eric K. Yamamoto et al., Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue, 16 U. Haw. L. Rev. 1 (1994) (describing legal process as cultural performance and legal procedures (particularly discovery) as instruments for shaping competing narratives about larger controversy); see also infra section IV (discussing role of "cultural performance" in meaningful decisionmaking).

n2 See infra note 26 and accompanying text (stating that developing LatCrit praxis infuses strategic social-legal action with critical theoretical insights). I write as a third generation Japanese American (sansei), born in Hawai'i. I am not a Native (or indigenous) Hawaiian. I also write as an Asian American working in communities to build bridges between Asian Americans and Hawaiians. Part of that work is, by invitation, "Hawaiian rights" litigation addressing land and water issues. Some of it involves assisting extra-legal attempts to reconcile Hawaiian justice grievances against the federal and state governments and against "settlers" to the islands.

n3 Rice v. Cayetano, 120 S. Ct. 1044 (2000), rev'g 146 F.3d. 1075 (9th Cir. 1998); see also infra Coda II (explaining Supreme Court's decision).

(1990) (providing preference for Native Hawaiian in HUD housing assistance programs).


n7 See, e.g., Luciano Minerbi et al., Native Hawaiian and Local Cultural Assessment Project 15 (1993).


n9 See Rodolfo F. Acuna, Anything but Mexican: Chicanos in Contemporary Los Angeles (1996).

n10 I have provided legal counsel to, and represented in litigation, two current OHA trustees, Haunani Apoliona and Collette Machado.

n11 See Haw. Const. art. XII, § § 5-6 (establishing board of OHA trustees and defining their powers).

n12 See Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to Offer an Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, § 1, 107 Stat. 1510, 1513 (1993) (expressing Congress's "commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people" and urging President to support reconciliation efforts, in sections 1(4) and 1(5)).

n13 See Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959). Section 5(f) of the Admission Act establishes a public land trust on certain lands (and the proceeds from those lands) granted or conveyed to the State of Hawaii by the United States under sections 5(b) and 5(e). See id. The State of Hawaii holds the section 5(f) trust lands for five purposes. See id. One is "for the betterment of the conditions of native Hawaiians." Id.


n15 Others view OHA as little more than a state agency beholden to prevailing political powers in the state. See He Alo a He Alo (Face to Face): Hawaiian Voices on Sovereignty (Hawai'i Area Office of the American Friends Serv. Comm., 1993); Samuel P. King, Hawaiian Sovereignty, Haw. B.J., July 1999, at 6, 7-8.


n19 Id. at 552 (quoting U.S. Const. art. I, § 8, cl.3, which grants Congress power to regulate commerce "with the Indian tribes"). Neither Adarand nor the Court's Native American cases following it held that Adarand overruled Mancari. See United States v. John, 437 U.S. 634 (1978); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977), But cf. Stuart Minor Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537, 56465 (1996) (attempting to distinguish these cases).


n21 See Rice, 146 F.3d at 1082. But see infra Coda II (discussing Supreme Court's decision, which reversed Ninth Circuit's ruling).
Both courts also rejected Rice's Fifteenth Amendment argument. The Ninth Circuit Court of Appeals stated:

If, as we must, we take it as given that lands were properly set aside in trust for native Hawaiians; that the State properly established an Office of Hawaiian Affairs to hold title to, and manage, property set aside in trust or appropriated exclusively for native Hawaiians and Hawaiians; and that OHA is properly governed by a board of trustees whose members are Hawaiian, it follows that the state may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be. Put in another way, the voting restriction is not primarily racial, but legal of political. Thus, we conclude that Rice's argument fails under both the Fourteenth and Fifteenth Amendments for essentially the same reasons.

Id. at 1079. However, the Supreme Court reversed the Ninth Circuit based on the Fifteenth Amendment. See Rice, 120 S. Ct. at 1060; see also infra Coda II (explaining Supreme Court's decision).


See id.


See id.

This is, in effect, the argument advanced by amici Bork and Thernstrom. See Brief for Amici Curiae Center for Equal Opportunity, supra note 8.


No one can say with certainty just what influence historical conceptions have had on the minds of men, nor can one accurately predict the impact of such conceptions on human relations in the future. But historical traditions have controlled the attitudes and conduct of peoples too often to permit a denial that history has been an important instrument in shaping human affairs.

Id.

The Rice case involved only a white American plaintiff. See Rice v. Cayetano, 963 F. Supp. 1547, 1548 (D. Haw. 1997), aff'd, 146 F.3d 1075 (9th Cir. 1998), rev'd, 120 S. Ct. 1044 (2000). If, however, decisionmakers find Hawaiians to be simply another racial group, as distinguished from a "political minority," then Hawaii's nonwhite racial groups, for instance African Americans or Asian
Americans, would be allowed to assert discrimination claims.

n35 The indicia of loss of nationhood (as distinguished from the harm or unequal or discriminatory treatment) include the loss of control over government structure, voting, economic, educational and justice systems, language, and land usage. See Draft of Brief for Amici Curiae JACL-Honolulu, supra note 23.

n36 See Sean Clark, Justice in the School, 22 Malamalama, JulyDec. 1998, at 10. The Jurist-in-Residence is organized every other year by Judge Myron Bright of the U.S. Circuit Court of Appeals for the Fifth Circuit, in conjunction with the William S. Richardson School of Law, University of Hawai‘i at Manoa.

n37 Wendy Scott Brown, Transformative Desegregation: Liberating Hearts and Minds, 2 J. Gender, Race & Just. 315, 344 (1999). I would substitute the word "limitations" for "biases" at the end of the quoted passage in the text.

n38 The Hawaiian art form of hula, or dance, plays an important role in recounting history and in perpetuating the indigenous culture of Hawai‘i. In its purest form, the hula is a type of storytelling. Through intricately placed hand and feet motions, as well as calculated facial and body expressions, a hula dancer, with precision, power, and grace, can physically depict a traditional Hawaiian legend, or describe the events of a day (like the birth of a child, or the coronation of a king), or convey a political message. Through this performative storytelling, hula helps pass from generation to generation deep understandings of history, culture, and identity, as the stories and their meanings are conveyed by hula teacher to student and by students to audiences.

For example, the hula "Aia la 'o Pele i Hawai‘i," describes the epic of Pele, goddess of fire and the volcano. Pele, a story intermeshing spirituality, kinship and environment, teaches anew each time it is performed. A hula student learns much more than just the physical motions of the hula; the student must study the language, history and culture, as well as the dance movements, to gain a both intellectual and visceral understanding of the performance. When a hula dancer performs a hula for an audience, the spirit of that hula story as well as its particulars are shared.

n39 Hula is performed in two general forms: hula kahiko (ancient hula) and hula 'auana (modern hula). Hula kahiko is performed to the accompaniment of Hawaiian chanting and beat drumming of the traditional Hawaiian ipu (gourd) or pahu (wooden drum). It is the formal hula, demanding great concentration. Hula kahiko is considered traditional because, prior to western contact in Hawai‘i, all hula were performed in this fashion. Prior to the performance, the kumu hula, or hula teacher, choreographs the often powerful dances, drawing on historical and cultural knowledge, and rigorously trains the dancers. During the performance, the kumu hula chants the Hawaiian lyrics of the chant and provides a beat for the hula dancers. Traditional hula attire is worn during a hula kahiko performance. For women, traditional hula attire includes a pa‘u (knee-length skirt), and a matching blouse. For men, a malo (loincloth) or pa‘u are appropriate. Hula dancers adorn themselves with traditional leis made from the palapalai (fern), ‘ohi‘a lehua (a native flower), or other greenery.

Hula 'auana is an informal style of hula. It is a hula performed to the accompaniment of nontraditional instruments such as the ‘ukulele, guitar, piano, and bass and to singing. The hula 'auana movements are often flowing in contrast to the generally stronger, sharper movements of the hula kahiko. With the arrival of nontraditional musical instruments to Hawai‘i, the Hawaiian style of music changed. The hula also adapted. Hula 'auana is most popular for the beautiful attire often worn during the performance. Because the style is informal, hula dancers may be creative in their movements and attire.

n40 I was one of the musicians for the performance. My vantage point was thus one of participant-observer.


n42 Id. (internal quotation marks omitted).
n43 See Sharon K. Hom, Lexicon Dreams and Chinese Rock and Roll: Thoughts on Culture, Language, and Translation as Strategies of Resistance and Reconstruction, 53 U. Miami L. Rev. 1003, 1006-17 (1999); see also supra Part IV (describing role of "cultural performances" in meaningful decisionmaking).

n44 See Michael Omi & Howard Winant, Racial Formation in the United States (2d ed. 1994).


n46 Id. at *12.

n47 120 S. Ct. 1044 (2000).


n49 Id.


n51 Id. at 1066.

Francisco Valdes *

BIO:

* Professor of Law, University of Miami. I thank the Dean Rex Perschbacher and Associate Dean Kevin Johnson of the U.C. Davis School of Law for their generous support of the conference that this Symposium memorializes. I thank also all the sponsors and participants at LatCrit IV, all the authors, and the U.C. Davis Law Review staff, who collectively brought this symposium into existence. I thank also the LatCrit community that recently has begun to coalesce, making this discourse possible. All errors are mine.

SUMMARY: ... This growing recognition of power relations as more like "webs" than "intersections" has helped increasingly to center multidimensionality as the evolving standard in LatCrit theory specifically and outsider jurisprudence generally. ... In the fourth essay, Professor Donna Coker grapples with a concrete and contemporary policy issue crucial to the well being of Latinas, other women of color and/or poor women: the design of state interventions in domestic abuse and battering cases. ... It remains unclear how the call in Professor Padilla's essay to syncretic analysis and praxis fits in with this call to embrace liberation theology, or if the two bear any intended relationship to the specific focus on Latinas in the issuance of these calls. ... This essay's project is the crafting of antiessentialist domestic violence policy interventions informed by the goal of delivering "increased material resources for women, and particularly for poor women of color. ... In so doing, this essay raises again the role or potential of hope in antisubordination discourse and praxis; this essay, like the preceding trio, implies or exudes a sense of hope as a positive ingredient in the imagination and implementation of a social justice movement. ... Rather, as these essays indicate, hope as antisubordination method in outsider jurisprudence must be accompanied by a rigorously multidimensional critique of the webs of power that suppress and violate disfavored humans. ...
The first trio of these essays, by Professors Guadalupe Luna, Terry Rey, and Laura Padilla, collectively enrich the historical and ideological context and substance of LatCrits' continuing conversation about the sociolegal effects of power relations mediated by the construction and operation of religions, classes, genders, sexualities, and races among Latina/o and other communities. These three essays depict the deployment of "religion," in the form of Roman Catholicism, to implant Eurocentrism, white supremacy, patriarchy, and heterosexism throughout this hemisphere. While noting in each instance the nuances of this history, the authors of the following essays confront the "awesome" record of Roman Catholic agency and complicity in the brutal conquest of the Americas, as well as resistance to that conquest, to extract from the record useful lessons for LatCrit antisuordination praxis today. In the fourth essay, Professor Donna Coker grapples with a concrete and contemporary policy issue crucial to the well being of Latinas, other women of color and/or poor women: the design of state interventions in domestic abuse and battering cases. In this essay, Professor Coker effectively confronts the present sociolegal legacy of the record that the prior essays help to illuminate; this final essay effectively links the heightened vulnerability of Latinas to social ills and societal alienation due to the ideologies and conditions spawned by and under Euroheteropatriarchy, which the prior three essays effectively provide as a fitting backdrop for this closing piece.

In the first essay, Professor Luna focuses on the conquest or domination of "Native California" first by the Spanish, then by the Mexican and finally by the American governments. Especially in the Spanish colonial period, Professor Luna notes, the Roman Catholic Church served as a state instrument integral to Euroheteropatriarchal imperialism and exploitation, underscoring the counterhistory of native resistance to that project and its relevance to critical antisuordination analysis today. Training attention on the record left for us by those "at the bottom" of that colonial struggle, this essay shows how the spiritual-military conquest of these lands was undertaken with "soldiers and priests" to appropriate the wealth and destroy the culture of the natives despite their micro and macro acts of resistance to that unprecedented invasion, and to erect in their place empires for the secular and sectarian conquistadores of Europe. Though the structure of power relations doomed their immediate cause, the resistance of the natives to the injustices of religious, cultural, economic and political colonization evidences a profound sense of hope in the eventuality of justice that sustained, and perhaps inspired, native oppositionality against all immediate odds. This gritty record of hope and determination leads Professor Luna to conclude her essay with a set of unsentimental lessons toward emancipation in the context of LatCrit theory and praxis, lessons that oftentimes reflect, and help to apply, several of the LatCrit guideposts suggested in some early works.

Perhaps most notably, these lessons point to the linkages that connect the present to the past: "In our time, politicians and other religious 'advocates' are asserting a return to the values, morals and religious beliefs" that accompanied, animated and allowed this hemisphere's colonial conquest, and this resurgence of suppressive ideological traditions "calls for answers as to the proper relationship between religion, law, and the polity," writes Professor Luna. This "lesson" not only recalls and affirms the importance of historicized sociolegal critiques in LatCrit theory and other genres of outsider jurisprudence but also properly trains the focus of the critique on the social and economic, as well as the political and legal effects of religiosity on marginalized communities. The point of antisuordination critique, in other words, is not whether any person's or group's particular faith is
worthy of others' belief but whether that faith is being activated culturally, materially, and otherwise in a manner consistent with basic antisubordination principles and ongoing social justice quests. And this point, of course, entails consideration both of the historical and contemporary uses of "religion" as an institutionalized factor in civil society by those with the power to mobilize its sociolegal resources and to influence the construction and operation of civil society. n18

The historical aspect of this question, though nuanced, strongly suggests that the project of Euroheteropatriarchal conquest throughout the Americas, as this essay's capsule history illustrates, amounted to the forced establishment of the conjoined isms that seem uniformly to concern LatCrit and other antisubordination scholars today: "European notions of white superiority" along with patriarchal ideology, heterosexual privilege, and economic exploitation. n19 These structures of "degradation and discrimination" have been used to ensnare the hierarchical norms and elites that still govern the Americas to the detriment of women, the poor and all non-Anglo, nonwhite, nonChristian, nonheterosexual persons and groups -- explaining, of course, LatCrit attention to these isms, as well illustrated by this essay. n20 This critical account of religious and secular colonial alliance, and its joined treatment of conjoined "isms," thus reminds us that, and again helps to show how, critiques from the bottom can help to expose contemporary structures of subordination not only as historical and local but also as contextual and multidimensional.

Professor Terry Rey likewise confronts this record of conquest and its continuing ramifications, similarly drawing insight from the [*903] bottom of religion's colonial record. While the geographic focus is expanded in this essay to cover various spaces and places, the critical focus is distilled, spotlighting a particular symbol freighted with cultural and political as well as dogmatic significance in the context of Spanish-Catholic imperialism throughout this hemisphere and in its continuing aftermath: the Virgin de Guadalupe. Yielding the more specific conclusion that "Hispanic colonization was Marian colonization," n21 this essay shows yet again how church and state conspired in the colonial project. Using the figure and cult of this Virgin as exemplar and trope, Professor Rey shows that the Virgin was as integral to the church's imperialism as the church was to the state's imperialism in the joint Catholic-Spanish project of socioeconomic conquest and cultural genocide.

But, in this analysis, the Virgin also has served emancipatory purposes strategically and significantly. A figure prominent in Roman Catholic cosmology that can be enlisted in particular times and places by the subjugated as a form of resistance to the "misogyny of orthodox Catholic theology," this icon "is a hotly contested symbol, taking on a host of causes and responding to the needs of both the dominant to dominate, and the subjugated to resist." This is true in the "economic, the political, and the sexual fields," explains Professor Rey. n22 The "subversive" element in this analysis is the capacity of nonChristian, nonwhite/non-European groups to syncretize the Virgin, challenging her Eurocentric, white-identified depiction as a "delicate blond" by casting her as a "goddess" racialized as black. By definition and depiction, the transfigured icon could be interposed at culturally or politically crucial moments by those at the bottom of this colonial equation to help undermine her own utility as an instrument of Euroheteropatriarchal conquest and hierarchy. n23

This element of Professor Rey's analysis, like Professor Luna's essay, brings into sharp relief the Eurocentric racial/ethnic politics of Roman Catholic and Christian evangelism, especially when coupled with state-sponsored colonization. As a pair, these essays make plain how "religion" has been exploited repeatedly throughout the continents of this hemisphere to help constitute "race" in general and white supremacy in particular, and vice versa. This [*904] essay, like the preceding one, elucidates and confirms that LatCrit engagement of "religion" is and must be a multidimensional engagement of "race" and racism, and vice versa, and also of their multi-intersected connections to other webs of power and identity, including culture, gender, class, and sexuality. n24

Like Professor Luna's essay, this account emphasizes the importance of resistance to enduring and structural sources of oppression. Depicting a "grassroots liberation Mariology," Professor Rey's essay explains that "a careful historical analysis of Latin American religious history reveals a consistent undercurrent of antisubordination Mariology that stands 'in active opposition' to all forms of oppression," and that has played an "irreplaceable role" in Haiti's and similar Latin American struggles for emancipation. n25 By implication, and as in the case of Professor Luna's essay, this emphasis on the "undercurrents" of colonialism suggests the significance of hope in maintaining a vision of the future that embraces the eventuality of liberation -in this instance, hope at the grassroots level that change is possible despite the intransigence of colonial hegemony, a hope that seemingly helps to sustain the long struggles and necessary sacrifices toward political change, legal reform and social emancipation. In these two essays, as
in the next two, identity, hope, and resistance are joined to expose, map and pierce both past and present webs of power.

More specifically, Professor Rey's focus on the Virgen and her sociopolitical symbolisms, especially the practice of "transfiguring these symbols in African terms," leads this essay to identify "syncretic appropriations" of oppressive symbols as a form of antisubordination praxis; resistance through "ideological appropriation" of power-laden symbols, as in the case of this Virgen in the hands of enslaved African Americans or native "converts" to Roman Catholicism, becomes the emancipatory tool emphasized hopefully in this essay. This strategy, of course, is well known among outsider legal scholars familiar with Queer theory, n26 and it more specifically [*905] recalls the challenges faced (still?) by LatCrits in the collective act of group selfdenomination. n27 Although Professor Rey does not spell out any particular "syncretic appropriations" ripe for reclamation and transfiguration, his invocation of this resistance strategy within the specific context of LatCrit theorizing serves the salutary purpose of training our collective attention on this type of action as part of the arsenal that LatCrits, like Queers and other outsiders, can activate strategically to combat sources of continuing disempowerment.

And because this call emanates from the particular example of African and indigenous resistance to racial, cultural and economic subordination, Professor Rey's analysis illustrates by example not only the linkages that tie race and ethnicity to culture, class, and religion, but also the continuities that tether the present to the past. The historical moments depicted in this essay thus provide a timely occasion for LatCrit and allied scholars to appreciate how and why the contemporary antisubordination projects of "different" nonwhite groups may have more in common than our immediate era, or personal experience, may otherwise suggest. Indeed, Professor Rey's account underscores the historical, ideological and structural interconnection of African and native peoples and cultures in the construction of today's multiply diverse "Latinas/os" specifically through the historical processes of colonialism that enslaved Africans, exterminated natives, yielded mestizas/os and led to today's multiply diverse and transnational "Latina/o" communities. In this way, this essay centers neglected histories and pressing legacies that call for critical coalitions among LatCrit and allied scholars, coalitions dedicated to a hopeful, capacious, and egalitarian resistance of multidimensional power webs based on the suppressive ideologies of Euroheteropatriarchy.

These first two essays, by Professors Luna and Rey, both marshal hidden histories and antisubordination criticality to call into view, and draw hopeful insights from, the resistance to subjugation of those who came before today's communities of color with the onset of Euroheteropatriarchal colonization. Professor Luna's focus on Native California, and Professor Rey's focus on Haiti and other lands of the Caribbean and Latin America, show how multidimensional and interdisciplinary analyses of particular social regimes can begin to map the patterns of interlocking structures of subordination across time, culture and place, and of sustained resistance to them. Both, in their respective projects, look to "the bottom" for contemporary normative insight and corrective policy-making creativity; both center groups at the margin to draw lessons with current resonance, thereby displaying the critical as well as reconstructive utility of this well-known method in outsider jurisprudence. n28 These essays thereby exemplify foundational LatCrit commitments and well-established outsider methodologies that pursue interconnective and transformative interventions on behalf of social justice in the discourses and practices of outsider critical theory. n29 But, this ongoing and growing engagement with canonical religion and its artifacts is not just theoretical, nor only political, cultural or social, but also personal, as Professor Laura Padilla's essay shows.

Professor Padilla's essay portrays a present and direct negotiation within the LatCrit community of the larger legacies that the prior two essays outline and critique in social and legal terms. The dilemma described here by Professor Padilla is how to advance the capacity of "Catholic Latinas to use religion as a source of strength, as a survival and resistance strategy, and as a way to build community" while diminishing its power as "a subordinating and oppressive force." n30 Noting the grip on Latina/o societies that is Spanish colonialism's bequest to Roman Catholicism, and centering the role of Latinas in the instillation of dogma via the traditional cross-sex family, Professor Padilla seeks some socially redeeming value for this religion, and finds it also in the figure and record of the Virgen. Like Professor Rey, Professor Padilla points hopefully to the politics and potential of the Virgen's image, and similarly proffers syncretization as basic outsider method and antisubordination praxis: this essay calls for "Latinas today to syncretize the traditional doctrine of salvation with a progressive vision of what religion can do for them." n31

These back-to-back calls for syncretism in LatCrit theory of course raise intriguing possibilities. Though both Professor Rey's and Professor Padilla's essays provide non-European transfigura [***907] tions of the
Virgen as an example of antisubordination syncretism, neither makes it clear how that example can guide
syncretic moves in LatCrit theory today. Nonetheless, these calls do coincide with LatCrit commitments to
transgressive analyses that cross, and affirmatively blur, the many borders and boundaries that dominant
forces seek to impose as the organizing principles of our realities. n32 Though these essays do not clarify
how LatCrit theorists might translate the call to
syncretism into antisubordination praxis, they do
remind us that sources of resistance always may be
found among the borders erected to confine and
control us, whether materially, politically, culturally,
or intellectually. These calls not only center a spirit of
hopeful resistance in antisubordination analysis, but
also ground hope and resistance in the human capacity
to act critically and ethically in strategic ways toward
substantive ends. In this sense, these twin calls to
syncretism as antisubordination method can serve as an
always-healthy reminder that all "scholarship" is
political and, in a legalistic society, perhaps especially
legal scholarship. n33

In any event, the project of reclaiming and redeeming
organized religion (as opposed to the image of the
Virgen) in Latina/o contexts clearly is complicated by
some hard facts, specifically for Latinas, as Professor
Padilla notes candidly: not only did this church
endeavor to "systematically destroy" the cultures and
civilizations of Latina/o forbears for self gain and pecuniary profit, but "Latinos have remained at the
margins of Catholic leadership, with Latinas nearly
invisible." n34 Indeed, this is a church in which all
doors that lead to influence still "are closed to women"
and through which public policy and religious dogma
that "leave Latinas [and other women] few procreative
options" still is promoted. n35 It is a church, as
Professor Padilla discusses, with histories and traditions that con [*908] sistently uphold and
valorize the superiority of men over women on the
basis of precepts about sex and gender, a church
endeared still, here and now, of these histories and traditions.

Professor Padilla finds, in the liberation theology of
Latin and South America, a path beyond this structural
and sociopolitical reality, proffering this alternative
and progressive expression of Catholicism as an
emancipatory tool for Latina/o and LatCrit evolution of
human religion and spirituality. n36 Of course, this
invocation of liberation theology confirms prior
LatCrit urgings to find in liberation theology's body of
work some of the theoretical and political means to
help align Christianity generally, and Catholicism
specifically, with LatCrit theory's antisubordination
ideals and objectives. n37 This essay, however,
beckons Latinas in the LatCrit community, in

particular, to take up this task. It remains unclear how
the call in Professor Padilla's essay to syncretic
analysis and praxis fits in with this call to embrace
liberation theology, or if the two bear any intended
relationship to the specific focus on Latinas in the
issuance of these calls. However, it is noteworthy that
liberation theory itself amounts to an act of
syncretism -- a mixing of traditional theological
doctrine with social justice principles. To the extent
that liberation theory may be viewed as a model of
antisubordination discourse and praxis n38 that has
used syncretism effectively, the question that this essay
thus raises is: precisely how should or may Latinas, in
particular, draw relevant lessons from the texts and
record of liberation theology, and then activate them in
the context of LatCrit theory and praxis?

Finally, Professor Donna Coker's essay in effect
depicts, and carefully analyzes from an
antisubordination perspective, a concrete set of current
issues rooted in the sociolegal legacies that we --
LatCrit theorists, other antisubordination scholars, and
society in general -- have inherited from the histories
of subordination and exploitation summarized and
confronted in the preceding essays. This essay's project
is the crafting of antiessentialist domestic violence
policy interventions informed by the goal of delivering
"increased material resources for women, and
particularly for poor [*909] women of color." n39 To
do so, as Professor Coker well demonstrates, requires
multidimensional analysis of the social and legal
conditions that define the position of poor women of
color vis-a-vis domestic violence and state power.
What is necessary, this essay shows us by example, is
multidimensional detail and critical sharpness capable
of cutting through the webs of power based on class,
gender, race, ethnicity, immigration status, language,
and culture that converge in domestic abuse policy to
overlook or even aggravate the position of these
particular women vis-a-vis law and society.

Professor Coker thus considers, first, how economic
vulnerability is integral to battering -- before, during
and after the fact -- concluding that "economic
dependency on the partner was a significant predictor
of severe violence" in various empirical studies. n40
She considers, in addition, how race, ethnicity, class,
gender, immigration status, culture, and language
interact to "structure the responses women are likely to
encounter from helping institutions, the manner in
which the battering is understood by those around
them, and the manner in which women understand the
abuser's behavior." n41 More particularly, to the
extent that social inquiry has considered race, she
continues, the 'research on battered women suffers
from a 'black/white' paradigm problem in which the
experiences of white women represent all women, the
experiences of African American women represent 'women of color,' and the differences between African American and White women represent all racial/ethnic differences." n42 Moreover, a regime of uncritical criminalization of domestic violence through the spread of pro-arrest and mandatory arrest programs has helped to "hide the social and political conditions that foster battering," especially among poor and nonwhite women. n43 Again "looking to the bottom" for analytical and remedial guidance, n44 Professor Coker details examples of sociolegal impediments to Latina agency and well being in domestic violence contexts due to the multiintersectional impact of personal and structural identity variables. The net result is an extraordinarily strong demonstration of the complex and discernible ways in which social, economic, and legal factors combine [*910] both to complicate as well as to neglect and marginalize the lives and interests of women of color and poor women in domestic violence policymaking and, by extension, perhaps in other policy arenas as well. In my view, Professor Coker's essay sets a standard for LatCrit attention to social particularity and multidimensionality in critical antisubordination analysis.

Despite its daunting depiction of social reality, this essay, like the preceding ones, is firmly committed to envisioning and promoting social change through antisubordination analysis and sociolegal reform. Recognizing that the particularities of different socially constructed situations "defy easy analysis," this essay shows how contextualized critiques of prevailing conditions and possible alternatives can yield tailored policy interventions geared to a constant social justice objective: rather than rely on essentialist stereotypes as the basis of a "one-size-fits-all" policy approach, "resources should be made available to women so that, with assistance, they can make the determination about the best course of action based on their own set of circumstances." n45 The policy objective is plain: empowerment of abused women through the targeted delivery of material as well as other resources. While confirming the indispensability of socioeconomic context and other axes of particularity in social justice analysis and in sound lawmaking, this essay effectively urges LatCrit theorists to persist both with particularity and diversity in antisubordination discourse and praxis. This essay, like the preceding ones, thus beckons LatCrit and allied scholars to check, and perhaps cure, the social ills and legal effects of Euroheteropatriarchy through hopeful acts of resistance against the suppressive identity politics of historically and presently dominant forces.

In urging the grounding of policy in contextual multidimensional analysis, this concluding essay, again like the ones before it, finds and proffers emancipatory recommendations geared to antisubordination resistance sustained and informed by a sense of hope for and vision toward a materially and ethically better future. Disclaiming "simplistic" solutions to variegated domestic violence issues, Professor Coker nonetheless manifests a strong belief in the possibility and viability of substantive sociolegal advancement through multidimensional interventions grounded in the insights [*911] and methodologies of outsider jurisprudence. In so doing, this essay raises again the role or potential of hope in antisubordination discourse and praxis; this essay, like the preceding trio, implies or exudes a sense of hope as a positive ingredient in the imagination and implementation of a social justice movement. In different ways and with different foci, each of the following essays points to a positive conjunction of identity, resistance, and hope in the articulation and sustenance of historic and contemporary struggles for liberation.

As a set, these essays certainly continue and advance the LatCrit engagement of religion, race, class, gender, immigration status, culture, and language from an antisubordination, antiessentialist perspective. They further a balancing of continuity, variety and diversity in the critical and self-critical development of LatCrit discourse. In performing this complex balancing act, the following quartet of essays also reveals some key features of the LatCrit enterprise at this particular juncture in its ongoing evolution.

To begin with, this cluster of essays displays yet again, and confirms, the difficulties presented by the legacies of organized religion specifically in Latina/o communities, and also more generally. These legacies comprise today's antisubordination battlefields, including: colonialism, white supremacy, patriarchy, heterosexism, structural economic inequality, and other human horrors. This church, of course, did not invent or exclusively champion these structures of inequity, but it has cast its lot over the course of history, by and large, with the forces promoting and benefiting from these oppressive ideologies. As Professor Padilla and others point out, individuals operating within the church sometimes are able to channel church actions or resources toward progressive ends or ideals, or, as Professor Rey especially recounts, symbols can be inverted, thus making the overall record complex. Yet these essays collectively also make plain that this overall record contains "awesome" examples of "systematic destruction" and (sometimes still continuing) examples of total exclusion aimed at persons and groups on the basis of their race, culture, religion, sex, gender, sexual orientation and/or class.

While opportunities for redemption no doubt can be found in the intricacies of history, the overall record
makes the project of reconciliation on substantive terms difficult to imagine, much less to articulate and implement, because what matters most are the cultural influence and social impact of the church as an institution with proprietary control of a vast and well-established belief system, which uses dogma mightily to control the making of law and policy. n46 On this point, the historical record is foreboding: these hopeful essays show how and why historicity in LatCrit theory presents a daunting challenge for critical and selfcritical efforts to integrate "religion" into antisubordination theory and praxis.

However, as Professor Luna notes, the difficulties stem not only or even chiefly from historical legacies, though these legacies no doubt add to the difficulty. The reasons why the reconciliation of formal Catholic dogma, practices, and institutions with antisubordination principles is a difficult project includes an enduring aspect of social life: the ecclesiastical machinery that owns title to and exercises dominion over the emblems and resources of the church, tangible and otherwise, elects to deploy them today, still "systematically," to oppress persons and groups on the basis of identity and identification. Without questioning the value of personal benefit through the comforts of faith, the current record presents a continuation of history that is just as foreboding: the church institutionally and systematically still deploys its resources to cause social and legal effects that are detrimental -- in material and other terms -- to many Latinas/os and others on the basis of identity and identification. Without questioning the value of personal benefit through the comforts of faith, the current record presents a continuation of history that is just as foreboding: the church institutionally and systematically still deploys its resources to cause social and legal effects that are detrimental -- in material and other terms -- to many Latinas/os and others on the basis of identity and identification.

The following essays thereby serve to remind us of a related point: the vindication of religion ultimately cannot be secured solely or primarily by the personal faith or unilateral insight of its LatCrit believers. A sprawling and sophisticated institution does exist, exerting conscious and calculated influence over the course of events, as an institution, with a highly centralized power structure headquartered in and cloaked by its own sovereignty as an internationally recognized state: the Vatican. This church's power to help give shape to the material world around us stems in part from its control, as a recognized and actual institution, of massive material resources, and as the long-time beneficiary of myriad tax advantages and other sociolegal and socioeconomic benefits that magnify ever more this religion's assets as a formal and socially aggressive institution. The enrichment of our collective critical engagement with "religion" that these essays exemplify is a necessary and ongoing priority among LatCrits today. But the LatCrit social justice challenge ultimately must also confront whether the power-wielding institutions of organized religion somehow can be socially tranquilized, even if not authentically converted to the cause of anti-essentialist, antisubordination praxis.

A second feature of the LatCrit enterprise at this moment in its young history, also indicated by the following essays, is the growing incorporation of class issues in the multidimensional analysis of sociolegal subordination. As a set, these essays make class and political economy a pervasive and integral component in their approaches to the particular webs of power they seek to disentangle and dismantle. For instance, the Luna essay traces the confiscation and manipulation of wealth as an instrument of racist, sexist, and religious colonization and resistance to it; n50 the Rey essay highlights "elite and popular" constructions and activations of the Virgen to sustain socioeconomic, as well as political and cultural, hierarchy and resistance to such colonization; n51 the Coker essay centers "economic dependency" in the power dynamics of abuse and in the antisubordination design of domestic violence interventions as applied especially to Latinas and other women of color. n52 The recurrence and prominence of class analysis in these essays bodes well for LatCrit theory and outsider jurisprudence more generally, as it helps to excavate insights and interconnections long neglected in our collective record to date.

This engagement of class, poverty, and economic stratification is necessary not only to map the glaring,
but complicated, interlacing of race and class in law
and society, it is also warranted by the original
inclusion of class issues in outsider jurisprudence's anti
[*915] subordination project. n53 and by the central
role of this construct in any agenda trained on
antisubordination transformation. Unwilling to settle
merely for formal or abstract equality, LatCrit theory,
like its predecessors and allies in outsider
jurisprudence, has set its sights on the actual
transformation of material social conditions. n54
Though class-based transformation by itself is not, and
by itself cannot produce, multidimensional social
transformation, the latter cannot be materialized
without the former. The material transformation of
socioeconomic realities effectively requires a
reconfiguration, or abolition, of traditional patterns and
preferences that construct extant forms of political
economy, class stratification and identity politics. As
these essays plainly recognize and confirm, LatCrit
and allied scholars must center class, color, culture and
political economy in multidimensional antisubordination
critiques to help transform society and achieve our collective social justice goals.

Moreover, initiating and sustaining class analysis can
aid LatCrit theorists' continuing effort to theorize the
formation and operation of outsider jurisprudence as a
distinctive intervention in legal discourse. For instance,
outsiders' approach to class analysis should query why
feminist, critical race, Queer, LatCrit and other
perspective movements have arisen during the past two
decades while a class-based subject position remains
unrealized. This question, of course, implicates the fact
that group identification and connection on
socioeconomic class grounds has little, if any, basis in
the American polity. On the contrary, class position as
a form of "identity politics" has been decidedly
discouraged as part of this nation's egalitarian
mythology and its relentless pursuit of "free markets"
and "merit"-based capitalism, both of which vaunt the
endless and untroubled malleability of class positions
and formations. Scholars in this country therefore do
not have a ready-made springboard from which to
articulate and activate class positionality and
perspectivity as a site of antisubordination identity,
community [*916] and politics. Yet the seeming
permanence of racism's effects, including the
production of an impoverished "underclass" of color,
n55 points to class positions and relations as untapped
sources of individual and group identity ready for
antisubordination enlistment.

These observations on class and multidimensional
analysis in LatCrit theory and allied genres of outsider
legal scholarship of course raise more questions than
can be answered in this Introduction, but they show
that our collectively postponed critique of class
formation, political economy and identity politics may
uncover innovative and effective strategies for social
transformation. These observations suggest that
antisubordination analysis and re/organization of
"class" through critical legal scholarship and praxis can
help to connect theoretical and political conditions to
promote social justice across various overlapping webs
and categories of disempowerment. These essays
vividly illustrate the significance of a long overdue
task: together with other progressive scholars, LatCrits
can and should take outsider antisubordination efforts
and tactics into promising, but underdeveloped,
domains by theorizing class consciousness as integral
to our multidimensional, anti-essentialist social justice
struggles. n56

In addition to these substantive features, the following
essays also project a continuing richness of
methodology in LatCrit scholarship at this point in
time. In these essays we witness scholars bringing to
be bear on antisubordination projects both various
disciplines and varying methods, ranging from history
and sociology n57 to cultural narrative and empirical
studies. n58 Happily, these essays illustrate and affirm
the LatCrit commitment to diversity not only in
subjectivity, but also in methodology.

In closing, these four essays, individually and
collectively, project a determined balancing of
skepticism and optimism. They rely, to varying
degrees, on a sense of hope to counter the weight of
tragic histories and toxic legacies. In some respects,
they even might en [*917] tail some leaps of faith,
religious or otherwise. This positive outlook might
seem odd, given the entrenched power of the
subordinating structures they confront and the
complexities presented by remediation, much less
transformation. But does this sense of hope in any way
distract from the sense of "disenchantment" that
characterizes or motivates much outsider scholarship,
including this quartet of essays? n59 To be sure, blind
hope can be a sign of dangerous naivete, but is it
always necessarily and automatically so? Or, may hope
somehow help to sustain proactive resistance against
sources of oppression and disenchantment? These
authors' sense of optimism and hope seem to suggest
the latter -- that hope can serve, and has served, as the
source of strength and vision at precisely those
moments when the rationality of perseverance in
antisubordination struggle may be most tested.

This sense of hope is not offered in the following
essays without sense of criticality, however. Nor
should it be. Rather, as these essays indicate, hope as
antisubordination method in outsider jurisprudence
must be accompanied by a rigorously multidimensional critique of the webs of power that
suppress and violate disfavored humans. Hope, as all else in LatCrit theory, must be informed by critical and self-critical approaches to antisubordination theory and praxis. n60 Hope, coupled with antisubordination criticality and self-criticality appears in these pages as another means of nurturing social justice struggle; critical hope, or hopeful criticality, thus joins critical coalitions as another method in the articulation and advancement of social transformation through outsider jurisprudence.

Clearly, LatCrit scholars must acknowledge and appreciate both the dangers and limits of hope as well as the resilience and prevalence of the sticky webs of power that construct identity, orient destiny and constrain agency. Just as clearly, antisubordination struggle must continue even, perhaps most, when the odds seem to make it futile. But, when our work's social relevance or worth must be found in the intrinsic value of antisubordination persistence, the question effectively posed by these essays for the LatCrit com [*918]unity is whether the obligation to persist can, or should be, informed by a critically hopeful vision of our joint capacity to elaborate and coalesce around a substantive commitment to a broadly-conceived postsubordination order. These essays suggest that yes, critical hope in our capacity to generate social progress through persistent and multidimensional grassroots struggle can be an empowering source of strength to sustain both past and present antisubordination efforts, and should be used by LatCrits today strategically toward the accomplishment of social justice ends.

Though some may disagree, I could not agree more because, in my view, outsiders cannot struggle for very long toward that which we cannot envision, and we are unlikely to accomplish anything of enduring value that we cannot or have not envisioned.

The closing observation prompted by these essays, then, is that LatCrit scholars, like other outsiders engaged in a long term struggle against enduring and complex webs of subordination, must be able to articulate a hopeful yet critical and practical vision of a postsubordination order, for which "we" then can decide jointly to struggle. But this sense of vision must be grounded in more than critical hope and praxis, of course. Postsubordination vision, to be effective jurisprudential method, must spring from and be guided by the many lessons and gains of our collective experiments as outsiders in the legal academy. Postsubordination vision, grounded in our collective jurisprudential record and informed critically by a sense of hope in our capacity to mold a better world than we inherited, must be a collective effort that articulates and produces the substantive principles and commitments necessary to the attainment of sociol egal equity for all groups and persons disempowered by Euroheteropatriarchal ideologies. n61 This sense of critically hopeful vision, in addition to history and more than identity, must increasingly become the organizing principle of collective antisubordination enterprises, jurisprudential and otherwise. n62 The passage of time, and the critically hopeful efforts that LatCrit and allied scholars devote to antisubordination vision and struggle, will help to determine whether today's emancipatory hopes become tomorrow's social progress, but, fittingly, the following quartet of essays nudge us now in the right direction.

FOOTNOTE-1:


n2 In this Introduction, I employ the term "web" as a metaphor more conducive to multidimensional analysis than is "intersection." In the legal academy, or among those in it identified with outsider jurisprudence, including LatCrits, multidimensional analysis in recent years has begun to emerge as the standard of antisubordination theory and praxis. The move toward multidimensionality in outsider jurisprudence began with "intersectionality" and "multiplicity." See, e.g., Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241 (1991); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990); Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 Women's Rts. L. Rep. 7 (1989). This work has continued with the articulation of ideas to complement and evolve these initial breakthroughs. See, e.g., e. christi cunningham, The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases, 30 Conn. L. Rev. 441 (1998) (on wholism); Berta HernandezTruyol, Building Bridges -- Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement, 25 Colum. Hum. Rts. L. Rev. 369 (1991) (on multidimensionality); Darren Lenard Hutchinson, Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse, 29 Conn. L. Rev.
They also serve the four basic aims or functions of critical legal theory, which, in my view, are: the production of critical and interdisciplinary knowledge; the promotion of substantive social transformation; the expansion and interconnection of antisubordination struggles; and the cultivation of community and coalition among outsider scholars. For further discussion of these four functions and their relationship to LatCrit theory, see Francisco Valdes, Foreword -- Under Construction: LatCrit Consciousness, Community, and Theory, 85 Cal. L. Rev. 1087, 1093-94 (1997), 10 La Raza L.J. 1, 6-7 (1998).

To date, the LatCrit gatherings in the United States include two colloquia and four conferences. The first colloquium was held in Puerto Rico in 1995 and the second in Miami in 1996. The first conference, LatCrit I, was held in San Diego in 1996, LatCrit II in San Antonio in 1997, LatCrit III in Miami in 1998, and LatCrit IV near Lake Tahoe in 1999. The next LatCrit conference, LatCrit V, is scheduled for Denver in 2000. In addition to these gatherings, an annual LatCrit-Spain symposium, held at the Universidad de Malaga Facultad de Derechos, was inaugurated in 1999 and is scheduled to be held again in the summer of 2000.


See generally Kwan, supra note 2.

See generally supra note 2.


See Terry Rey, "The Virgin's Slip in Full of Fireflies": The Multiform Struggle over the Virgin Mary's Legitimierende
Macht in Latin America and Its U.S. Diasporic Communities, 33 U.C. Davis L. Rev. 955 (2000).

n9 See Laura M. Padilla, Latinas and Religion: Subordination or State of Grace?, 33 U.C. Davis L. Rev. 973 (2000).

n10 See Rey, supra note 8, at 955.


n12 By "Euroheteropatriarchy" I mean the fusion of white supremacy, Anglocentrism, androsexism and heterosexism, which are bundled together to produce the current sociolegal ecology of interlocking precepts, networks, and hierarchies that combine to place white, especially Anglo, straight, gender-typical men at the center of all social and legal institutions. See generally Francisco Valdes, Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender, and Sexual Orientation to Its Origins, 8 Yale J.L. & Human. 161 (1996) (analyzing specifically sex/gender aspects of this hybrid).

n13 See Luna, supra note 7, at 921-26, 928-42.

n14 For an exposition of the critique from the bottom, which has been foundational to outsider jurisprudence, see Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323 (1987); see also Iglesias & Valdes, supra note 6, at 515-21 (counseling adoption and employment of this methodology in LatCrit theory).

n15 Luna, supra note 7, at 931-32.

n16 See id. at 945-52.

n17 Id. at 944.

n18 See infra notes 46-48 and accompanying text.

n19 See id. at 929-38.

n20 See id. at 952-54.

n21 Rey, supra note 8, at n.15.

n22 Id. at 957.

n23 See id. at 963-67.

n24 See generally Religion and Spirituality in Outsider Theory: Toward a LatCrit Conversation, 19 Chicano-Latino L. Rev. 417 (1998) (presenting cluster of essays on "religion" and LatCrit theory from various perspectives); see also Iglesias & Valdes, supra note 6, at 511-55 (discussing those essays in context of LatCrit theory).

n25 Rey, supra note 8, at 963.


n27 I refer, for instance, to the choice of "Latina/o" over "Hispanic," as well as to the problematics of that choice vis-a-vis indigenous peoples both within and outside of "Latina/o" communities. See Iglesias & Valdes, supra note 6, at 568-70.

n28 See, e.g., supra note 14 and accompanying text.

n29 See Valdes, supra, note 1; see also supra note 2 and accompanying text.

n30 Padilla, supra note 9, at 974.

n31 Id. at 986.

n32 For an example of "border-crossing" analysis from earlier LatCrit symposia, see Margaret E. Montoya, Academic Mestizaje: Re/Producing Clinical Teaching and Re/Framing Wills as Latina Praxis, 2 Harv. Latino L. Rev. 349 (1997).

n33 The political relevance of legal scholarship has been recognized in LatCrit theory from inception. See Valdes, supra note 1, at 53 (noting that, "Perhaps the foundational message that resonates through the works in [the LatCrit I] symposium is that all legal 'scholarship' is necessarily and fundamentally 'political' because law is used to structure society and theory helps to construct law"). See generally Francisco Valdes, Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility in Social Justice Scholarship, 75 Denv. U. L. Rev. 1409, 1412, 1459-63 (1998) (emphasizing importance of critical legal theory and
praxis in legalistic society, such as one we inhabit).

n34 Padilla, supra note 9, at 988.
n35 Id. at 994.
n36 Id. at 989-1001.
n37 See, e.g., Iglesias & Valdes, supra note 6, at 535-45.
n38 See id. (proffering liberation theology as instructive model of antisubordination discourse and praxis, and focusing on few particular examples of its utility in LatCrit theory).
n39 Coker, supra note 11, at 1055.
n40 Id. at 1024.
n41 Id. at 1026.
n42 Id. at 1029.
n43 Id. at 1016.
n44 See supra note 14 and accompanying text.
n45 Coker, supra note 11, at 1020.
n46 See generally Editorial, Church, Politics, Abortion, Miami Herald, Nov. 21, 1998, at 24A (objecting to "use of public office to translate church doctrine into general law"); see also Sara Diamond, Spiritual Warfare: The Politics of the Christian Right (1989). See generally Kenneth L. Woodward, 2000 Years of Jesus, Time, Mar. 29, 1999, at 52 (assessing in mass culture format how Christianity has helped to shape "Modern World," from "Holy Wars" to "Helping Hands"). Consequently, and despite the formal separation of church and state written into the Constitution, the cumulative cultural sway and concerted political campaigns of organized religions makes the religious beliefs and attitudes of even presidential candidates an electoral issue. See, e.g., Jodi A. Enda, Religion Becomes a Defining Issue, Miami Herald, Nov. 14, 1999, at 3A.
n47 An easy example is persons and groups characterized by minority sexual orientations, both within and beyond Latina/o communities, who continue to be a prime target of religious assault and exclusion. See Iglesias & Valdes, supra note 6, at 546-61. In addition, as Professor Padilla notes, the Church today closes the door on women when positions of influence at the higher echelons within the hierarchy of the institution are involved, even though women of course are permitted to perform certain services for the Church. See supra notes 34-35 and accompanying text. It should be noted that the Church's current persistence with aggressive evangelism continues to spark the objection of indigenous or non-European, nonwhite people, sometimes to the point of sparking violent riots to protest the imperialisms associated historically and presently with evangelical missions. See, e.g., Alessandra Stanley, Pope Tells India Church Has a Right to Evangelize, N.Y. Times, Nov. 8, 1999, at A3; see also, Uli Schmetzer, India Gives Pope Low-Key Reception; Hindu Militants Force Elaborate Security Plans, Chi. Trib., Nov. 6, 1999, at 4. The contemporary response of the Church to such reactions, as recently issued from its highest authority, the Pope, is simply to reassert "apostolic exhortations" that insist on the unfettered right to convert others anywhere and everywhere in the world. Id. While the "freedom of religion" that properly is every human's right no doubt encompasses activity that might be described as conversion, the point of difficulty, not to be missed, is how a powerful institution orchestrates its resources internationally to mount socially significant campaigns; the questions arising from this point, and making reconciliation difficult because of the answers compelled, are: who benefits from these institutional campaigns, and who hurts? Accepting the proposition that faith in organized religions provides comfort to some individuals, why should support be extended for suppressive institutional or dogmatic campaigns and their consequences, whether in the form of tax breaks or personal fealty, in light of their social, economic, political, and legal imperatives or effects?
n48 For recent summary descriptions, see Iglesias & Valdes, supra note 6, at 523-27, n.45-60.
n49 The divisive and vexatious power of human faith in organized religions prompted James Madison to cite this phenomenon as one of the reasons for a
system of government that separates and disperses political power: "different opinions concerning religion" cause humans to "vex and oppress each other." The Federalist No. 10, at 18 (James Madison) (Roy P. Fairfield ed., 1966).

n50 See Luna, supra note 7, at 936-37.

n51 See Rey, supra note 8, at 957-71.

n52 See Coker, supra note 11, at 1024-32.

n53 This early focus, and its general lack of development during the first decade, were discussed in Stephanie Phillips's presentation at the Eighth Annual Critical Race Theory Workshop in 1997, and is further elaborated in Stephanie L. Phillips, The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History, 53 U. Miami L. Rev. 1247 (1999). There has been a reengagement of class in outsider jurisprudence.

n54 For one view of LatCrit theory vis-a-vis other strands of outsider jurisprudence, see Francisco Valdes, Afterword - Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience -- RaceCrits, QueerCrits and LatCrits, 53 U. Miami L. Rev. 1265 (1999).


n56 Fittingly, the planning committee of LatCrit V, the Fifth Annual LatCrit Conference, scheduled for Denver in May 2000, has adopted a class-oriented conference theme, "LatCrit Theory and Praxis in a World of Economic Inequality." See generally supra note 3 and accompanying text.

n57 See, e.g., Luna, supra note 7; Rey, supra note 8.

n58 See, e.g., Coker, supra note11; Padilla, supra note 9.

n59 See Angela P. Harris, Foreword -- The Jurisprudence of Reconstruction, 82 Cal. L. Rev. 741 (1994) (discussing tension of optimism and pessimism associated with modern/postmodern elements in critical race theory, including commitment to struggle for actual social change while at same time recognizing daunting proposition that social justice advocates face).

n60 See Iglesias & Valdes, supra note 6.


PIERCING WEBS OF POWER: IDENTITY, RESISTANCE, AND HOPE IN LATCRIT THEORY AND PRAXIS: Gold, Souls, and Wandering Clerics: California Missions, Native Californians, and LatCrit Theory

Guadalupe T. Luna *

BIO:

* Professor of Law, Northern Illinois University, College of Law. Caution: I am not a theologian, a scholar of religious studies, or a practicing Catholic, and, thus, am not here with an evangelical cap but rather with my scholastic cap. The intent of this Article, moreover, is not to advocate religion one way or another. With much appreciation I thank David Cruz and the LatCrit IV committee for organizing this panel and Berta Hernandez-Truyol and Elvia Arriola for their support and encouragement.

SUMMARY: In line with past LatCrit objectives regarding the relationship between our Latina/o communities and religion, this Essay considers the role of California missions as sacred architectures of conquest and colonization. To their detriment, Native religiosity did not correspond with European ideas on religion. Indigenous social and political structures and Native land use practices also clashed with European ideology. The race and culture of tribal groups thereby conflicted sharply with European notions of white superiority.

HIGHLIGHT: We came here for the single purpose of doing them good and for their eternal salvation, and I feel that everyone knows we love them. "You can take your Christianity I don't want it."
groups of "traveling clerics" infuse this brand of Roman Catholicism n18 and in the process complete so much fragmentation of a distinct ethnicity, culture, and religiosity? What role did law play in ensuring such drastic changes in the Indigenous populations, both in respect to Native society and religious cosmos, not only in California but in Mexico as well? n19 Although absolute answers refuse to surface, the role of the state in the conquest of Indigenous America offers a potential "template" for the LatCrit enterprise.

As observed, "the maintenance and regulation of relations of production in the interest of the dominant class is the primary goal of legal ideology in the hands of the holders of state power." n20 In looking to Spain's actions in California a template emerges. Outside of European notions of religious and racial justifications of the conquest, Spain feared encroachment from competing European nations. In seeking to protect its hold on the region and keep its rivals at bay, Spain appropriated Native Californians for their labor and land base. In line with past successes of conquest in Mexico Antigua and with very little financial effort, Spain also relied on its crusaders for Christianity. Christian evangelism, with its long history of displacing the spiritual and religious world of Indigenous America and in California allowed Spain to accomplish many of its defined goals.

The friars Spain sent to California were educated men and retrained a world view perspective. When they were converting the Indigenous populations, the Age of Enlightenment had emerged, n21 as well as the United States Constitution, allowing individuals "inalienable rights." n22 Yet the Spanish friars "saw Indians as errant children who could become model Christians only with stern guidance and constant supervision." n23 This interpretation facilitated their identification of Indians as "heathens" or "subhuman beings who were easily domesticated." n24 Saving souls for Christianity, therefore, as apologists of the period argue, did not allow the friars to see the brutality of the whippings, floggings, incarceration and the violence of forced acculturation that erupted with this evangelism. n25 The resulting deaths from disease, inhumane treatment and discrimination, nonetheless, provide evidence of the harshness of this form of Catholicism. n926

During the historical period, the removal of the Jesuits by royal order defined the boundaries of relations between the Franciscan friars and Spain. Notwithstanding the banishment of the Jesuits from New Spain, forced conversion witnessed the friars as active agents of the state in dispossessing Native communities of their material, social, and spiritual world throughout Indigenous America. n26 This issue bears directly on the jurisprudence of LatCrit theory.

In connecting this concern to the present, attorneys sign oaths and make ethical promises as conditions subsequent to securing a license that establishes our relationship with the state. A refusal to obey certain rules brings forth possible state enforced sanctions obligating allegiance. In some instances we are permitted "safe" spaces in our profession only where the status quo remains unchallenged. n27 Can this relationship disallow law's impact on the subaltern and also establish reciprocal relationships with those communities held hostage to the arbitrary whims of the state and treatment of the marginalized?

Finally, the effects of blanket essentialism regarding the treatment of Native Californians and in some instances, their Chicana/o descendents, also presents an immediate issue. Specifically, Spain's rivals seeking access to the region condemned the Spaniards for their treatment of Indigenous America. Accordingly critics of Spain "vigorously criticized the most conspicuous institution of their colonization, the mission" n28 for their own personal gain. Drawing from the negative stereotypes of Mission Natives and the friars' treatment of them, "La Leyenda Negra" (the Black Legend) allowed such characterizations that marked the "Spaniards and Mexicans as unworthy of California." That a few padres n927 protected some California Natives facilitating their survival underscores this point. n29 Nonetheless, a wide realm of negative stereotypes thereafter facilitated the United States conquest of Alta California for the treatment of Indigenous California under Spanish governance and its "failure" to industrialize the region's natural resources. This followed Mexico's independence from Spanish governance. n30 Displacement of Native and Chicana/o landowners from their property and ownership of natural resources thereby became grounded in culturally based negative stereotypes.

The primary documents, and more specifically, the narratives of Native Californians, permit Native populations a "space" in the present. Moreover, the "lessons" derived from the experiences of Native Californians allow for the application of LatCrit theory, thus benefiting LatCrit jurisprudence. Accordingly, Part I presents a brief historical overview of Native California. Adversely affected tribal groups in the region witnessed the degradation and loss of their land base and fractionalization of their religious cosmos and societal values. Within the realm of the Hispanic conquest, however, conflicting evidence also shows that several individuals attempted to help the Indigenous population and accordingly introduces a complex array of issues. Part II therefore addresses the
impact of Hispanic religious "enthusiasm" and foreign contact with Native California. The consequences of this form of imperialism, however, are not limited to the ancient past. The ongoing struggle over the rich natural resources of Indigenous communities and legal efforts to curtail Native religiosity serve as reminders. n31 While [*928] the role of missions and their relationship with Native Californians presents a contested paradigm that calls for further critical reflection, Part III contemplates several lessons drawn from mission evangelism.

I. Precontact: Indigenous California

The Native Californians were not simply in California; they were California. They were an integral and essential agent in the creation of a balance of land, vegetation and animal life. n32

Prior to Hispanic entry, estimates of Native Californians range from 310,000 to 700,000 people situated throughout the region. n33 With over 1000 individuals occupying the larger locations, Native Californians grouped into villages, rancheria, or as band peoples. n34 That Native Californians engaged in a close relationship with their natural surroundings is seen through tribal classifications. The Bullfrog people, for example, identified the Central Sierra Miwok of Tuolumne County, who resided near water. The Bluejay people characterized the Miwok residing away from bodies of water. n35

Several tribes occupied various portions of California. The Wintun resided west of the Sacramento River while the Maidu occupied the eastern side of the river. The Cosumnes occupied the Sierra foothills and the Miwok lived in the Merced (except Lake and Coastal Miwoks). The Yokuts resided in the San Joaquin Valley, and the Costanoan tribe inhabited the area south of San Francisco. n36 The Pomo, recognized for their basketwork, occupied [*929] Sonoma, Lake, and Mendocino counties. n37 The Chumash, skilled navigators and fisherman, inhabited the southern Coastal Ranges, and the Yuman the southeastern portion of the state and along the Colorado River. n38

The basic unit of political organization encompassed the village community, or tribelet, comprising several small villages, ranging from an acre to two hundred to three hundred square miles. n39 Territorial assertions of their geographic land base are also documented. Although principally food-gatherers, several of the tribes relied on fishing and small game hunting for subsistence with others agriculturally based. Throughout the region, Native groups spoke approximately 135 different Indian languages deriving from twenty-one or twenty-two linguistic families. After foreign entry, demands from outsiders sought to eliminate their race, ethnicity, religiosity, and culture. n40 What was lost directs the forthcoming lessons for the jurisprudence of the LatCrit enterprise.

II. Foreign Contact: Hispanic Conquest and Ideology: 1769-1821

By the royal order of August 22, 1776, the northern and northwestern provinces of Mexico were formed into a new and distinct organization, called the Internal Provinces of New Spain. This organization included California. n41

With over two hundred years of colonial experience during the conquest of Mexican Indians, Spanish law and policy fully prepared its explorers and crusaders heading for the California coast. [*930] While external international events mobilized the Spaniards to protect its territories, its invasion of the region also constituted a joint religious/military enterprise as witnessed by Spain's mission structures. n42

A. Mission Evangelism

Catholicism has been the official religion of Spain since time of the Visigoths. As far as the church in Spanish-America was concerned, the King of Spain was supreme patron. n43

Considered "reduccion" or "congrecion," mission structures n44 adopted from earlier colonization of Indigenous America in the California region extended from the Mexican border to the north. n45 Two Franciscan friars headed each mission complex, one charged with temporal affairs, and the second directing spiritual affairs. The theory underscoring the mission complex charged the friars with "training" the Indigenous population "to be good Catholics and loyal subjects of the Spanish crown" n46 and holding mission land in trust for the neophytes (converts). Once deemed "acculturated," the friars were to release mission Indians into "white society." The missionization of Native Californians was to last in some cases at least ten years. Thereafter secularization of the missions for distribution to the neophytes subsequent to their "assimilation" into Hispanic culture was to follow next. n47 Land [*931] awarded for missionary work was thus not made to the "Church per se." n48

1. Roman Catholicism and Indigenous California

Not unlike its control of Indigenous communities in ancient Mexico, Spain also depended on the intimate relationship between the soldiers and priests to effectuate its hold of Indigenous California. The use of missions and friars in the conquest "illustrates the unique blend of church and crown, of secular and spiritual matters, in the Spanish empire." n49 This relationship, a combination of the spiritual and the
While mission records provide accounts of the large numbers of neophytes converted to Catholicism, the act of conversion did not comprise a meaningful one but consisted in a number of cases of simply sprinkling water on the neophyte. Having baptized the neophytes, the friars changed the names of the neophytes. Losing their independence, freedom, and unique religiosity, the neophytes became the legal wards of the friars. n52 Through attendance at religious services, the friars required the neophytes to learn new forms of worship and spirituality. Soldiers with bayonets guarding entryways disallowed the escape of converts from Church rituals. Bailiffs, using whips, canes, and goads "to preserve silence and maintain order, and what seemed more difficult than either, to [*932] keep the congregation in their kneeling posture," n53 also held Native Californians hostage to Church rituals. In a number of instances, soldiers physically harmed the neophytes, and accounts of soldiers raping Native women in some missions is well-documented in historical investigations. n54 This relationship caused some to assert that the Spaniards offered the neophytes the "crucifix or the lance," leaving them, in the words of an Indian leader, "no room to choose between Christ and death." n55 While not all Native Californians experienced conversion and displacement, this Christianity nonetheless also extended beyond mission infrastructures by its effect on tribal society and gender relations. n56

3. Catholicism and Restructuring Tribal Societies

We are familiar with the history of California. We fully appreciate that the missions are reminders of a past filled with poesy and romance. n66

Regardless of the side of the conquest on which one fell, Christianity introduced significant changes to Native California. In exchange for Catholicism and its attendant forced acculturation, the friars prohibited Native initiation ceremonies, dances, and songs, and, as some assert, "sought to destroy the ideological, moral and ethical systems that defined native life." n67 The evidence of such assertions demonstrates the loss of rituals, ceremonies, and other attributes of Native culture and religious cosmos. The transformation in their own beliefs and political and religious systems additionally resulted in a rigid caste system.

As in Mexico, the Spaniards imposed on the Indigenous population a caste system in which they declared themselves purebreds (peninsulares). In this system whites (the Spaniards) self-identified as "gente de razon" (people of reason), and occupied the highest positions of power privileged by their place in society. In contrast, the Spaniards identified those born with a mixture of Indian and Negro blood as castas who, along with imported African slaves, occupied the
Native polytheism was displaced by a religiosity characterized by Vine DeLoria as an angry theology. Yet another significant change affecting tribal society was a patriarchal ideology in which Catholic rituals and practices redefined social and sexual relations between men and women. The ceremony of marriage, for example, introduced sexual repression, and by their division of labor in church rituals, the friars also lowered the status of Indian women. With Hispanic arrival and its emphasis on marriage came heterosexual privilege replacing tribal societal values. In their place, Antonia Casteneda asserted that gender hierarchy, male domination, and heterosexuality became the "exclusive organizing principles of desire, sexuality, marriage and the family." The friars also accelerated the demise of former tribal societies by aligning themselves with individuals to control the non-Hispanic population. In Mission San Luis Rey de Francia, Luiseno neophyte Pablo Tac wrote, "the Fernandino Father is like a King, having his pages, Alcaldes Y Mayordomos [Spanish overseers,] Musicians, and Soldiers." These friars undermined "traditional Indian village chiefs' authority" and "represented a sharp break from the tribal kinship groups." En el nombre de Dios, Native cultures witnessed degradation and discrimination with demands of "filial obedience." On an 1816 Pacific expedition to a California mission, artist M. Louis Choris wrote: "I have never seen one laugh. I have never seen one look ["*936" one in the face." Gone was their right to own land, self-governance, Native languages, communication, and their religious cosmos, which Native polytheism was displaced by a religiosity characterized by Vine DeLoria as an angry theology.

B. Analyzing the Mission Evangelism

What many apologists for the Spanish mission system have in common is an extreme low and disparaging attitude toward the Indians of California. Their reasoning appears to suggest that whatever befell the native peoples of Alta California during the mission era, it was preferable to their native culture, and in fact, somehow uplifting. Did the friars succeed in establishing Spain's presence in California with the assimilation of Native tribal members into the dominant group? The mission infrastructure and its economic success provide a measure of the friars' performance. Holding some of the best geographical base in the region, the use of Indigenous labor in building and supporting mission infrastructures and its enormous gardens, not only furthered the material and economic success of mission structures but the state as well. Together with the production of capital and labor, the friars garnered spectacular economic success for the missions. Mission revenues generated from the production of agricultural commodities and goods such as wool, leather, tallow, beef, wheat, maize, and barley greatly enhanced its economic coffers. Mission surpluses, moreover, facilitated supplies to the Mexican interior and export. Some estimates of mission wealth place their value at $78 million in 1834 prior to secularization. Notwithstanding mission/state wealth, Native Californians did not share equally with the state or the mission friars, much less witness the fruit following secularization of the mission infrastructure. Edward Castillo emphasized that "this end goal was never reached." The denial of their meeting "assimilation standards" led by state and mission definitions as false norms disallowed Native Californians the full attributes of Spanish society. While some former tribal members received plots of mission land, the majority did not. Edward Castillo asserts that:

Despite legal and Christian moral arguments put forward by Franciscan historians and others, the Spanish Crown/Franciscan empire benefitted only a handful of natives. The vast majority of California mission Indians were simply laborers in a larger quest for worldwide domination by that eighteenth-century empire. It seems important to the majority of the descendants of these mission Indians that a voice be raised in their defense concerning the alleged benefits Indians received under the empire.

The friars' declarations that the Indigenous population was not ready to assimilate accordingly disallowed distribution of mission lands to the neophytes.

Beyond these considerations still other external events also impacted Native Californians' status. Led in large part by Padre Hidalgo's grito, Mexico gained its independence from Spain following three hundred years of Spanish governance. Mexico's independence changed the status of mission Indians by providing them citizenship status and ownership to some land tracts. And while Roman Catholicism did not leave with the Spaniards, competition from civilians not benefiting from the natural resources of the region ultimately led to the secularization of the missions. Their disbanding also resulted in part from charges that the Franciscans were ineffective in "civilizing" the neophytes, and from the fact that as
citizens under Mexican law they were now equal with whites. n86

While some Native Californians received land, to the detriment of Native Californians most of the mission's land base was transferred to non-Native groups. n87 Many mission Natives left to work on Mexican ranches and with their labor also brought material success to ranch holders and facilitated the settlement of California's major cities. n88 With secularization, a number of church officials were also purportedly reduced to impoverished conditions. n89 Notwithstanding their changed legal standing under Mexican law as citizens, yet another conquest erupted and confronted Indigenous California.

The United States, seeking to connect its eastern coast with the West and access to California's natural resources initiated, a war with the Mexican Republic. In a number of circumstances, de [*939] meaning stereotypes and the Black Legend advanced the conquest of the region. After the conquest, the United States, through the Treaty of Guadalupe Hidalgo, promised to recognize the citizenship of Indigenous groups and protect their property interests. n90 Yet even more so than under the Mexican period, the United States by its breach of the Treaty also brought forth additional disbursal and loss of Native land and citizenship status. n91 The legal rights permitted pueblos under Mexican law were rejected, with pueblos or individuals losing their land and access to its natural resources. n92 Furthermore, judicial actors held that California cities could access the natural resources denied from those previous rejections. n93

Benefiting from the Black Legend Native Californians confronted Manifest Destiny resulting in yet further disbursal and harm. n94 The American regime's demand for their labor used law to entrench its hold on Native Californians. n95 In the early American [*940] period, for example, new laws facilitated the use of former tribal members and their descendants as a labor force. In one instance, this even caused an American reverend to observe that: "In the vine-growing districts they were usually paid in Native brandy every Saturday night, put in jail the next morning for getting drunk, and bailed out on Monday to work out the fine imposed upon them by the local authorities." n96 The new region also allowed illegal Indigenous ceremonial practices, rituals, and dances. n97 Rules, for example, prescribed punishment for certain actions identified as "Indian offenses," constituting in one case, the "sun, the scalp and the war-dance, polygamy," as well as "the usual practices of so-called 'medicine men.'" n98

In contrast to the Mexican period, Anglo-American law, furthermore, denied Native Californians citizenship status and disallowed private ownership of land in a number of repeated circumstances. n99 The Black Legend and the demeaning stereotypes it facilitates allowed American settlers to believe that the Natives were neither deserving nor industrious, and stymied the assimilation of Native Californians. n100 Courts, moreover, used the status as mission [*941] Indians as a false standard in comparing the claims of nonmission Indians reasoning that those not residing in missions were "uncivilized." n101 This new "standard" permitted the rejection of claims of land ownership through ever increasing use of shifting and arbitrary definitions of what and who qualified as "civilized." n102 Later their disbursal and continued tribal fragmentation resulting from such rejections precluded their meeting ever elusive federal definitions of who qualified for tribal status and federal benefits. For Native Californians, now removed from their natural habitat and former tribal structures, yet greater difficulty and onerous circumstances arrived. Without their land or access to natural resources, and with the fracturing of their previous political and socioeconomic structures, Native Californians were reduced to yet further disintegration.

In sum, Native Californians continued to serve as state forming agents ensuring the economic success of the state but with very little granted in return. Could anything they received in exchange compare to what they lost by way of their land base, natural resources and in many instances, their forced labor? Moreover, the denial of their meeting "assimilation standards" led by state and mission definitions of false norms disallowed the full attributes of Spanish society. By the mid1900s only 15,000 remained in the former province. [*942]

III. "Lessons"

The connection between law and the standing of Native Californians obligates us to draw forth several points from the relationship between Indigenous groups and those holding state power. Within this conceptual framework a few "lessons" are considered.

Lesson One: Dr. Jekyll/Mr. Hyde. Throughout history one sees two systems of law -- one applying to "civilized" peoples (ChristianEuropean) and the other applying to the so-called "backwards races." n103 Native Californians faced a European dual system in which white Europeans proclaimed themselves gente de razon (people of reason) and further disallowed Native Californians legal authority. Backed by the state, mission evangelism diminished the stature of Natives to "heathen" status and devised tactics that disallowed Native Californians from joining Spanish society. By the interpretations of a select few, the conquest ensured that Native Californians lacked legal
standing and real authority. Dating from the earliest of Spanish law, officials selectively ignored a compilation of Spanish laws granting protection to Native peoples. n104 The Recopilacion de las leyes de los reinos de las Indias, ("Compilation of the Laws of the Kingdom of the Indies") disallowed the mistreatment of Indians. n105 In New Spain, however, many of its tenets and principles were misapplied and or ignored. n106

The lesson underscored here questions Spain's disregard of the Recopilacion's basic tenets, simultaneously telling Native Californians they were not ready to enter white society. Accordingly the neophytes became landless, and the disruption of the regions' natural habitat ultimately harmed their ability to support themselves with a forever changed environment. n107

Lesson Two: Siamese Twins. n108 While Spain charged the Franciscan order with control of the missions, "every aspect of Spanish activities in California, the structure of the province, and the laws and regulations that controlled her development and functioning, were authorized by the King of Spain, acting through his representative, the viceroy in Mexico City." n109 Its consequences yielded a resultant blurring of jurisdiction between religion and civil matters with parallel reasoning in the present. n110 Traditionally the dominant society closely identifies with a certain religious form, and by that relationship proscribes the vast range of acceptable differences based on moral, evil, and/or other grounds. n111 For religiosity deemed incompatible with those defined norms, history shows law used to facilitate the demise of outsider religiosity.

One example in our time shows politicians and other religious "advocates" arguing for a return to the values, morals, and religious beliefs of the eighteenth and nineteenth centuries. A new law school, for example, declares an emphasis on teaching what the Catholic Church sees as moral truths according to its definitional standards. n112 The forces of the extreme religious right and other advocates are also arguing for deference to religious precepts in courts. n113 closely identified with the interests of the state. These efforts, with striking similarities to the past, obligate closer scrutiny and calls for answers as to the proper relationship between religion, law, and the polity. Spain practiced the antithesis of this with great resultant harm to Indigenous America. Documents exist outside the legal record in which to examine the relevant periods and allow yet further lessons. n114

Lesson Three: Historical Amnesia. With the secularization of the missions, critics assert that the friars failed in their efforts to "assimilate" Native Californians. The evidence demonstrates that very little was granted them in exchange for taking their property interests. Further study of Indigenous history therefore obligates us to look not only for those legal forces that disallowed their full integration but also for the mechanisms used that precluded their full participation into Spanish society. n115

Additionally, much of the credit for the "founding" of California's cities does not go to the Indigenous population, with distortion of the public record dominating the status quo. n116 Narrow readings disregarding the diverse human condition, although quite possibly shaped by the events of the time, also link the past to the present. Law students are taught the principles of law yet, as others have long emphasized, receive little exposure to "social, religious, historical, and other dimensions." n117 The consequences ensure a less than precise history of the country's origins and its legal history.

For example, following the various conquests, several Native members, not unlike the Gabrielenos, married Mexicans with their offspring becoming some of the nation's earliest Chicanas/os. n118 Their descendants experienced a number of legal mechanisms that disallowed into the present their full participation in society. The Chicano Blowouts in which the protests against the disproportionate high numbers of Chicanos drafted into the Vietnam combat represents an example. While a large number of Chicanas/os were physically assaulted during the protest, police actions resulted in the death of newspaper reporter Ruben Salazar. Ruben Salazar had authored a number of articles emphasizing the disparate treatment of California Chicanas/os. His death continues to generate much criticism over the use of law in curtailing Chicana/o voices. Without studying our history, other evidence suggests insufficient analysis in demonstrating the extent to which law established our communities as outsiders.

The Black Legend in which conquerors exploited mission actions for their own gain also hinders a precise historical and legal record. Each region throughout the State and the country experienced the conquest in different ways. The effects of California missions differed from Texas missions as in New Mexico and throughout Latin America. Because of the different historical time frame and circumstances, Native experiences confronting them differed. In many instances this facilitated blaming the culture for its purported "failure" to "assimilate" without regard to the direct causation and events leading to that marginalization.

The Black Legend perpetuated simplistic assertions that blamed the friars and/or Roman Catholicism without considering whether some actually protected
mission neophytes. n119 In the present, priests working in Indigenous communities to protect Native resources and communities and facing death for their efforts emphasizes the complexities of the relationship between the Church and *[^946] Indigenous peoples. n120 Without studying the historical and religious linkages with law our silence accordingly leaves "standard texts" founded on Black Legend stereotypes as privileged, with false records standing as irrefutable universal truths. Accordingly, this lesson requires investigation of the historical and legal record.

Lesson Four: God Is "Red." n121 Once "converted" the descendants of Native California could not attend mass without being forced to sit in the back of churches or in basements away from the dominant culture. n122 At times when Indigenous ceremonies were recognized and practiced, European priests new to the region disallowed Natives' participation or ordered removal of Native paintings from churches. n123 From the colonial period, suppression of Indigenous religious practices continues, with hostility directed towards ceremonies and rituals. n124 This lesson therefore calls for protection of Native religious practices and examining involvement of the Church with state measures that also repress Latina/o communities.

Lesson Five: The Untouchables. Wherever the Spaniards conquered new worlds, legal and religious authority facilitated the transformation[^947] from Indigenous communities to Hispanic colonies. n125 This left in its wake changed transformation of Native cultures supported by state privileges such as control of education with Spanish friars targeting Native children for conversion, which, in turn, also brought in their parents. Catholic missionaries and the Euro-American educational system went to great lengths to "denaturalize or deculturalize" Native peoples through their children. n126

Canon law recognized the personal immunity of ecclesiastics and disallowed remedies for Indigenous groups. Although changed somewhat fueros responded to claims for almost anything deemed "distasteful or injurious to the interests of the Church." n127 Three principal fueros included local, real, and personal prerogatives or exemptions, n128 from taxation or other forms of contribution, personal service, or public duties. Along with positive immunities the right to trial by ecclesiastical courts permitted privileges to a select few.

Special courts, presided by clerical judges ruled by canon law, heard and tried cases involving clergymen with an end result from very early on leading to abuse and "created a class of untouchables -- a class elevated above the rest, that none of the means of social control or civic sanction could reach." n129 The separation of religion from state legal authority in principle disallows the reach of several legal precepts and rules, and must be examined to ensure that subordination of our communities does not linger.

Lesson Six: Monja Alert. In the contemporary period, previous versions of papal privilege exist that continue to marginalize women both within and outside church institutions. For example, the denial of tenure to nuns and others advocating greater freedoms for women creates a special elite by limiting the involvement[^948] of women as key principals in Church law and teachings. n130 Additionally, the separation of religion from state legal authority in principle disallows the reach of several legal precepts and rules. n131

Lesson Seven: Toypurina Alert and Insurgency. Throughout history numerous examples show that with division comes conquest. The Spaniards in the conquest of Mexico benefited from the highly centralized and stratified nature of the Aztec, Maya and Inca Empires. Within tribal society, California Natives did not speak of themselves as "individuals/the self and society" but instead identified as "the self in society." n132 Nonetheless, more recent accounts attribute women leaders as seeing more clearly than others exactly what their gender would lose in Spanish civilization, and serves as an example. n133 Toypurina, a shaman leader from the Japchavit rancheria, for example, led a pantribal movement against Mission San Gabriel. n134 At her trial she declared her purpose was to drive the foreigners from her land. n135[^949]

Covert actions also show Native resistance against the status quo but which until recently remained hidden history. In the Stations of the Cross in Mission San Fernando for example, the faces of Jesus's tormentors along the Via Dolorosa are Indian faces as carved by Native Californians. Graffiti is also found in early layers of whitewash on mission walls and several altars, choir lofts and opposite the pulpit also containing hidden Indian designs. Native resistance offers viable examples, not only for restoring their role during the period of conquest, but also in managing turbulent times generally, serving as a tool in the present.

First, it shows resistance to inclusion of marginalized groups even when promises were made such as releasing mission lands to the neophytes and or permitting entry into white society. These differing and shifting forms of what qualifies as assimilation arise in cycles through time and demand further study. Second, they offer evidence that the Indigenous population in California resisted against Church structures, and
provide immeasurable accounts of their reasoning skills in contrast to monocultural accounts of the conquest.

Lesson Eight: Human Rights. Indigenous groups receive greater recognition of their nation status and assertions of sovereign status outside the realm of domestic law. n136 These gains must be studied for application into domestic law. n137

Heterosexual privilege arrived with the European conquerors, and the discrimination against gays and lesbian as a primary example requires vigilance. The linkages between law and its use to curtail individual freedoms needs drawing out to ensure women are not further dominated by patriarchy as imposed by this form of Christianity.

Lesson Nine: Environmental Relationships. In contrast to European agricultural practices, Native law, custom and practices, reveal a greater relationship with nature. The resultant environmental degradation, following the conquest shows the loss of the nation's rich biodiversity and reveals the legacy of those differences. n138

Greater study of the Property Clause giving Congress the power "to dispose of and make all needful Rules and Regulations respecting the territory or other Property belonging to the United States" is therefore required in each region throughout the nation. The unlawful takings of Native property and overly intrusive governmental controls offer intellectually challenging constitutional takings questions and analysis regarding the control of the nation's natural resources in the present. This awareness delineates the need to promote local knowledge between states and its impact on Indigenous and Latina/o communities. n139

Lesson Ten: Mestizos and Law. The conquest of Indigenous America included the creation of new societies and ethnic groups. n140 Colonizing Los Angeles, for example, included a number of mestizos from the Mexican interior and their role and relationship with the state also remains relatively unknown. n141 The intersection of law with identity deriving under and from the mission period thereby calls for further study. n142 This links to the methods in which the nation-state identified and labeled the blending of inter alia, Spaniards with Indian, Indian with Black, Indian with other foreign nationals, and accordingly could provide analytical tools to dissect the state's treatment of people of color.

Lesson Eleven: Cultural Memory/Tonantzin Me Socorra! n143 The region's history of contradictions and conquest did not eliminate Roman Catholicism in California. To the contrary, it remains a viable institution with much influence over some Native and Latina/o communities. Catholicism in Chicana/o and Native religiosity is heir to Indian and Spanish religious legacies with many practices kept alive from generations past.

One layer of this issue extending into the present includes the rejection by younger generations of the patriarchy imposed on women. They, in a number of instances, are returning to Indigenous interpretations and rejecting the patriarchy of Church structures. Nowhere is this more evident than worship of the Virgen de Guadalupe the Aztec Princess who spoke to Juan Diego following the conquest of the Aztec Nation. n144 The "Official/Hispanicized Version" of the Virgen de Guadalupe has long obscured her Indigenous cultural context and was used to promote the subordination of women in church structures.

Her importance in Native cultures is something long passed from generation to generation not only by worship and adoration, but also by tradition. Jeannette Rodriguez, scholar on the Virgen, has told us that cultural memory ensures her Indigenous survival in Latina America. Rodriguez has contended that "the people carry a memory and the memory is also a carrier" not unlike language, images, ideas, ideals and other traditions sustaining culture. While the institutional Church remained a "Spanish Church subjectively for the Indian there was now a Native and national symbol." n145

Throughout Native America and in Latina/o communities many are asserting a return to their Indigenous heritage. Newer interpretations of La Virgen are causing some Chicanas of the present to assert that "she represents a blend of culture, nationalism and politics" with deeply non-religious meanings as well as being a symbol of bol." n146 Representing the feminism of Catholicism in newer revisions is promoting the rejection of the Church's patriarchal teachings.

The lesson highlighted here emphasizes that, notwithstanding the contradictory role of religion in our cultures, the importance of popular religiosity as different from universal canon law and church dogma cannot be refuted nor denied, and requires yet further investigations in the LatCrit enterprise.

The above lessons are offered as potential corridors through which to examine race, class, gender and other categories of analysis inside a most complex and painful history. They seek to emphasize that in their absence law is constrained and limited by the dominant discourse.

Yet, in a number of instances law has blended various jurisprudential philosophies towards meeting social
goals and contemporary values. The integration of three jurisprudential philosophies as found in MacPherson v. Buick Motor Co., n147 and, as Harold Berman emphasized, provides an example as to law's vitality. In MacPherson, Justice Cardozo relied on "the holdings of previous decisions (positivism), the equities of the case (natural law), and the social and economic evolution of the United States during the previous half-century (historical jurisprudence)." n148 As a form of insurgency this opinion therefore permitted a new doctrine of manufacturers' liability. In short, this demonstrates not only law's capacity but a measure of its ability to promote justice in harsh and inequitable circumstances.

Conclusion

We are a people in the making within a larger nation-state. Most of what we produce is taken beyond our reach, and we get back from the larger society much less than what we contribute to it. Law and order are defined and imposed from outside of our culture, communities, and control. n149

In introducing this Essay, I included the query as to whether an alternative theoretical lens can provide a protective measure of space regarding a legal and religious relationship long obscured by the writing of the conqueror. n150 If so, can a more precise rendering lead to potential legal remedies and relief for long impoverished and marginalized communities? Our relationship with the state as attorneys coupled with the invisibility in law of the Native Californians and in some instances their Chicana/o descendants allows nothing but a response in the affirmative. Within mainstream law, legal theory has advanced jurisprudence on the basis of hybrid cases, thereby revealing that the blending of jurisprudential "thought, process, and reasoning permit integrations" as legal scholar Harold Berman argues are long cloaked with the mantle of "real law." n151

Drawing from the lessons of the various periods shows not only what was lost, but also yield evidence of power relations where one voice dictated over the voice of the majority. In spite of the inhumane actions and legal record imposed on Native Californians, the strength of their Native identity and religious identities, and their refusal to disappear make evident their response to aggressive evangelism, the Black Legend, and other forms of conquest. As state-causing actors California's Indigenous population and the country's earliest Chicanas/o received very little in exchange for their labor and immeasurable sacrifices.

The LatCrit enterprise even in its infancy can and should continue in its commitment to change in law. Failing to uncover long neglected truths and inaction allows textbook dogma to stand as a false record, guarantees the continued assault on our culture, religion, ethnicity and other cultural attributes and categories without receiving parity with those holding positions of power. The task for the LatCrit community is to reach those communities long serving as primary state causing actors, but receiving little in exchange for their labor while losing their land and access to natural resources. Recognizing native resistance against state linked actions imposing false norms of "assimilation standards" beyond their reach while despoiling their land base can influence LatCrit theory in the present and into future generations, therefore allowing one last "lesson."

"We are a people who honor our dead" n152 --"sangre llama a sangre" (blood cries out to blood) and the legal and historical realities of Native Californians and our antepasados (ancestors) are calling." n153 Through the LatCrit enterprise can we do anything but respond?

FOOTNOTE-1:

n1 "Gold, then, and souls, were the objective of the vanguard of conquerors. Gold for the chests of their majesties, and for their private pockets; souls of the flock of His Holy See and the Mother Church."

Ernesto Galarza, The Roman Catholic Church as a Factor in the Political and Social History of Mexico 17 (1928). Not unlike the conquest of Mexico antigua, Hispanic conquerors sought dominion and control of the California region for its natural resources, labor, access to the souls of the Indigenous population and its territorial land base. For case law reference involving the search for gold and silver and a contested mine encompassing all three periods of the conquest of the region see United States v. Castillero, 67 U.S.(2 Black) 17 (1862).

n2 Jerry Stanley, Digger, The Tragic Fate of the California Indians from the Missions to the Gold Rush 42 (1997) (quoting Father Serra).

n3 Mission neophyte Lorenzo Asisara's response to the use of a cuarta de hierros (a horse whip tipped with iron) used by the friars to "control" recalcitrant neophytes. See Steven W. Hackel, Land, Labor, and Production: The Colonial Economy of Spanish and Mexican California, in Contested Eden, California Before the Gold Rush (Ramon Gutierrez & Richard J.


n6 The first expeditions in the region took place in 1542. See W.H. Hutchinson, California, Two Centuries of Man, Land, and Growth in the Golden State (1969). There are many accounts of California's early history. See, e.g., E.S. Capron, History of California from Its Discovery to the Present Time (1854); James J. Rawls, Indians of California, The Changing Image 25 (1984). There are also instances of case law discussing California history:

Prior to May 14, 1769, the date of the arrival in the territory now comprised in the State of California of one of the first exploring expeditions of the Kingdom of Spain by way of Mexico, the Indians in the state lived in their primitive and aboriginal condition, divided into many separate and distinct bands, tribes and rancherias, enjoying the sole use, occupancy and possession of all the lands in the State of California, undistributed by any European power.

Indians of California v. United States, 98 Ct. Cl. 583 (1942).

n7 Spain employed a trio of settlements: the presidio (military post), the missions, and civilian settlements in its conquest of Indigenous America. "A mission was more than just a church and included a wide network of outlying structures," Warren A. Beck & Ynez D. Haase, Historical Atlas of California 12 (1974) ("A few friars could erect mission installations and control potentially dangerous natives at far less cost than could the military."). For examples of mission structures, photographs, survey plats, drawings and architectural renditions see Architectural Features, in Mexican California 45 (Carlos E. Cortes ed., 1976) [hereinafter Architectural Features].

n8 Native Californians confronted three forms of sustained contact. Each moreover, obligating separate investigation and unclouting. Beginning with Spanish governance, in the late 1700s and lasting until 1821, as the first, and Mexico's independence from Hispanic governance in 1821 comprising the second period of occupation. The United States's invasion and conquest of the Mexican province in 1848 thereafter consisted of the third and last conquest of native California.

n9 See James L. J. Nuzzo, The Rule of Saint Benedict: The Debates over the Interpretation of an Ancient Legal and Spiritual Document, 20 Harv. J.L. & P. Pol'y 867 (1997) (discussing canon law as subset of civil law system). "Church law is that body of canon law, statutes, and doctrines promulgated by competent authority within the Roman Catholic Church to govern the social and pastoral activities of the Church and its members." Id. Church law encompasses both universal law and particular law. "Unlike church constitutions, charters, and contracts, canon law is unmistakably theological in all its aspects. It represents the codification of church theology into canonical or legal language." Church law in the Americas is differentiated from the type of Christianity practiced in Europe. See generally Florence C. Shipek, Californian Indian
Reactions to the Franciscans, in Native American Perspectives on the Hispanic Colonization of Alta California 174 (Edward D. Castillo ed., 1992) [hereinafter Native American Perspectives]. Finally, canon law is also differentiated from royal law.

n10 See generally Rev. Father Juan Caballeria, History of San Bernardino Valley History of San Bernardino Valley from the Padres to the Pioneers, 1810-1851, in Mexican California, supra note 7, at 33. "The mission Indian was naturally docile and submissive. After a few years of training at the mission, the unclothed, degraded savage, living a life of sloth and immorality was transformed into an industrious Christian with fair ideas of religion and morality." Id. In California monocultural accounts dominate the literature and are "considered standard works." Edward D. Castillo, Introduction to Native American Perspectives, supra note 9, at xix. Within the law, the focus of literature on religious and ethnic identities considers primarily European history and identity thereby presenting a false norm. As such it presents incomplete investigations on the role of religion and its relationship with marginalized groups.

n11 See Arenas v. United States, 322 U.S. 419 (1944). The Arenas Court noted that:

Long ago the Franciscans converted them to Christianity, taught them to subsist by good husbandry and handicrafts. Under the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922, their ancestral lands and their governance passed from Mexico to the United States. During the gold discovery days they were too gentle to combat the ruthless pressures of the whites and came to lead a precarious and pitiable, but peaceful, existence.

Id. at 427.


n13 Castillo, supra note 10, at xxi ("Native religions were not just different religions, but different types of religion."); see also Raymond White, Religion and Its Role Among the Luiseno, in Native American Perspectives, supra note 9, at 355.

n14 Farnsworth, supra note 12, at 186.

n15 M. Kat Anderson et al., A World of Balance and Plenty, Land, Plants, Animals, and Humans in a Pre-European California, in Contested Eden, supra note 3, at 16; see also Rawls, supra note 6, at 10.


n17 The terms dominant population, Euro-American, and EuropeanAmerican reference individuals of European descent. See generally In Re Camille, 6 F. 256, 257 (C.C.D. Or. 1880) (referencing members of the dominant population as "Europeans or white race").

n18 See Caballeria, supra note 10, at 26 ("In taking up the work in Alta California, these missionaries brought minds single to one purpose, and that purpose the sowing of the seed of Christianity.").

n19 Subsequent to their arrival in Mexico the Spaniards stated that "there are so many Indians that they are like stars of the sky; so that they cannot be counted." Yet in the Mexican interior in one quarter of a century thousands of their temples were reduced to dust (approximately 80,000) and eight million natives converted. See Galarza, supra note 1, at 23.

n20 Michael E. Tigar & Madeleine R. Levy, Law & The Rise of Capitalism 287 (1977). In this Article the definition of law is borrowed from Tigar and Levy's book. See id. The authors define law:

As used by the protagonists in the struggle we describe it means at different times (a) the rules made by the powerful; (b) the rules that some group or class thinks ought to be made in a godly, or at least a better, society; (c) the customs and habits of a people, which have been observed immemorially; (d) the manifesto of a revolutionary group; (e) the rules that some group makes for its own internal governance.

Id. at 6-7.
n21 Several friars and priests participated in early expeditions of the region even before establishing formal mission structures. Friars served as mariners, navigators, and joined early explorations charting out passageways into the region. Their diaries are reprinted in a number of texts offering English translations. See generally Junipero Serra Reports on The Missions of California, in A Documentary History of the Mexican Americans 131 (Wayne Moquin & Charles Van Doren eds., 1971).

n22 See generally Michael J. Gonzalez, "The Child of the Wilderness Weeps for the Father of Our Country": The Indian and the Politics of Church and State in Provincial California, in Contested Eden, supra note 3, at 153-54.

n23 Castillo, supra note 10, at xxii.

n24 See id. at xviii; see also Robert F. Heizer & Alan F. Almquist, The Other Californians, Prejudice and Discrimination Under Spain, Mexico, and the United States to 1920, at 5 (1972).

n25 See generally Castillo, supra note 10, at xxii.

n26 "It is important that the development of Spanish California be viewed, not in isolation, as it so often is, but as the final expression of Spanish colonial expansion in the New World." Farnsworth, supra note 12, at 21. The form of Christianity imposed on native groups in North America is differentiated from European Christianity and from popular religiosity. See Stanley G. Payne, Spanish Catholicism, An Historical Overview 3-11 (1984) (giving historical account of Spanish Catholicism as practiced in Europe).

n27 The denial of tenure of several in the LatCrit teaching communities emphasizes this point.


n29 The Bishop Bartolome de Las Casas's criticism of the violent treatment of the Indigenous population in Mexico provides an example. The role of priests in their advocacy for social justice and liberation theology also provides an example of this contradiction. Also, that a number of Native Californians volunteered to join the Spanish missionaries also presents a historical conflict. See Martha Menchaca, The Mexican Outsiders, A Community History of Marginalization and Discrimination in California (1995). At least one commentator has addressed the internal struggle of San Franciscan Native Californians regarding whether or not to join the mission complex. See Randall Milliken, A Time of Little Choice, The Disintegration of Tribal Culture in the San Francisco Bay Area 1769-1810, at 205 (1995) (explaining that Native Californians "struggled with mixed feelings, hatred and respect, in a terrible, internally destructive attempt to cope with external change beyond their control").


n31 Anderson, supra note 15, at 12 (California has environmental diversity and richness unparalleled anywhere in the world."); see also Joseph P. Sanchez, Spanish Bluecoats, The Catalonian Volunteers in Northwestern New Spain 1767-1810, at 39 (1990) (describing landscape "as arboried and filled with fragrant plants like sage, rosemary, and roses, among other wild plants in flower and animal life"); William Claiborne, Furor over Hog Farm, Star Trib., Apr. 7, 1999, at A7 (describing story of large agricultural enterprise purportedly seeking to evade federal and state law restrictions on hog farming operations by seeking to
erect large hog operation on Native American reservation).


n33 See Rawls, supra note 6, at 13. While missionaries concentrated their efforts on native groups occupying coastal regions Native Californians, nonetheless, existed throughout the State in various regions. Friars categorized those in missions as "tame" Indians, "useful and hostile Indians" classified some outside mission walls, while still others were classified as "wild." See id.

n34 Farnsworth, supra note 12, at 25.

n35 See id. at 67.

n36 Some estimate a lower population. See generally Beck & Haase, supra note 7, at 11 (providing 133,000 on low end).

n37 To the present, Pomo basket weavers are recognized for their "variety of design and technique" as "unequaled among indigenous peoples." Greg Sarris, Keeping Slug Woman Alive, A Holistic Approach to American Indian Texts 51 (1993).

n38 Yet other tribal groups included the Shoshonens, Monos, Tubatulabal, the Panamint, Ute, Chemehuevi, Serrano, Gabrielinó, Luiseno Cahuilla, the Penutians, and Hokans. Beck & Haase, supra note 7, at 11; see also Native Californians, A Theoretical Retrospective (Lowell J. Bean & Thomas C. Blackburn eds., 1976) [hereinafter Native Californians].

n39 See Rawls, supra note 6, at 9 ("All of the California tribes had complex socio-political systems with numerous specialists or shaman managing specialized knowledge which contributed to the survival and welfare of each band or tribe.").

n40 See, e.g., Native Californians, supra note 38; Thomas D. Hall, Social Change in the Southwest 1350-1880, at 37 (1989); Antonio Rios-Bustamante & Pedro Castillo, An Illustrated History of Mexican Los Angeles, 1781-1985 (1986).


n42 See generally Sanchez, supra note 31, at 32.


n44 Rawls, supra note 6, at 14, 16 ("By various means the Indians were congregated around the missions, where they were 'reduced' from their 'free undisciplined' state to become regulated and discipline members of colonial society.") (citations omitted).

n45 The northern section held eleven missions with a land base of approximately 11,000 square miles and an original population of about 26,000. The central section that included four Santa Barbara missions involved a land base of about 5000 square miles and an original population of about 8500. Last the southern section with missions from San Fernando comprised 20,500 square miles with a native population estimated at around 20,000. See Beck & Haase, supra note 7.

n46 See, e.g., Native American Perspectives, supra note 9, at 117-19; Douglas Monroy, They Didn't Call Them Padre for Nothing, in Between Borders: Essays on Mexicana/Chicana History 435 (Adelaida R. Del Castillo ed., 1990) [hereinafter Between Borders] ("Fearful of encroachment from other powers, especially Russia, Spain sought to transform the native population into loyal subjects of His Catholic Majesty, the King of Spain.").

n47 See Rawls, supra note 6, at 19.

n48 For a court's interpretation of this relationship see Niebili v. Redman, 6 Cal. 325 (1856), explaining that church structures in California were political establishments.

n49 Rawls, supra note 6, at 14.

n50 In describing the Spanish conquest of Mexico, Ernesto Galarza asserted that "mailed armour accompanied Gregorian chants." Galarza, supra note 1.

n51 The testimony of those who ran away from Mission Dolores in San Francisco in 1797, but were subsequently returned to
the missions, informs us that they left because of, among other things, floggings, fear in seeing their friends flogged, hunger, incarceration, and beatings for other infractions. See generally Heizer & Almquist, supra note 24, at 9.

n52 See James A. Sandos, Between Crucifix and Land, IndianWhite Relations in California, 1769-1848, in Contested Eden, supra note 3, at 205-06; see also Cynthia Radding, Wandering Peoples (1997).

n53 Stanley, supra note 2, at 44 (quoting British scientist Frederick Beechey describing Sunday mass in Mission San Francisco in 1816).

n54 Compare Antonia Casteneda, Engendering the History of Alta California, 1769-1848, Gender, Sexuality, and the Family, in Contested Eden, supra note 3, at 230, with William Mason, IndianMexican Cultural Exchange in the Los Angeles Area, 1781-1854, 15 Aztlan: Int'l J. Chicano Stud. Res. 123, 124-26 (1984). "Contrary to the opinions of some writers, there was relatively little sexual abuse of Indian women by settlers, if the archival references are any indication. Despite the notoriously lax situation that existed at San Gabriel in 1772-73, when the frequency of rape of Indian women by Spanish Mexican soldiers provoked a revolt, later infractions were punished if discovered." Mason, supra, at 126. Nonetheless, the record shows that Native men were killed in defending native women captured by Spanish soldiers. See Monroy, supra note 46, at 435 (asserting that "the Spanish acquired converts at Mission San Gabriel with the soldiers that pursued them to their rancherias, where they lassoed women for their lust and killed such males as dared to interfere").

n55 Sandos, supra note 52, at 196, 205.

n56 See Native American Perspectives, supra note 9, at 27 (providing that even those residing outside of mission structures were required to contribute one-tenth of their agricultural produce to missions).

n57 See Caballeria, supra, note 10, at 32 ("The missions were conducted on the patriarchal plan. The inmates lived as one large family, their interests general and identical. Separation of the sexes was rigidly enforced from the beginning.").

n58 Hackel, supra note 3, at 123; see also Shipke, supra note 9, at 181 (discussing Kumeyaay responses to Franciscans and narratives of run-a-ways who told of "great grandmothers being whipped if they dallied over the work or were too slow for the overseers").

n59 See generally Antonia I. Casteneda, Engendering the History of Alta California, 1769-1848, in Contested Eden, supra note 3, at 23034.

n60 Sandos, supra note 52. In his report as president of the missions, Father Lasuen asserted that "the girls and the unmarried women (wrongly called nuns) are gathered together and locked up at night in their quarters." Architectural Features, supra note 7, at 179-81.

n61 See, e.g., Monroy, supra note 46, at 435. The room at Santa Barbara housing the women is described as encompassing:

17 varas [a vara equals roughly a yard] long by 7 wide, is of brick and has a high, wide window for light and ventilation. It has its sewer for corporeal necessities during the night. Along the walls is a platform, 20 varas long by 2 1/4 wide, with two stairways of brick and mortar at the ends for those who ant to ascend and sleep upstairs. In the evening they have a fire for heat and every night they are given a tallow candle to illuminate the room.

The Indian Versus the Spanish Mission, in Native American Perspectives, supra note 9, at 127.

n62 Hackel, supra note 3, at 123.

n63 After some point in time the missions became overly populated, causing the friars to permit the neophytes to visit their communities and in some instances reside near the missions. The fact that some converts were not mistreated physically, and that in some instances the friars protected some native women from Spanish soldiers (although at some point soldiers were encouraged to marry native women) presents contradictory evidence in need of further unpacking. It nonetheless obscures the basic point that former Native societies became fractionalized and
restructured according to Hispanic interpretations of property ownership and gender relations.

n64 Castillo, supra note 10, at xvii (commenting that "traditional Indians did not share linear time concepts with the Euro-Americans they confronted in 1769" but rather their "world view was organized around a yearly cycle of renewal ceremonies and acts."); see also Caballeria, supra, note 10, at 33 ("Mission life was one of industry. At day-break the whole place was awake and preparing for labor.").

n65 Native American Perspectives, supra note 9, at 27.


n67 Monroy, supra note 46, at 435.

n68 It is well established that early settlers to the Los Angeles region were also of Indian and African descent. See, e.g., J. Gregg Layne, The First Census of the Los Angeles District, Padron de la Ciudad de Los Angeles y Su Jurisdiccion, 19 Q. Hist. Soc'y S. Cal. 81 (1937); Mason, supra note 54, at 135. For a review of mestizaje and class definitions of Mexican society, see Dennis Nodin Valdes, The Decline of the Sociedad de Castas in Mexico City (1978) (unpublished Ph.D. dissertation, University of Michigan) (on file with author) (examining people of mixed descent including but not limited to mestizos and mulattos).

n69 For a present example of the influences of Spanish characterizations with linkages into the present see Kevin R. Johnson, "Melting Pot" or "Ring of Fire?: Assimilation and the Mexican-American Experience, 85 Cal. L. Rev. 1259 (1997), 10 La Raza L.J. 173 (1998).

n70 See Wilfrid Hardy Callcot, Church and State in Mexico, 1822-1857, at 20 (1965).

n71 Casteneda, supra note 59, at 230-32.

n72 Sandos, supra note 52, at 206; see also Castillo, supra note 10, at xxiv.

n73 During the Mexican period alcaldes functioned as mayors of a given area. Ultimately American males became alcaldes following the United States conquest of the region.

n74 Castillo, supra note 10; see also Richard Griswold del Castillo & Arnoldo de Leon, North to Aztlan, A History of Mexican Americans in the United States (1996).

n75 Castillo, supra note 10, at xvi; see also Robert H. Jackson, Gentile Recruitment and Population Movements in the San Francisco Bay Area Missions, in Native American Perspectives, supra note 9, at 199, 201 (discussing failure of royal officials to apply Spanish laws that were contrary to their interests, and how missionization, contrary to established historical accounts, "involved a degree of force").

n76 See Castillo, supra note 10, at xxi (explaining that Spanish policy forbade teaching Christian doctrine in native languages).

n77 Native American Perspectives, supra note 9, at 423.

n78 See, e.g., Beck & Haase, supra note 7, at 9-10 ("The fauna of California is as diverse as its climate and topography."); Anderson, supra note 15, at 12 ("California has environmental diversity and richness unparalleled anywhere in the world.").

n79 The struggle to control Native labor also surfaced during the Mexican governance of the province after 1821. Throughout this period, Native Californians argued for independence from mission governance. See generally Gonzalez, supra note 22, at 147-49.

n80 See Farnsworth, supra note 12, at 73 ("Economically the California Missions were a complete success."); see also Norton, supra note 12, at 59.

n81 See Farnsworth, supra note 12, at 108.

n82 But then in some instances thereafter, these Native Californians were confronted with charges that they lacked ownership status of that interest. See generally Serrano v. United States, 72 U.S. (5 Wall.) 451 (1866).

n83 See Native American Perspectives, supra note 9, at 423.

n84 See Brigadier General Jose Figueroa, A Manifesto to the Mexican Republic (C. Alan Hutchinson ed., 1978) (discussing his interpretation of events leading to secularization of missions).

n85 See Hackel, supra note 3, at 136 (summarizing opening of California to international trade, Colonization Act of 1824, Supplemental Regulations of 1828, and Secularization Act of 1833 all manifested unforeseen political transformations).

n86 See United States v. Wilson, supra note 1861, providing background on plots of land regarding Huerta de Ramualdo adjoining Mission San Luis Obispo).

n85 See Brigadier General Jose Figueroa, A Manifesto to the Mexican Republic (C. Alan Hutchinson ed., 1978) (discussing his interpretation of events leading to secularization of missions).

n86 See Hackel, supra note 3, at 136 (summarizing opening of California to international trade, Colonization Act of 1824, Supplemental Regulations of 1828, and Secularization Act of 1833 all manifested unforeseen political transformations).

n87 See, e.g., Luco v. United States, 64 U.S. (23 How.) 515, 52122 (1859) (commenting on importance of protecting settlers from "barbarous tribes"); United States v. Ritchie, 58 U.S. (17 How.) 525, 540 (1854) (describing Indians and their "degraded condition . . . and ignorance generally"). Ejectment actions also confronted the population. See generally Byrne v. Alas, 68 Cal. 479, 9 P. 850 (1886). In some instances recognizing the inequities nonetheless required facing legal struggles over their property. In Byrne, the court allowed re-opening affidavits because as the court wrote they were "ignorant and unacquainted with modes of judicial proceedings may be reopened on affidavits of merits made by counsel." Id.

n88 See generally George Harwood Phillips, Indians in Los Angeles, 1781-1875: Economic Integration, Social Disintegration, in Native American Perspectives, supra note 9, at 395 (recognizing historians disregard of economic relationship between settlers and Indians).

n89 Some mission holdings were sold to aid the Mexican government's efforts to "keep California out of the hands of the United States." Helen S. Giffen, Some Two-Story Adobe Houses of Old California, 22 Q. Hist. Soc'y S. Cal. 1, 9 (1938) (noting sale of 121,542 acres of former mission land sold to raise funds in war effort for $ 14,000 to Eulogio de Celis). The writings of mission visitors report on the decaying of mission buildings. "In October 1836, the United States ship 'Peacock' stopped at Monterey on its way from the Orient where Mr. Edmund Roberts as special agent of the United States government had been engaged in a diplomatic mission." Architectural Features, supra note 7, at 32-34. During his stop he visited Mission San Carlos mission. "At this time there are twenty-one missions in Upper California, all of which are in a state of decay. I visited that at Carmelo which I found in ruins, and almost abandoned." Id.; see also Den v. Den, 6 Cal. 81 (1856) (involving lease of Mission Santa Barbara for nine-year term).

n90 See Treaty of Peace, Friendship, Limits, and Settlement with the United States of America and the Republic of Mexico, Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922, 930 [hereinafter Treaty of Guadalupe Hidalgo]. There is ample case law on land formerly belonging to California missions and/or affecting Native Americans. See, e.g., Barker v. Harvey, 181 U.S. 481, 482 (1901); United States v. Workman et al., 68 U.S. (1 Wall.) 745 (1863) (involving ex-mission San Gabriel and purported conveyance of mission from Father Jose Prudencia Santillan for two hundred thousand dollars); White v. United States, 64 U.S. (23 How.) 341 (1859) (involving purported grant to secular priest, subsequent conveyance, and determination as to validity of successor in interest); United States v. Ritchie, 58 U.S. (17 How.) 525 (1854); (involving Mission Indian's claim of right to permanent occupancy); Chunie v. Ringrose, 788 F.2d 638, 644 (9th Cir. 1986) (holding Chumash Indians had lost their right to California islands for failure to assert claims in California land confirmation proceedings); Mora v. Foster, 17 F. Cas. 720 (C.C.D. Cal. 1875); Harvey v. Barker, 126 Cal. 262, 58 P. 692 (1899) (regarding claims of successors of mission Indians); Byrne v. Alas, 68 Cal. 479, 9 P. 850 (1886); see also Albert L. Hurtado, Indian Survival on the California Frontier (1988).

n91 For an interpretation of U.S. impact on the region, see Menchaca, supra note 29.
For a review of the annexation of the former Mexican province see Neal Harlow, California Conquered, The Annexation of a Mexican Province, 1846-1850 (1982).

n92 See Los Angeles Farming Milling Co. v. City of Los Angeles, 217 U.S. 217, 218 (1910) (regarding litigation over riparian rights).

n93 See id.

n94 George Harwood Phillips, wrote that in 1851 for example, an "Anglo-American visitor to California claimed that the extreme indolence of their nature, the squalid condition in which they live, the pusillanimity of their sports, and the general imbecility of their intellects, render them rather objects of contempt than admiration." Phillips, supra note 88, at 383.

n95 Native Californians outside of the mission complex supplied labor around Los Angeles for civilians and in the presidios. See generally Mason, supra note 54, at 124-25. Mason wrote:

The Indian's economic and social role in Los Angeles was important. Rancheros around Los Angeles were using Indian labor at least by the 1790s. Vinyardists considered them indispensable. Most agricultural tasks were done on a contract basis by Indians. Both military authorities and missionaries felt that the Indians were major factors in Los Angeles agricultural production. Id. at 124.

n96 Macleod, supra note 5, at 161.


n98 United States v. Clapox, 35 F. 575, 576 (D. Or. 1888) (involving arrest of Minnie, Umatilla tribal member, for "offense of living and cohabiting" with "an Indian other than her husband"). This also exemplifies the dominant culture imposing its own values on a culture that in many instances regarded spousal relations as the domain of the male.

n99 Mexican law, in contrast to the new American regime, recognized the Indigenous population as possessors, and not merely occupants, of their property interests. See, e.g., Arenas v. United States, 322 U.S. 419, 427 (1944).

n100 As an example, in violation of the Treaty of Guadalupe Hidalgo, Congress promulgated yet further legislation obligating all holders in interest to defend their property holdings. See An Act to Ascertain and Settle the Private Land Claims in the State of California, Ch. 41, 9 Stat. 631 (1851) (obligating "each and every person claiming lands in California to present documentary evidence and testimony to support claim of ownership"). Attempt to reconcile Article IX of the Treaty of Guadalupe Hidalgo with the results of land dispossession, providing:

The sacredness of this obligation shall never be lost sight of by the said Government, when providing for the removal of the Indians from any portion of the said territories, or for its being settled by citizens of the United States; but on the contrary special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

Treaty of Guadalupe Hidalgo, supra note 90, at 932; see also United States v. Candelaria, 271 U.S. 432, 442 (1926).

n101 See Arenas, 322 U.S. at 427. The Arenas Court commented:

Long ago the Franciscans converted them to Christianity, taught them to subsist by good husbandry and handicrafts. Under the Treaty of Guadalupe Hidalgo . . . their ancestral lands and their governance passed from Mexico to the United States. During the gold discovery days they were too gentle to combat the ruthless pressures of the whites and came to lead a precarious and pitiable, but peaceful, existence. Id.


n104 Donald Juneau, The Light of Dead Stars, 11 Am. Indian L. Rev. 1, 2 (1983). Juneau argues that: "Not only does the Recopilacion afford a basis for establishing ownership in property derived from immemorial aboriginal possession, it can be used to reclaim property wrongfully dispossessed of an Indian tribe that has used and occupied the lands for a long period of time." Id.


n106 Galarza, supra note 1, at 45.-6.

n107 See generally Chester King, Chumash Inter-Village Economic Exchange, in Native Californians, supra note 38, at 289.

n108 See, e.g., Galarza, supra note 1; Lawrence J. Mosqueda, Chicanos, Catholicism and Political Ideology 33 (1986). For an analysis of Spain's political jurisdictions and governing bodies in New Spain, see Peter Gerhard, Colonial New Spain, 1519-1786: Historical Notes on the Evolution of Minor Political Jurisdictions, in Handbook of Middle American Indians, 63, 66 (1967) (commenting that "the church in America was part of the Spanish state, and control of it through the papal concession known as patronato real was a privilege jealously guarded by the Spanish kings").

n109 Farnsworth, supra note 12, at 21.

n110 See, e.g., Gonzales v. Roman Catholic Archbishop of Manila, 280 U.S. 16 (1929) (stating that it "is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them"); Theresa J. Fuentes, Title VII, Religious Freedom and the Case of the Nontenured Nun, 65 Geo. Wash. L. Rev. 743 (1997).


n112 Magnate Plans Catholic-view Law School, Chi. Trib., Apr. 9, 1999, at A18 (noting creation of new law school to produce lawyers who "will consider the moral consequences of the law from a Roman Catholic point of view").


n114 See e.g., Helen Lara-Cea, Notes on the Use of Parish Registers in the Reconstruction of Chicana History in California Prior to 1850, in Between Borders, supra note 46, at 131; Carmen, Ramos Escandon, Alternative Sources to Women's History, in Between Borders, supra note 46, at 200.


n116 See generally Menchaca, supra note 29, at xiv.

n118 See, e.g., Rios-Bustamante & Castillo, supra note 40, at 22; Mason, supra note 54, at 135 ("After about 40 years of missionization, when a few neophytes were selected to leave the missions and seek homes among the Mexican settlements, some of the women in Los Angeles and nearby ranchos married men who had recently been released from the missions."). Mason also asserts that contrary to some accounts this branch of Native Californians did not completely disappear: "Evidence of a few descendants of Gabrielinos, heavily mixed with the Mexican descendants of gente de razon, are frequently found." Id. at 141.

n119 Callicot, supra note 70, at 10-11 (asserting that priests were "the real friends of the natives and did all in their power to assist them and to protect them from oppression"). There is some merit to her argument as represented by Las Casas, the "Apostle of the Indies" designed to "protect the Indians from the evils of what, in practice, was a species of slavery." Id. Additionally, Mexico won its independence from Spain in large measure from the actions of Father Miguel Hidalgo y Costilla. See generally Mosqueda, supra note 108, at 38. The role of priests working with the Mayan and Zapatista liberation movements also involved the work of religious actors throughout Indigenous America.


n122 The Church's stance on homosexuality, women's rights, and absence of diversity in the operations of church structures provide a few examples of its limitations. See Jose E. Limon, Dancing with the Devil, Society and Cultural Poetics in Mexican-American South Texas (1994) (comparing Catholic Church's emphasis on existence of evil but noting that it says "nothing about the evident evil expressed in the social treatment of the barrios it ostensibly served" yet also recognizing positive features of Catholicism).

n123 Mosqueda, supra note 108, at 33.


n125 See, e.g., Farriss, supra note 103, at 6; Galarza, supra note 1, at 52; Perciaccante, supra note 113.

n126 This is a well-documented issue. See, e.g., Antonia Casteneda, Language and Other Lethal Weapons: Cultural Politics and the Rites of Children As Translators of Culture, 19 Chicano-Latino L. Rev. 229, 238-39 (1998) (commenting on assimilationist strategy of targeting
Catholic missionaries and the Euro-American educational system went to great lengths to "denaturalize or deculturalize" native peoples through their children. See Lorne M. Grahams, "The Past Never Vanishes," A Contextual Critique of the Existing Indian Family Doctrine, 23 Am. Indian L. Rev. 1, 10 (1998) ("Education became one of the most pernicious methods used to separate American Indian children from the influences of family and community and assimilate them into mainstream society.").

n127 Galarza, supra note 1, at 57.

n128 See Capron, supra note 6, at 3; Farriss, supra note 103, at 6.

n129 Galarza, supra note 1, at 57.

n130 The records kept by mission priests also provide information on the role of women in some church ceremonies. See Lara-Cea, supra note 114, at 131, 139 (explaining that women performed baptisms and served as lay ministers); see also Margarita Gonzalez De Pazos, Mexico Since The Maya Uprising, 10 St. Thomas L. Rev. 159, 171 (1997) (explaining that women performed baptisms and served as lay ministers); see also Margarita Gonzalez De Pazos, Mexico Since The Maya Uprising, 10 St. Thomas L. Rev. 159, 171 (1997) ("The Catholic Church continues promoting peace in Chiapas and denouncing the situation of the Indians."). Some Catholic priests, whose links are with Indians in the area controlled by the Zapatistas, continue to pay a high price for helping the Mayans. See Matt Kantz, Mexican Archdiocese Withdraws Theology Document, 35 Nat'l Cath. Rep. 9 (Feb. 19, 1999) (criticizing Indigenous theology employed at San Cristobal de las Casas, Mexico).


n132 William S. Simmons, Indian Peoples of California, in Contested Eden, supra note 3, at 48, 63.

n133 Sandos, supra note 52, at 210.

n134 See generally Thomas Workman Temple, II, Toypurina the Witch and the Indian Uprising at San Gabriel, in Native American Perspectives, supra note 9, at 326. Temple wrote:

As a sorceress, medicine woman, witch; or whatever we call her as she first appears, full-blown and in all the wild majesty she possessed and exerted over her Gabrielino tribesmen, she deserves to be remembered. She is the only Indian woman in the colonial records of Alta California, known to have led a revolt against the padres and soldados of a mission.

Id.

n135 Other women also called for revitalization movements. "In their preoccupation with Indian sin, priests blinded themselves to something more fundamental and important: Indian resistance and the continuance of native culture within the mission compound." Sandos, supra note 52.


n139 This applies with equal force to the issue of environmental racism in native and Latina/o communities. See, e.g., Nancy B. Collins & Andrea Hall, Nuclear Waste in Indian Country, A Paradoxical

n141 Layne, supra note 68, at 81.

n142 Racial classifications continue to raise significant criticism and debate. See Angel Oquendo, Re-Imagining the Latino/a Race, 12 Harv. BlackLetter L.J. 93 (1995). For case law examples, see de Baca v. United States, 36 Ct. Cl. 407 (1901), and In re Rodriguez, 81 F. 337 (W.D. Tex. 1897), and Otero v. State, 17 S.W. 1081 (Tex. Ct. App. 1891), involving case of "Mexican Pete."

n143 The Nahautl and the Spanish translates into La Virgen/Tonantzin Keep Me Safe. It is used in this context to emphasize the nature of syncretism in the Latina/o culture.

n144 Before Christianity forced him to change his name, his Indian name was Cuauhtlatoatzin ("one who talks like an eagle"). See The Story of Guadalupe, T. Luis Laso de la Vega's Huei Tlamahuixoltica of 1649 (Lisa Sousa & James Lockhart eds., 1998). For a translation of the Nahautl rendition of the Virgin de Guadalupe into English, see Jeanette Rodriguez, Our Lady of Guadalupe, Faith and Empowerment Among Mexican-American Women (1994). The author emphasizes the Virgin's impact on the Indigenous population: first, "it was the foundation of Mexican Christianity and second, it provided a connection between the indigenous and Spanish culture." Id. at 45. She asserts that the "Aztecs adapted Catholicism to their own religious concepts by a process of fusional syncretism." Id.; see also Goddess of the Americas/La Diosa de las Americas: Writings on the Virgin of Guadalupe (Ana Castillo ed., 1996).
PIERCING WEBS OF POWER: IDENTITY, RESISTANCE, AND HOPE IN LATCRIT THEORY ANDPRAXIS: "The Virgin's Slip Is Full of Fireflies": The Multiform Struggle over the Virgin Mary's Legitimierende Macht in Latin America and Its U.S. Diasporic Communities

Terry Rey *

*BIO:*

I revolt against any conception of Latin America that excludes Haiti, hence my use of the term "Latin America," connotes -- besides those nations usually understood as "Latin American" -- the "francophone" Caribbean, especially Haiti, which, I would agree with Paul Farmer, "is in many respects the most representative of Latin American republics." Paul Farmer, The Uses of Haiti 52 (1994). In light of this and of the possibility that no immigrant group in the United States has been subjected to greater injustice than Haitians, in my opinion LatCrit would be well counseled to create space for a broader consideration of Haiti and Haitians in the United States than has heretofore been the case, judging from LatCrit publications.

SUMMARY: ... Given the awesome influence that Roman Catholicism has had on Latina/o communities throughout the Americas, and in light of the strong Mariocentricism of Latin American Catholicism, such an analysis ineluctably entails careful exploration of the cult of the Virgin Mary in Latin American history and cultures. In addition, analysis must also explore Marianism's function in the creation and perpetuation of structures of domination as well as in the inspiration and development of antisubordination movements and ideologies. Critical of certain earlier LatCrit essays on Our Lady of Guadalupe for failing to critically examine the Virgin's symbolic power, Iglesias and Valdes call for "a more critical and contextualized analysis of this Virgin and the ideology that constructs and sustains her symbolic power and cultural effects."  

[*955]

Introduction

In an earlier LatCrit commentary on religion, Elisabeth Iglesias and Francisco Valdes have appropriately insisted that:

religion, like any other social or political force or institutional arrangement, must be analyzed in terms of and engaged on behalf of the anti-subordination commitment that unifies the LatCrit movements' multiple diversities -- with critical attention focused on whether and how religion's historical and contemporary agendas tend to promote and/or obstruct the liberation struggles and anti-subordination imperatives that have coalesced in and around the LatCrit movement. n1

Given the awesome influence that Roman Catholicism has had on Latina/o communities throughout the Americas, and in light of the strong Mariocentricism of Latin American Catholicism, such an analysis ineluctably entails careful exploration of the cult of the Virgin Mary in Latin American history and cultures. In addition, analysis must also explore Marianism's function in the creation and perpetuation of structures of domination as well as in the inspiration and development of antisubordination movements and ideologies. Critical of certain earlier LatCrit essays on Our Lady of Guadalupe for failing to critically examine the Virgin's symbolic power, Iglesias and Valdes call for "a more critical and contextualized analysis of this Virgin and the ideology that constructs and sustains her symbolic power and cultural effects." n3

In part a response to this call, this Essay presents substantive examples of Marianism's function as a repressive and antisubordinational force in Latin American history, cultures, and select diasporic Latina/o communities, and Marianism's role in constructing identity for and in these communities. In
doing so, it aims to contribute to a "critical and comparative charting of diverse religious forces or experiences that can only enlighten LatCrit understanding of religion as a tool of oppression and/or liberation." n4 While these examples are discussed necessarily in broad fashion, the purpose is to stimulate further exploration of each and additional relevant cases, and establish that in the considered communities and nations, Marianism has consistently demonstrated the capacity to serve as a formidable antisubordination force. n5

I. Hispanic Colonization as Marian Colonization: Taproot of a Multiform Dichotomy

Goethe's Faust concludes with the resounding claim, "das ewige Weibliche zieht uns heran" ("The eternal feminine draws us ever anon"), which is of course a central reason why Catholicism in many parts of the world, and nowhere more so than in Latin America, is in reality the cult of the Virgin Mary with some lingering [957] christocentric sacramentality. There seems to be an irressible insight in the human religious consciousness that the sacred, the divine, or the Godhead is itself as much motherly as fatherly. Hence the Virgin's eclipse of God, the Father, and His Son in popular Catholic spirituality represents something of a timeless, universal act of resistance to the misogyny of orthodox Catholic theology and its limitation of sacramental power and Divinity to the male, the celibate male, at that. The Church hierarchy has been rightly accused by feminist theologians of employing the symbol of the Virgin as a "weapon of symbolic violence" n6 to beat women into submission to patriarchal domination and obedience to a Church that tells them they are unworthy of anything but a subservient role inside and out. Many feminists feel that the Virgin myth and symbol are so tainted by such patriarchal manipulation that they can make no meaningful contribution to "the struggle for ultimate womanhood." n7 However, a careful examination of the nature of popular Marian devotion in many parts of Latin America and its U.S. diasporic communities reveals clearly that, to quote a Haitian proverb, "the Virgin's slip is full of fireflies" (jipon lavyej plen koukouy). n8 In other words, the Virgin is a hotly contested symbol that takes on a host of causes and responds to the needs of both the dominant to dominate and the subjugated to resist. Such struggles over the Virgin's symbolic power feature in the economic, the political, and the sexual fields, as will be reflected in the examples below.

For the dominant of these fields, orthodox Mariology has performed a function of religion that Max Weber dubbed legitimierende Macht, or the "legitimizing authority" of their power and privilege. [958] The subjugated, oppositinally, often through syncretize the Virgin with the usually assertive, dark, and powerful goddesses of the indigenous and/or imported African religious traditions, transforming her into a force of resistance. This vision of the Virgin is especially evident in Latin America. n9 The phenomenon of underclass Marian syncretism, along with the longstanding tradition of elites milking Mary's legitimierende Macht has bred all sorts of fireflies in the Virgin's slip. We propose here to undress the Virgin to better glimpse these creatures and more broadly theorize Latin American Marianism and its foundational place in both structures of domination and antisubordination struggles by exploring the particular cases of the cults of Our Lady of Guadalupe, patron saint of Mexico (and, by papal sanction, all of the Americas), and of the leading Marian icons in Brazil, Cuba, Peru, and Haiti, including two of their diasporic communities in the United States. In doing so, with Brazilianist Paul Johnson, we illustrate how in Latin America, as throughout the Catholic world,

images of the saints have provided privileged, divinely sanctioned sites for negotiating the powers of ethnicity, nationalism, and . . . race. Moreover, if certain prominent images of the Virgin Mary have been effectively forwarded as a national face, Catholic yet distinct from the Roman version -- Guadalupe in Mexico, Fatima in Portugal, Lourdes in France, Nossa Senhora Aparecida (Our Appeared Lady) in Brazil -- precisely what, whom, and how these images represent has also been contested within national contexts. As the nationalist associations with saints grow, as might be suspected, the stakes as to what and for whom she signifies are magnified. n10

Scholarly texts treating Marian devotion in South and Central America, Mexico, the Caribbean, and their diasporic communities in the United States are heavily influenced by liberation theology and emphasize the history of oppression to which poor Latin American Catholics have been subjected. Such an emphasis guides inquiry to a consideration of how the poor's Marian devotion takes the form of both an endeavor (through syncretism and symbolic [959] appropriation) in indigenous cultural maintenance and represents "the flag of all the great movements of independence, betterment and liberty." n11 Scholars like Leonardo Boff, Virgil Elizondo, and Ivone Gebara and Maria Clara Bingemer have shown that popular Marian devotion in Latin America can and, depending upon the historical moment and a variety of circumstances, sometimes does emerge as a potent ideologicoreligious critique of, and an effective challenge to, social, economic, political, cultural, and/or sexual oppression. According to Boff, throughout Latin America, "special appreciation of
Mary's role of denunciation and proclamation (denuncia y anuncia) . . . stands out as a key aspect of the people's devotion to her." n12

Sociohistorical studies of Latin American Marianism also demonstrate the proclivity of society's dominant -- be they politically, culturally, economically, sexually, religiously, or militarily dominant -to employ the symbol of the Virgin and Marian devotion to legitimize the status quo and, thereby, their privilege and power. Latin American elites, as has been the case since the Spanish conquistadors and missionaries first arrived in the New World, "institutionalize Christianity itself, with all its symbols and concepts, and reduce it to the service of their selfish cause." n13 In all of the symbolic violence perpetrated toward this cause, the symbol of Mary, along with the virtues that Catholic orthodoxy has promoted through her, including submission, obedience, and female subordination, has been a weapon of choice. This weapon is illustrated rather graphically in the image of Columbus chancing upon the shores of diverse Caribbean islands while standing on a ship christened Santa Maria.

The Virgin Mary had long been European Catholicism's ruler of the seas (Stella Maris; Our Lady of the Navigators; etc.), thus making her the logical choice as divine guiding force behind Spain's maritime exploration and subsequent colonization of the New World. As Marina Warner notes, "The Virgin's governance of the oceans was adapted to a practical purpose: she was prayed to by the missionaries who set out across the Atlantic and other oceans to conquer new territories for Christ," n14 and thus, as Nicholas Perry and Loreto Echeverria conclude, "Hispanic colonization was Marian colonization." n15 Sixteenth century Spanish painter Alejandro Fernandez's Virgin of the Navigators, described here by Carol Damian, is a forceful "visual expression of the influence of Mary in Spain during the epoch of discovery" and a telling image of the Virgin's legitimierende Macht for the Euro-Catholic colonial enterprise:

The Virgin is represented standing on a cloud, the traditional image of the Virgin of Mercy, dressed in a splendid brocade tunic with a cape extended behind her. Two groups of navigators and other persons involved in the colonization of the New World are gathered within the protection of her cape. On the right side are King Ferdinand, Bishop Don Juan de Fonseca, Chief of the Casa de Contratacion and Superintendent of the Indies, and Don Santo Matienzo, first Abbot of Jamaica. On the left appear Christopher Columbus, accompanied by the celebrated navigators Juan de la Cosa and Americo Vespucio. Beneath the figure, sailing vessels ply the calm blue sea. The implication was that the Queen of Mercy was responsible for the triumph of the Conquest of the New World and that the Conquest had her blessing. n16

By the twentieth century, Fernandez's Virgin would take new form in the icons draped over the balconies of Latin American juntas' military headquarters. Her iconic alter ego, meanwhile, once the motherly patroness of slave rebellions in Saint-Dominique and Brazil, would herself learn karate and take up antisubordination causes like those of immigrant Mexican farm workers in California and Marielito rafters in their flight from oppression in Cuba to freedom in Miami.

II. Some Marian Contributions to Diverse Forms of Domination and Resistance in Latin American History

Considerations of socioeconomic class in Latin America thus go far in explaining the central juxtaposed poles in the contest over the Virgin Mary. Yet, the divergence between popular and elite perceptions of Mary represents but one level of the struggle that [*961] has characterized the development and structure of Marianism throughout Latin American history and cultures. The contest over Catholicism's most important feminine symbol extends to a gender struggle, an ecclesial struggle, and a political struggle. In the gendered struggle, the Church hierarchy has employed the Mary symbol and myth to reinforce Catholicism's epic misogynist portrayal of human society and the consequent subjugation of women. This gender struggle is a principal theme of Warner's essential study of the history of the Marian cult, Alone of All Her Sex:

The Virgin Mary is not the innate archetype of female nature, the dream incarnate; she is the instrument of a dynamic argument from the Catholic Church about the structure of society, presented in a God-given code . . . an undiminished certainty that women are subordinate to men . . . n17

For but one concrete illustration of this argument manifest in Latin America, we can turn to Marjorie Becker's study of nineteenth century Mexican Catholic sermons and pastoral letters:

In sermon after sermon priests recreated an image of purity and obedience. As the "immaculate daughter of God, the Virgin mother of God, the purest wife of God the Holy Spirit," she was chaste. As a woman who allowed a male God to have his way with her, she was portrayed as a model for women, who were to be "submissive to their husbands." Then too, she was generous beyond generosity. As she reputedly told the faithful, "I am a loving and tender mother for whomever asks my help in their pain and suffering. n18
On the theological front of the gendered struggle, feminist theologians like Rosemary Radford Ruether, Mary Daly, and Catharina Halkes have clearly exposed the sexism inherent to orthodox Catholic Mariology. While this has led "many feminist theologians [to argue] that Mary is not salvageable," n19 others, meanwhile, keep [n*962] the faith in the possibility of recasting Mary as a symbol propitious to the liberation of women. Halkes, to this end, links the political potency of Mary's Magnificat, n20 which has been reclaimed by Latin American liberation theology for political and ecclesiological argument, to prospects for a feminist Mariology. "Consequently, liberation by a female symbol can have a positive influence on the conscientization of women and the struggle against machismo, the dominant male vanity, which is still so present." n21 Daly, however, could not disagree more:

The immaculate conception . . . illustrates and legitimates the ineffable circularity of rapism. Mary's victimization is astonishing. . . . As "Virgin" she is a reminder to women of their destiny to be raped, for in the patriarchal system, a virgin is a future rape victim. Since she is "forever virgin" (despite her maternity), she is forever future rape victim. The message is even more exacerbated by the extremity of her tantalizing purity. Moreover, as archetypal "Mother," she is past rape victim. Encompassing all time, her rape is the perpetual entombment of her life-time. n22

The Virgin Mary's relevance for the struggle against patriarchy in Latin America (and thus for antisubordination theory) seems to [n*963] depend on a transformation from archetypal rape victim to a black belt in karate striking back at the oppressor. This image is strikingly portrayed in Chicana artist Ester Hernandez's aquatint etching La Virgen de Guadalupe Defiendo los Derechos de los Xicanos. Admittedly, one may question how meaningful a reflection a single feminist painting is of any grassroots liberation Mariology. Yet, a careful historical analysis of Latin American religious history reveals a consistent undercurrent of antisubordination Mariology that stands "in active opposition" to all forms of oppression. In each case detailed in this Essay, the transformation of the archetypal rape victim who patronized the Columbus expedition is rooted in a rich religious consciousness that, conditioned by oppression, assimilates the Virgin with the powerful goddesses of local or imported African traditions.

The subjugated have in fact assimilated these two powerful symbols toward the creation of an antisubordination ideology. For example, Mexico's Guadalupe was for them none other than a manifestation of Tonantzin, the ancient Mexican mother goddess, wife of the serpent. As a Virgin thus transformed from a pale, submissive "rape victim" into a dark, powerful serpentine woman for Mexico's dark skinned Masses, Guadalupe immediately became the symbol of resistance par excellence. This symbolic appropriation has remained very strong in Mexican popular Catholicism and is the wellspring of much of the liberatory force that Guadalupe represents for underclass Mexicans and Mexican Americans.

The importance of syncretizing the Virgin with indigenous (or imported African) goddess to Mary's place in any antisubordination agenda is confirmed also by the irreplaceable role that such syncretized forms played in the Haitian Revolution. Being the only successful national slave revolt in world history and the New World's first nation in which political liberty was won for all of its residents, this revolution is perhaps the most significant, concrete, antisubordination achievement in Latin American history. n23 [n*964]

To be sure, elites in Mexico and elsewhere would not allow the Virgin to be so subversively appropriated without a fight, and they sought to salvage her support for the status quo by lightening her skin anew:

This woman Guadalupe who had originally been dark, Semitic, and poor was recast. Painting her skin in tomes of ivory, icon makers whitened her, presenting a striking contrast to her real-life appearance, and to the darkskinned Tarascans and mestizos of the area. In her new life she appeared as a delicate blond. n24

Whereas the subjugated syncretize the Virgin to inspire resistance in Latin America, the dominant, European culture this manipulated the Virgin's symbolism to validate atrocities. The following historical account forcefully illustrates this manipulation, in which the builder of the New World's first church, Nicolas de Ovando, saw fit to make a virtual holocaust offering to Mary of dozens of native Xaraguans:

Ovando subjected three hundred Haitian chiefs, vassals to the queen, to torture. It was during their torment that they certified having conspired [against the Spanish]. They were then burned alive. After the extermination of the better part of the population of Xaragua, Ovando founded a town which he named Sainte-Marie-de-la-Paix [St. Mary of Peace!]. n25

Following such brutal, Catholic-based oppression of the indigenous populations of the lands it conquered in the Americas, Euro-Catholic imperialism next employed the Virgin Mary to sanction plantation slavery. Rachel Beauvoir-Dominique finds it duplicitous and ironic that "the establishment of the slave regime [in Saint-Domingue] should be
patronized by such a figure" as Notre Dame de l'Assomption, for instance:

The symbol of the bodily ascension of the Virgin, the purity of this carnal representation, would seem fundamentally opposed to the physical violence committed against thousands of enslaved men and women. All the same, one makes what one wants of signs and symbols; they are manipulated, diluted, and adapted to needs. And, among the various representations in which she has been experienced from the very beginning of Christianity, the figure of Notre Dame most monopolized by the first French colonists would be that of the crowned Virgin, the immediate and logical development of the Assumption. n26

As Beauvior-Dominique insightfully noted above, how religious symbols are interpreted, manipulated, and used is chiefly dictated by the needs or agenda of a group or individual. These needs (political, religious, economic or sexual) represent one of the driving forces behind the diversity of interpretations of the symbol of the Virgin Mary in Haitian (as well as Latin American) religious history. In contrast to the conformist effect that the French (like the Spanish before them) intended for Marian devotion to have upon their subjugated flock in SaintDominique, forms of syncretism of the Virgin Mary with female African spirits soon became a defining feature of slave religion in the colony. "It seems logical to assume that when the missionaries evangelized the slaves during the colonial period," writes Leslie Desmangles, "they related the stories of the Virgin's life and made instructional use of the Catholic symbols connected with her, but that the slaves responded to such instruction by transfiguring these symbols in African terms." n27 Like the "orthodox" Mariology of the oppressors, then, the syncretic appropriations of the Virgin by enslaved Africans in Saint-Domingue amounted to "strategic discourses promoting particular ends," n28 to use Johnson's definition of the correspondent phenomenon in Brazil.

From the Euro-Catholic imperialist perspective, however, worse than syncretic Marian devotion among the oppressed was the slaves' ideological appropriation of the symbol of the Virgin Mary. In some cases, this appropriation transformed her into "the protectress of various liberation movements, including those of slaves." n29 In Brazil, for example, Nossa Senhora de Aparecida was "even at the very outset of her career, implicated in the dynamics of national resistance to the colony." n30 Furthermore, as evident in the celebrated Hidalgo Revolt of 1800 in Mexico, such ideological Marian adaption sometimes functioned to inspire armed rebellion:

Not long before the rebels moved out to intercept the royalists, a solemn celebration was held in the Sanctuary of the Virgin of Guadalupe in Guadalajara to implore the protection of the Virgin of the Patria for the insurgent cause. Hidalgo, Allende, and the other commanders attended, with a large part of their army massed outside. Every method of employing the Virgin in sic behalf of the Revolt was continued and perfected . . . . n31

In this remarkable case, the struggle over the legitimizing force of the Virgin Mary thus spilled over onto the battlefield, with images of the Virgin pitted in iconic combat above her opposing armies:

The priest Hidalgo used the flag and the colours of the Virgin of Guadeloupe for his army, as did Morelos, while the Spaniards grouped themselves under the banner of Perpetual Succour, which Cortes had saved from the Aztecs in the "sad night." n32

However, in Mexico, as elsewhere in Latin America, the Catholic hierarchy (allied with the dominant) n33 has been quick to rebound from such sociopolitical outbursts of subversive Marianism and reestablish Mary's role as the "guardian of the status quo.

The specter of revolution triggered a longstanding clerical anxiety. With the arrival of liberal soldiers in the 1858-61 War of the Reform, priest hastened to the ideological battlefield. In their determination to defend an inequitable status quo against the liberal challenge, they plucked up the Virgin Mary and outfitted her for battle. Stressing her alleged purity, they remade her into a guardian of the status quo. The campaign climaxed with her 1851 coronation as the patron saint of Zamora. n34

Likewise, the Haitian Catholic hierarchy effected an ideological retrieval of the Virgin's legitimierende Macht upon its return to Haiti [n967] in 1860. n35 As was the case for the Mexican Catholic hierarchy, Haitian ecclesial authorities had to reckon with the legacy of a Virgin-inspired resistance movement, in this case one far more radical and heterodox than that of Hidalgo. Led by Romaine-la-Prophetesse, who claimed to be "the godson of the Virgin Mary," this movement of escaped slaves spread revolt from plantation to plantation between Leogane and Jacmel, torturing and murdering whites, slaughtering livestock, and burning plantations. n36 Romaine said Mass before an inverted cross, a saber in his hand, and retrieved his godmother's written messages from within his church's tabernacle, wherein normally rests the Eucharist alone. This forceful example demonstrates how religious symbols, once appropriated, can be transformed from legitimizing buttresses of sociopolitical domination into
inspirational forces for insurgency. Invariably, the Virgin, through Romaine's highly syncretic rituals and mediumship, instructed his band of rebel slaves and maroons to terrorize the French colonists for a period of seven months until the underground army of several thousand insurgents was finally disbanded.

This Essay has alluded to but a few examples to demonstrate the symbolic importance and central place of the Virgin Mary in the domination/resistance dichotomy that characterizes Latin American history and societies. Moving from the highly politicized and militarized examples of this arena of contest over the Virgin in Haiti and Mexico, we next consider examples from Brazil, Cuban Miami, and Peru of how the struggle for Mary's legitimierende Macht is waged just as forcefully by oppositional forces in the arenas of nationalism and identity.

III. The Virgin Mary, Nationalism, and Identity in Brazil, Peru, and Cuban Miami

In Peru, the Virgin Mary is not the national patron saint, rather that status is held by St. Rose de Lima. Perhaps the Virgin Mary's resultant dissociation from "official" Peruvian nationalism renders her more readily seizeable by the underclasses. With St. Rose of Lima being just that, a Saint of Lima and not of the entire nation, the Virgin herself is left free to mingle among the provincial goddesses of indigenous culture (primarily Incan). The popular syncretization of the Virgin and Incan traditions are thus not surprising.

For example, Marian festivals in Cuzco, as in other provincial centers, features chicha (potato whiskey) offerings to Pahcamama, the leading goddess of the Incas. These chicha cups are a common sight before the door of the Cuzco cathedral, which is built upon an ancient Incan temple site. Retalbos, small, originally Incan altar boxes made of potatoes and used to hold sacrificial offerings, represent another site of Peruvian Marian assimilation with devotions to the indigenous goddesses. Once adorned with the imagery and symbolism of Incan nature spirits, today retalbos usually depict nativity scenes, St. Rose de Lima, or some image of the Virgin Mary, especially Our Lady of Mount Carmel of Sorrows, the Immaculate Conception, and the Candle Stick (Candelaria). In part out of discouragement with St. Rose's irreversible association with the Spanish and their elite Peruvian offspring, Peru's foremost retalbero, Nicario Jimenez Quispe, offers no space in his artwork for his nation's patron saint, decorating his retalbos most often with Nuestra Senora de Candelaria, patron saint of his native rural village. This is perhaps reflective of what the artist perceives of as her irrelevance to any but the urban Peruvian elite.

National identity is very much at stake in portrayals of those Virgins who are the patron saints of nations and in the orchestration of their devotions, especially on their feast days. To attend the feast day of Nuestra Senora de Caridad del Cobre (September 8), patron saint of Cuba, at the Hialeah Race Track in Miami is to witness exile Cuban nationalism in all of its passionate politicized pomp. In 1998, fifteen thousand attended as Caridad's icon, herself an immigrant smuggled out of Cuba in 1961, entered the stadium along the racetrack across which normally gallop quarter-horses. The Virgin sat nobly encased in glass, surrounded by a couple of priests and a few men in Guayaberas and sunglasses perched above the backseat of a sparkling new (appropriately white) Mercedes Benz convertible. The greatest surge of emotion rose at the singing of the Cuban National anthem, which inspired passionate chants of "Viva Cuba Libre" throughout the event, while limpid Catholic hymns barely raised a collective devotional eyebrow. In studying this annual event, Thomas Tweed, in fact, "sensed in conversations with some of the clergy that it might be a bit too 'secular' for their tastes . . . . In any case, all of the singing, reciting, applauding, and weeping -- yes, there is weeping here too -- negotiates diasporic identity."

As elsewhere in Latin American, popular devotion to the Virgin in Cuba and among Cuban Americans in Miami cannot be fully understood without awareness of the "pagan" goddesses with whom she is most often assimilated and the cosmology in which these goddesses love, dance with, and "mount" their devotees. Moreover, just as legitimacy is at stake in the political field in the struggle over the Blessed Virgin Mary, so is it in the sexual field, and not only patriarchal domination but heteropatriarchal domination as well. In the African-based religion of Santeria, homosexual men find acceptance by certain orishas (spirits) (namely Ochun, Yemaya, and Ogun) and rejection by others, especially Shango, the most powerful orisha in the Santeria pantheon. The Virgin Mary's assimilation in Cuban Santeria with Ochun (as Caridad del Cobre) and Yemaya (as Our Lady of the Regla) opens a discursive locus of legitimacy for homosexual men in popular Cuban Mariology. However, Ogun, who is syncretized with St. Peter, pays a significant price for his acceptance of gay children in that none are admitted to the highest ranks of the religion, be they gay or straight. It would seem, in any event, that those fireflies in the Virgin's slip that are gay, Cuban, and male are "children" of Ochun and Yemaya, with a few of Ogun's children counted among them.

This case, in effect, suggests that Marian syncretism with indigenous or imported African goddess figures is
an issue that should be central to LatCrit's theoretical exploration of antisubordination religious forces, because it serves as resistance against all forms of domination, including heteropatriarchal hegemony. n44

By virtue of its sheer size and extraordinary cultural diversity, there are perhaps more fireflies in the Virgin's slip in Brazil than anywhere else. Since the discovery of her icon in a river in the early eighteenth century, Nossa Senhora Aparecida has gradually been transformed from a regional patroness of fisherman into Brazil's national patron saint. Pedro I in his 1822 declaration of Brazilian independence form Portugal, officially proclaimed her as Brazil's patron saint, which the Vatican formally sanctioned in 1930. As was the case in Haiti and elsewhere, the Catholic hierarchy in Brazil employed the Virgin as patroness of its campaign to suppress African-based religious traditions such as Candomble and Umbanda. Already in 1804, the example of the Haitian Revolution, along with local maroon dissidence, was enough for Brazilian elites to realize the enormous threat that religious syncretism represented, and within a few years police were legally empowered to raid batuques, African-based drumming ceremonies, and arrest participants. n45 As Johnson explains, "Nossa Senhora Aparecida had now become the marker of public space, one that was transformed into the folkloric shadow of the mulatto, albeit 'whitened' for the public good." n46 She has since even been named the highest-ranking general in the Brazilian army. n47

Given these multilocal powers invested in Aparecida, what occurred on October 12, 1995, her feast day, was an affront to all sectors of Brazilian society except Protestant Pentecostals of the fundamentalist extreme. On a nationally televised broadcast, Protestant Pentecostals of the fundamentalist extreme, an affront to all sectors of Brazilian society except Protestant Pentecostals of the fundamentalist extreme. On a nationally televised broadcast, Protestants, who have much interest in promoting obedient resignation in the masses. This pursuit often involves an assault against sometimes politically or otherwise subversive indigenous or syncretic popular forms of religious expression, wherein are found loci of empowerment on the political, ideological, and sexual levels. [n*972]

The overarch of this multilevel contest over the Virgin in Latin America and its diasporic U.S. communities are, in the end, significant facets of the culture of domination and subjugation that has characterized Latin American history and societies. These struggles demand forthright address in LatCrit antisubordination theory and should be central to any LatCrit theory of religion. Orthodoxy's interests in maintaining doctrinal unity in the name of ecclesial supremacy and the domination of the laity have usually been pursued in the form of an alliance with the politically and economically dominant. The dominant comprises largely of elite men, who have much interest in promoting obedient resignation in the masses. This pursuit often involves an assault against sometimes politically or otherwise subversive indigenous or syncretic popular forms of religious expression, wherein are found loci of empowerment on the political, ideological, and sexual levels.

Conclusion

The overarch of this multilevel contest over the Virgin in Latin America and the wealth of legitimierende Macht invested in her is the quest for power and domination in relationships including: men over women, the rich over the poor, whites (or mulattos) over blacks and native Americans, and the Catholic hierarchy over the laity and indigenous religions or heresy. Theoretical explorations of Latin American Marianism that seek to deconstruct in order to create space for reconstruction must, therefore, focus careful attention on the relationship between power and the uses of the symbol of the Virgin Mary and Marian devotion. Furthermore, these explorations must keep sight of the fact that struggle implies, of course, the presence of two or more conflicting forces. In the sociomariological context, this means that those who are to be subjugated through the dominant's manipulation of Mary themselves can respond with their own forms of Mariology that sometimes emerge as politically, socially, sexually, or theologically subversive. This being the case, it should be expected that in Latin America, the fireflies in the Virgin's slip will continue to be fruitful and multiply.

FOOTNOTE-1:

n1 Elizabeth M. Iglesias & Francisco Valdes, Afterword: Religion, Gender, Sexuality, Race and Class in Coalition Theory: A Critical and Self-Critical
Analysis of LatCrit Social Justice

n2 The tendency to place Mary at the
center of one's or a community's
devotional life.

n3 Iglesias & Valdes, supra note 1, at 520.

n4 Id. at 545.

n5 Because much of my demonstration of
the liberatory dimension of Marianism in
Latin America depends on an exploration
of the empowerment gained through the
Virgin's syncretism with indigenous or
important African goddesses, I am
concerned that an implied casual dismissal
of orthodoxy might be perceived in my
position. While the issue of just how far
the Virgin can be assimilated before no
longer being the Virgin is highly complex
and beyond the scope of this essay, I will
note that impetus for the Virgin Mary's
inculturation can be found in Catholic
doctrine. See, e.g., Lumen gentium and
Nostra aetate, in Vatican II Documents.
Thus, a reconstruction of the Virgin Mary
as an antisubordination force does not
necessarily require the rejection of
orthodoxy.

n6 See Pierre Bourdieu, Outline of a
Bourdieu's term "weapons of symbolic
violence" connotes any custom, institution,
expectation more, or belief system which
is employed or manipulated in "that
gentile, invisible violence, unrecognized as
such, chosen as much as undergone" which
permit, as explains Richard Jenkins
"relations of domination to be established
and maintained through strategies which
are softened and disguised, and which
conceal domination beneath a veil of
enhanced relations." Id.; see also Richard

n7 I borrow this term from the subtitle of
Maurice Hammington, Hail Mary? The
Struggle for Ultimate Womanhood in
Catholicism (1995). See supra notes 18-21
and accompanying text (surveying feminist
thought on Mary).

n8 Carol Damian writes of Spanish
missionaries discovering that the Virgin's
slip was literally full of -- if not fireflies --
indigenous religious trinkets in Peru:
"Spanish campaigns to destroy the idols of
the Andean people revealed ritual objects
hidden beneath the gown of statues of the
Virgin Mary . . . . " Carol Damian, The
Virgin of the Andes: Art and Ritual in

n9 Such symbolic appropriation is a central
feature of the revolutionary capacity
inherent to popular religion, which
Gramsci called "a worldview in active
opposition" to that of the dominant.

n10 Paul C. Johnson, Kicking, Stripping,
and Re-Dressing a Saint in Black: Visions
of Public Space in Brazil's Holy War, 37

n11 Virgil Elizondo, Popular Religion as
Support of Identity; a Pastoral-
Psychological Case-Study Based on the
Mexican American Experience in the
United States, in 186 Popular Religion,
Concilium 36, 39 (Norbert Greinacher &
Norbert Metz eds., 1986).

n12 Leonardo Boff, The Maternal Face of
God: The Feminine and Its Religious

n13 Id. at 191.

n14 Marina Warner, Alone of All Her Sex:
The Myth and Cult of the Virgin Mary 267
(1976).

n15 Nicholas Perry & Loreto Echeverria,
Under the Heel of Mary 31 (1988).

n16 Damian, supra note 8, at 38.

n17 Warner, supra note 14, at 10.

n18 Marjorie Becker, Setting the Virgin on
Fire: Lazaro Cardenas, Michocan Peasants,
and the Redemption of the Mexican

n19 Hammington, supra note 7, at 162.
"Many feminists want to forget Mary and
concentrate on other issues, such as
revisiting the language used for divinity or
recovering women's spirituality. One could
argue that this entire investigation has been
a rationale for moving beyond Mary. However,
deconstruction must occur before a
reconstruction is possible. Mary is
such a complex religious figure that to
attempt any reworking of her image
without fully addressing her history is to
fail to appreciate her religious potency."
Id.

n20

My being proclaims the greatness of the Lord,

my spirit finds joy in God my savior,
For he has looked upon his servant in her lowliness;

all ages to come shall call me blessed.

God who is mighty has done great things for me,
holy is his name;

His mercy is from age to age
on those who fear him.

He has shown might with his arm;

he has confused the proud in their inmost thoughts.

He has deposed the mighty from their thrones

and raised the lowly to high places.

The hungry he has given every good thing,

while the rich he has sent empty away.

He has upheld Israel his servant,
ever mindful of his mercy;

Even as he promised our fathers,
promised Abraham and his descendants forever.

Luke 1:46-55


n24 Becker, supra note 18, at 15.


n26 Id. at 28.


n28 Johnson, supra note 10, at 127.

n29 Ivone Gebara & Maria C. Bingemer, Mary: Mother of God, Mother of the Poor 134 (Phillip Berryman trans., 1989) (1987).

n30 Johnson, supra note 10, at 127.


n33 Becker, supra note 18, at 21.

n34 Id. at 14.

n35 Catholic priests were mostly slaughtered or fled the colony during the Haitian Revolution from 1791 to 1804. Upon gaining independence, Haiti struggled to gain recognition by the Vatican and would be bereft of Vatican-sanctioned priests until the signing of a concordat in 1860 brought an end to what Haitian historians refer to as the "Great Schism."

n36 For an extensive discussion of the history and scope of this rebel/prophet, see Terry Rey, The Virgin Mary and Revolution in SaintDomingue: The Charisma of Romaine-la-Propheteesse, 11 J. Hist. Soc. 341, 341-369 (1998).

n37 Candelaria have been functionally associated with the portable altars originally employed by traveling Spanish friars
n38 This discussion is based upon insights shared with me by Carol Damian.

n39 Thomas Tweed, Our Lady of the Exile: Diasporic Religion at a Cuban Catholic Shrine in Miami 127 (1997).

n40 In the metaphoric language of numerous religious cultures wherein spirit possession is esteemed, a person who is possessed is referred to as a "horse" whom the spirit "mounts" as her/his rider.

n41 The spirit of lightning and thunder.

n42 The highest ranking religious specialists in the religion are known as the brotherhood in babalawos.

n43 It is interesting, if not suggestive, to note in this regard that men are the majority of devotees at the shrine of Nuestra Senora de Caridad del Cobre in Miami. Tweed explains this phenomenon with reference to Cuban nationalism. See Tweed, supra note 39, at 61.

n44 The pinnacle religious experience of African and African-based religions, that of spirit possession, is another area that should be investigated by anti-subordination theory. In possession experiences/performances, not only are gender lines often erased, the possessed devotee (more often female than male) is understood to experience a displacement of her/his personality, and with it, all responsibility for anything uttered. It is the possessing spirit who speaks, creating an unparalleled discursive arena for popular resistance ideology. For a discussion of this function of spirit possession see I.M. Lewis, Ecstatic Religion: An Anthropological Study of Spirit Possession and Shamanism (1971).

n45 See Johnson, supra note 10, at 137.

n46 Id. at 128.

n47 For a discussion of contested representations of the Virgin in the direction of liberation theology in Brazil, see Robin Nagle, Claiming the Virgin: The Broken Promise of Liberation Theology in Brazil (1997).

n48 Johnson, supra note 10, at 131.

n49 Id. at 134.
PIERCING WEBS OF POWER: IDENTITY, RESISTANCE, AND HOPE IN LATCRIT THEORY ANDPRAXIS: Latinas and Religion: Subordination or State of Grace?

Laura M. Padilla *

BIO:

* Professor of Law, California Western School of Law, J.D. Stanford Law School, 1987; B.A. Stanford University, 1983. I am grateful to the W.K. Kellogg Foundation for awarding me a Kellogg Fellowship. Through that experience, I was given the resources and freedom to pursue learning in an area outside of law, hence, the liberty to explore how people throughout the world use spirituality to build community. In that process, I became increasingly interested in how Latinas/os use spirituality to build community and so began my interest in the topic presented in this Essay. I am especially grateful to Margaret Montoya and to participants at the Fourth Annual LatCrit Conference for allowing me to share some of these ideas in a panel entitled "Religion, Gender & Sexuality: Conscience in LatCrit Theory." I also want to thank Guadalupe Luna for her careful reading and comments on this essay.

SUMMARY: ... To illustrate, Catholicism has oppressed many women through its conservative insistence on male domination, yet devout Catholics have challenged that domination through liberation theology, including the mujerista theology described by Ada Maria Isasi-Diaz. n2

[973]

Introduction

Religion is not any one stable force across the vagaries of time and place . . . Religion encapsulates both the oppression practiced by Roman Catholicism's authoritative apparatus, as well as the resistance against such oppression mounted by dissident forces within that Church. n1

To illustrate, Catholicism has oppressed many women through its conservative insistence on male domination, yet devout Catholics have challenged that domination through liberation theology, including the mujerista theology described by Ada Maria Isasi-Diaz. n2

[974]

This Essay addresses how religion simultaneously subordinates Latinas while serving as a source of strength. More specifically, it focuses on Catholicism and how the same church and religion have a fragmented and varied impact on Latinas, particularly Mexican-Americans, with whom I am most familiar. n3 When using the term "religion" in the context of Latinas, I normally refer to Catholicism and sometimes to Christianity more generally because even though not all Latinas/os are Catholic, at least sixty-five percent self-identify as Catholic. n4 In spite of the high numbers of Latina/o Catholics, an increasing number of Latinas/os are turning to evangelical and Pentecostal churches. "While firm statistics are lacking, local religious leaders agree there has been a dramatic increase in evangelical and Pentecostal churches that serve Latina/o immigrants." n5 Catholicism's hold on
Latinas/os is weakening, demonstrating that the Church, for various reasons, is not fulfilling the needs of many Latinas/os.

Even though this Essay focuses on Latinas and the Catholic Church, it is not meant to diminish the experiences of non-Catholic or non-Christian Latinas, and even among Catholic Latinas, the experiences are anything but homogenous. Nonetheless, there is enough common experience to justify exploring the paradox of how Catholic Latinas use religion as a source of strength, as a survival and resistance strategy, and as a way to build community, on the one hand, while experiencing it as a subordinating and oppressive force, on the other. I broach this controversial topic for the important reasons expressed by Professors Valencia, Iglesias and Valdes. Professor Valencia stated that: [*975]

The role of the Catholic Church in Chicano/a lives is not one that can be denied, ignored, or glossed over, but must be one which is both recognized and directly addressed by LatCrit theory. To fail to do so would be disingenuous and irresponsible at the very least and revisionist history at its worst. n6

Professors Iglesias and Valdes pointed out that "LatCrit theorists must apply critical, anti-essentialist lessons to ensure that religion is in fact an anti-subordination force in everyday life -- or, alternatively, to aid mobilization of resistance against any imposition of subordination in the name of any religion or any other construct." n7

A question underlying my exploration is whether religion can liberate Latinas without unduly oppressing them. Answering that question is complicated by Latinas' cultural tendency to accept their fate of suffering with dignity, n8 whether that suffering be religiously or culturally based. My exploration commences with background information on Latinas, religion, and culture. That provides the basis for deconstructing Latinas' relationship with Catholicism, including a discussion of how religion has served as both a source of subordination and strength. The Essay then explores how Latinas' relationship with the Church might be reconstructed to intensify religion's liberating potential while diminishing its tendency to subordinate Latinas. n9 The Essay concludes with a reminder that each person's relationship with religion is unique. Yet it also exhorts Latinas for whom religion is important to intentionally define their relationship with the Church so as to fulfill their own needs, whether for solace, freedom from oppression, or social justice, and to refuse to accept as inevitable its subordinating potential. [*976]

I. Deconstructing Latinas, Culture, and Religion

This Part describes the cultural and religious backgrounds of many Catholic Latinas, and attempts to provide a framework for understanding the complex, and by no means universal, relationship between Latinas and religion. It also gives a brief history of the Catholic Church vis-a-vis Latinas/os, which unique relationship shapes the Church's potential to both subordinate and liberate Latinas.

A. Latinas' Cultural and Religious Background

Many Latinas share a cultural background, which affects how religion operates in their lives:

Culturally, Latinas may lack self-compassion because of social conditioning which tells them that they have caused their own problems or that their problems result from God's will and they should simply accept their problems. Cultural conditioning also discourages them from involving others in their problems. n10

Latinas' propensity to accept blame for their problems is well documented.

The women take direct responsibility for what they do or do not do. Though they have a certain sense of predestination, they do not blame anyone but themselves for what goes wrong. On the other hand, God is given credit for the good that they do, the good that occurs in their lives." n11

This sense of predestination and acceptance often results in Latinas' willingness to accept unfavorable religious and familial roles and conditions. Moreover, there is a pervasive sentiment among Latinas that because those roles are preordained, they should accept them with dignity, n12 and hence, should not agitate for change. This may explain a general tendency to accept both Church doc [*977] trine towards women and the Church's limited roles for women, n13 but such acceptance is certainly not global, and Latinas throughout the Americas have resisted and worked to change the status of women in the Church. n14

Latinas' cultural background is also characterized by its reverence for family. n15 Although such reverence has been implicated as a source of oppression, not all Latinas accept this charge. "Maintaining our families is an intrinsic part of our struggle. Therefore, we are not willing to accept fully the Anglo feminist understanding of the family as the center of women's oppression." n16 Rather than blindly accepting others' pronouncements about what family should mean for them and the appropriate relationship between family and religion, Latinas must decide for themselves the significance of family.

Latinas' view of family also impacts their religiosity. As mothers, Latinas are primarily responsible for inculcating religious values into their children. "It has
been characteristic of the role of women, whether as mother or catechist, to instruct children in the faith, to see to it that they receive the sacraments. And to instill in them the values and virtues consonant with a good Christian life." n17 Regardless of family status, religion is a central part of many Latinas' lives. n18 Researchers consistently find that Latinas/os consider themselves very religious, n19 with Latinas even more likely than their male counterparts to consider religion very important. n20 The centrality of religion for Catholic Latinas/os is manifested through both orthodox doctrine and popular religiosity. The former is illustrated, for example, by many Latinas/os' belief in heaven, hell, the virginal birth of Jesus, and Jesus's resurrection, n21 as well as Latinas/os' participation rates in sacraments such as baptism and Church weddings. n22 The latter is illustrated in many ways, including through devotion to the Virgin Mary, n23 a strong belief in the intercession of saints, and the habit, particularly among women, of lighting candles or establishing home altars. n24

Regardless of the formality of their religious beliefs, 'Latinas' relationship with the divine is a very intimate one. This intimate relationship is a matter not only of believing that God is with us in our daily struggle, but that we can and do relate to God the same way we related to all our loved ones." n25 In other words, Latinas' God is a personal, living God with whom they converse daily -- upon awakening, while driving to work, booting up a computer, reprimanding children, and wondering how they will possibly get through another day. They can harm this divine relationship through apathy and excessive autonomy, n26 thus distancing them [979] selves from a God who could provide meaning in their lives. These sins of indifference and selfishness cause individual and collective harm by preventing Latinas from both living up to their potential and co-creating healthier communities. To avoid these sins,

Latinas need to actualize our sense of comunidades de fe [faith communities] by setting-up communities which are praxis-oriented, which bring together personal support and community action, and which have as a central organizing principle, our religious understandings and practices as well as our needs. n27

There is a multidirectional relationship between Latinas, their culture, and religion, with each clearly impacting and shaping the other. In order to better understand that relationship and to modify it so that Latinas can preserve their religiosity while pursuing an antisu...
A poor, rural India shared with the espanola of the upper classes the prevailing norm of exclusion from participation in the new system. The universal function of women during this period was to serve in the home as procreators, housekeepers, wives and mothers. Other common grounds of exclusion shared by indias and espanolas were the universal denial of participation in religion, government, and education. Accordingly, all women were considered inferior to men, and native women were at a more extreme disadvantage. Yet in spite of the disdain with which Europeans viewed the indigenous and mestizos, particularly women, efforts at assimilation, including religious assimilation, continued. Religion's development in the New World became increasingly complicated, partly because of an interesting event that occurred shortly after the Spanish invasion. This event has directly affected Latinas/os throughout the Americas, and continues to shape their religious beliefs. In the predawn hours of an early December day, the Virgen de Guadalupe (Virgin of Guadalupe) revealed herself to Juan Diego, a poor, dark campesino (farmer or countryman). She asked him to convey to the bishop her presence and her request that the bishop build a hermitage at the site where she revealed herself to Juan Diego. After Juan Diego complied with her request and was rejected by the bishop, she twice more revealed herself to Juan Diego, he continued to make the same request of the bishop, and the bishop continued to resist until Juan Diego's third interview with him. At that interview, as a sign from the Virgen, Juan Diego presented to the bishop brilliant flowers from the desolate hilltop where she had revealed herself to Juan Diego. And as Juan Diego unfolded his white mantle to present the flowers, "she painted herself: the precious image of the Ever-Virgin Holy Mary, Mother of the God Teotl. . . . " The bishop then believed and in short order, the hermitage was built. Hundreds of millions of pilgrims have already journeyed to this site, and thousands continue to make the journey. It is important to briefly discuss the ramifications of the Virgen story's symbolism and potential to liberate. By choosing to reveal herself to Juan Diego, a poor and oppressed Nahuaatl Indian, the Virgen illustrated the importance of reaching and serving the oppressed, the downtrodden -- those at the bottom. Juan Diego represented the people that had been conquered and whose religion had been dismantled -- when the Virgen chose him, she chose someone who stands for every person whose self-dignity has been crushed, whose credibility has been destroyed, whose sense of worth has been trampled. As he will tell us himself, he is nothing; he is a bunch of dry leaves. He has been made to think of himself as excrement. . . . He no longer knows himself as he truly is, seeing himself only through others' eyes as totally worthless and useless. The Virgen story replicates biblical teachings in which God favors the poor and outsiders. In the Old Testament, the Lord declares that He "will assemble the lame, and gather the outcasts, even those whom I have afflicted. I will make the lame a remnant and the outcasts a strong nation." The Virgen story contains parallels to Christ's life as well. Just as the Virgen selected Juan Diego, a poor and marginalized indio, Christ frequently singled out the poor and the oppressed -- as his chosen people. For example, Jesus chose Mary Magdalene, a known prostitute, to be among his select company. Likewise, the Virgen chose Juan Diego to be her messenger, while Jesus chose poor fishermen from Galilee, certainly deemed outsiders, to be his disciples and messengers. While this may seem unremarkable, consider that during Jesus's time, Galilee was looked upon as a backwater and those in power in the Church, such as the Pharisees and the scribes, were from Jerusalem. The Virgen story also calls to mind many New Testament stories where Christ favors the despised, as the Virgen favored Juan Diego by selecting him as her messenger and providing him solace. For example, while Jesus was passing between Samaria and Galilee . . . as He entered a certain village, ten leprous men who stood at a distance met Him; and they raised their voices, saying, "Jesus, Master, have mercy on us!" And when He saw them, He said to them, "Go and show yourselves to the priests." And it came about that as they were going, they were cleansed. The leprous men were despised not only because of their physical condition, but also because of their ethnicity, like Juan Diego. Pharisees from Jerusalem were accorded the highest status whereas people from Galilee were like campesinos, and those from Samaria were even further down the pecking order. Accordingly, those Jesus and the Virgen chose as the beneficiaries of their love and grace were those considered least deserving of recognition or salvation. The Virgen story additionally illustrates the potential for synthesis as a mode of liberation for Latinas...
because it respects elements of indigenous religion and culture while teaching Christianity. The Virgen told Juan Diego "know and be certain in your heart, my most abandoned son, n61 that I am the Ever-Virgin Holy Mary, Mother of the God of Great Truth, Teotl, of the One through Whom We Live, the Creator of Persons, the Owner of What is Near and Together, of the Lord of Heaven and Earth." n62 By using the names of Nahuatl Gods, the very same Gods who Spanish missionaries first disrespected and then dismissed, the Virgen acknowledges those Gods and thus grants them the respect that had formerly been stripped away from them. In the process, she neither discredits the natives' Gods nor denies the Christian God. Thus, she moves out of the "either/or, us or them" paradigm into a paradigm of acceptance. This contrasted with early conquerors' and missionaries' zeal for destroying all vestiges of the old religion and culture: from domination to partnership; and of the conquered culture: from victimization to survival and creative development." n63 This partnership model provides guidance for Latinas today to syncretize the traditional doctrine of salvation with a progressive vision of what religion can do for them, particularly with respect to religion's potential to honor sacred traditions and to liberate.

The Virgen of Guadalupe appeared early in postconquest Mexico, but her influence is still felt throughout the Americas, even today providing relevance for Mexican American Catholics. n64 Further north, the development of Catholicism among natives and mestizos had its own nuances, some of which are worth mentioning here in order to better understand today's relationship between Latinas/os and religion. n65 The Catholic Church's policy toward natives and mestizos was impacted by its "prevailing view of these people as uninstructed in the faith and deficient in their adherence to the general norms of Church practice." n66 And in the Southwest, the Church's policy was influenced by its limited resources. n67 Although the Catholic Church initially followed a policy of assimilation for Latinas/os, n68 it soon realized that Latinas/os did not assimilate in the same way that European Catholics, for example, did. n69 Language posed one barrier, as did culture.

The popular and informal characteristics of Mexican/Mexican American Catholicism were reinforced without the imprint of the official Catholic hierarchy . . . . This form of popular religion expressed the lifestyle, beliefs, and values that were interwoven with Mexican culture throughout the northern frontier and largely created a Catholic atmosphere that lacked the bearing of a religious clergy. n70 Latinas/os' unique culture and needs partially explained the Church's transition from an assimilationist strategy to an accommodation strategy. n71 This transition was also prompted by the recognition that "the borderlands were not so much battlefields where the English-speaking values inevitably triumphed but stew pots where each element flavored the others." n72 Accordingly, while Church doctrine may have remained relatively intact and Latinas/os continued to be under-represented in positions of Church power, n73 the Church nonetheless acknowledged Latinas/os' unique needs. It responded with Spanish-language training for its clergy, n74 and recognized particular Latina/o Church traditions such as the prominence of the Virgen de Guadalupe. n75 In spite of efforts to accommodate Latinas/os' unique needs, the orthodox Church was not instrumental in developing Latina/o leadership, nor has it been as influential as the popular form of religiosity represented by the Virgen de Guadalupe. As commentators have explained:

For the most part, Mexican American Catholics have remained inactive within the formal structures of the institution because of the neglect and marginalization of popular piety by the hierarchy. Where other disenfranchised groups, like African Americans, have developed leaders and social movements through their religious structures and traditions, Mexican American Catholics have been discouraged by the formal religious structures from taking an active leadership role in their church or community. In fact, historically, the American Catholic hierarchy has been diametrically opposed to Mexican American collective action for economic or political change. n76

Although Latinas/os have remained at the margins of Catholic leadership, with Latinas nearly invisible, the Church has gradually turned its attention to Latinas/os specific needs. For example, the Church has been involved in social justice issues impacting Latinas/os.

It has at times provided extensive welfare services for the Mexican-American community, has sponsored citizenship classes and youth organizations, . . . and has recently seen some of its clerical representatives demonstrate in picket lines on behalf of striking Mexican-American farm workers, directing antipoverty programs, and testifying on minimum-wage legislation before Congressional committees. n77

Although the Church has not uniformly embraced these causes, n78 significantly, a critical mass within the Church has embraced them and been willing to
take a controversial stand. This is consistent with the
"Latino Religious Resurgence" which followed the
Second Vatican Council, n79 and allowed Latinas/os
to proclaim a new role for their religion. This new role

Problematized the ability of the churches to practice
pious colonialism toward Latinos, and it introduced
forms of democratizing self-governance into church
disciplines; it transformed the religious practices
common under pious colonialism that were dependent
on the agricultural cycles of a rural Latino populace
into new expressions for religious traditions, social
consciousness, and imagination proper to urbanized
communities; and it accelerated the process of creating
within church usage a transnational label of
"Hispanic/Latino" that went beyond the self-contained
categories of nationality identity like Puerto Rican,
Mexican, Cuban, and so forth . . . . And . . . the Latino
Religious Resurgence widened the institutional
leadership roles of women, a trend currently called
"the feminization of religion." n80

Liberation theology in Latin America preceded and
coincided with the development of the Latino
Religious Resurgence in the United States. n81
Although this Essay cannot provide an in-depth
discussion of liberation theology, no discussion of
Catholicism in the Americas would be complete
without a brief introduction to [*990] liberation
theology. n82 One legal academic laid out the
fundamentals of liberation theology as follows:

1) People's response to God is impeded by oppressive
economic and social conditions.

2) Where the institutions we have in place create such
oppressive conditions, we have a duty as Christians to
do what we can to reform them.

3) Inherent in oppressive institutions is a class struggle
between the beneficiaries and the victims of those
institutions. The institutions cast the beneficiaries, like
it or not, in the role of oppressors of the victims.

4) Reform of the institutions in question liberates the
beneficiaries from their role as oppressors just as it
liberates the victims from their role as persons
oppressed.

5) Efforts to bring about such liberation have
eschatological (religious and eternal) value even if
their historical fruition is problematic. n83

More succinctly, Professor Araujo stated that "one
goal of liberation theology is to reconcile human
beings so that injustice and oppression caused by
people and institutions are replaced with a more just
society in which the dignity and the right to a
flourishing human existence for all are respected." n84
For Latinas/os, liberation theology and movements
which are similarly based on a desire to liberate
subordinated persons from oppression provide an
opportunity for religion to be used as part of an
antisubordination crusade. Because of movements like
that embodied by liberation theology, "Latin-American
Catholicism in the past two decades has [*991]
become identified in the popular imagination with
progress and defense of human rights." n85

Nonetheless, Latin American Catholicism remains
somewhat at odds with liberation theology because of
the conflict between "bureaucrats whose power is
based on a clear line of authority and centralized
hierarchy, and reformers whose ideology and
organizational dynamics favor the growth of local
churches." n86 To elaborate, Claude Pomerlau
characterizes conservative Catholics as favoring a
"vision of cultural Christianity that is centralized and
hierarchical, clerical and male, authoritarian, and
obediently responsive," n87 whereas "liberation
theology accompanies a model of church organization
that is decentralized and egalitarian, nonclerical and
feminine, creative and challenging to itself and to
surrounding society, conscious of -- if not always
comfortable with -- the search for new formulas that
embody religious beliefs." n88 In spite of its
movement away from formal Church hierarchy, its
antisubordination agenda, and its acceptance of the
feminine, liberation theology has not explicitly sought
to liberate Latinas. n89 Nevertheless, Latinas could
use liberation theology's philosophy to further their
own liberation, as some writers have suggested. n90
[*992]

C. Women/Latinas Within the Church

Many hold religion responsible for perpetrating and
maintaining a sense of inferiority, docility, and
servitude among women. Because in religion the
power to govern the institution resides chiefly with
men, religion is considered patriarchy pure and simple.
Catholicism, which directly excludes women from
ordination, is considered, at least by some, patriarchy
par excellence. n91

Before elaborating on the Church and liberation
theology's potential to utilize an antisubordination
agenda for Latinas' benefit, it is appropriate to discuss
women's limited role within the Church, particularly
Latinas.

Judeo-Christian religions generally, and Catholicism
specifically, are traditional patriarchal institutions
which have subordinated and oppressed women. n92
This subordination is rooted in the bible, and has been
extended through biblical interpretation and
subsequently developed Church doctrine and policy. In
response to Eve's transgression in the first book of the
bible, the Lord God said to woman, "I will greatly multiply your pain in childbirth, in pain you shall bring forth children; yet your desire shall be for your husband, and he shall rule over you." n93 Thus appears the first directive from God that man shall rule over woman. It is not the only such directive. The book of Ephesians orders that:

Wives, be subject to your own husbands, as to the Lord. For the husband is the head of the wife, as Christ also is the head of the Church, He Himself being the Savior of the body. But as the church is subject to Christ, so also the wives ought to be to their husbands in everything. n94

In the Book of Timothy, Paul exhorted women to maintain certain roles. [*993]

Let a woman quietly receive instruction with entire submissiveness . . . do not allow a woman to teach or exercise authority over a man, but to remain quiet. For it was Adam who was first created, and then Eve. And it was not Adam who was deceived, but the woman being quite deceived, fell into transgression. But women shall be preserved through the bearing of children if they continue in faith and love and sanctity with selfrestraint. n95

Women also experience oppression at the hands of the Church through limits it places on their leadership, such as prohibiting their ordination as priests. n96 One author discussed restrictions which Catholic women face as follows:

If one has a restricted role, an added or special responsibility, or a position for which she is not eligible, then de facto there is not equality of opportunity. Roman Catholic women meet every one of these conditions. Their church holds them primarily responsible for the success of family life, the moral virtues of their children, and the welfare of their spouses. Ambition in many domains, particularly in service for the church as priests, is seen by many in official positions at best as untoward and at worst sinful. n97

Thus, at a fundamental legal level, doors within the Church are closed to women. This not only officially limits women's roles in the Church, it sends a message about women's position and their (in)abilities.

Women are subordinated not only through biblical text and limited leadership opportunities, but also through interpretation of doctrine and Church policies that impact or limit women's rights. For example, the Catholic Church prohibits birth control, n98 and [*994] abortion. n99 That leaves Latinas few procreative options if they want to comply with Church doctrine.

Even within progressive Church movements, men have been granted a favored position and women's needs have either been ignored or considered only as an after-thought. n100 For example, in Cursillos, three-day retreats appealed particularly to Latinos. n101

"Christ's message" of dynamic self-reform and responsibility for others is woven into presentations of traditional doctrinal themes. The intended result is a lifetime commitment to active Christianity within the Roman Catholic Church. One of the special facets of the movement is its attempt to recruit men first. Only after a group of men has made the Cursillo are their wives invited. n102

Liberation theology similarly began with a male focus, n103 only extending its vision to include the liberation of Latinas after it had delineated other important initial goals. n104

Considering biblical teaching about women, limited Churchdefined roles for women, and women's relative lack of power in the Church, it would be easy to conclude that within the religious realm, women are destined to a life of subordination. However, it would be inaccurate to accept that pronouncement and simply dismiss any hope for women within religious structures. "Contrary to some current stereotypes, women have always had a religious role for autonomous decisionmaking, especially in clergycontrolled [*995] Catholicism." n105 While Latinas are generally not recognized as Church leaders, n106 their role remains significant. n107 One author explains that:

The "womanly" quality that Latina women bring to the daily practice of Christianity is precisely that which keeps it relevant. A look at the frequency with which women assume leadership responsibilities in las comunidades de base in Latin America . . . and are involved in preaching and ministering in all Christian denominations give sufficient indication that women's role in religion has not diminished. n108

Not only have women's roles not diminished, women frequently hold leadership positions in grass-roots movements. n109 Thus, to view Latinas as powerless in the Church oversimplifies a more complex dynamic. As noted,

Tuch a view leaves little room for differentiating between the institutionalized form of religion, on the one hand, and popular religiosity with its roots in the beliefs and traditions of the people, on the other. Upon a closer examination of how power unfolds, it becomes clear that women exercise a productive function in religion; one that subverts and transforms social values. n110
Even prior to recent feminists' assertions that Latinas play a significant unofficial role in religious life, others had acknowledged the importance of Latinas in the Church. n111

When through lack of interest or numbers, the priests, sisters and other religious personnel vanish from Latino communities, or fail to provide adequate ministry it is business as usual for the local "espiritista" [spiritual healer], "curandera" healer and rezadora [prayer leader], as they continue . . . to give counsel so much needed in times of crisis . . . . Despite the patriarchy of the clergy, particularly within Catholicism, women's input continue to shape the transmission of social values among Latinas today. As in the past, the sustaining sources of popular religiosity are not the priests, nor even lay male leaders, but women. n112

Latinas accordingly are central in the transfer of religious and moral values, even if they are not formally recognized as religious leaders. Indeed, "the continuity of Latino Christianity . . . is made possible primarily through the auspices of women who despite obstacles and limited resources have been able to have an impact upon the religious world beyond men's dreams and expectations." n113 Although it is still difficult for Latinas to assume positions of power within formal religious institutions, they nonetheless carve out appropriate roles for themselves, and may take on even more significant roles in the future.

One could cogently argue that with the inevitability of fewer clergy in the Catholicism of America's future, the autonomous power of Latinas in religion will grow, not diminish. When the institutional church fails to mediate the vital relationship between home and heaven, Latinas can summon a tradition of prophetess and priestess of popular religiosity to bridge the gap. n114

D. Religion as a Source of Strength

Thus far, this Part of the Essay has focused on Latinas' culture and religion, and how in spite of some counter-narratives, the Church has been a subordinating force for Latinas and Latinos alike. But that is only part of the story. Although the Church's institutional hierarchy and patriarchy trivialize Latinas' role in the Church and it is doubtful that women will ever be men's equal within the Catholic Church, at many levels, Latinas have created significant roles for themselves. In creating these roles, their purpose has not been to elevate their status, but rather to make religion more meaningful in their daily lives, to create a source for family and community building, and to provide a survival mechanism. This has been crucial because:

Personal survival is integrally linked with the survival of the community and, in a special way, with the survival of the children of the community . . . . We need to make our humanity as women and as Hispanics count in this society; we need to participate actively in defining the society in which we live, which is another way of saying that we need to struggle against the classism, ethnic prejudice and sexism that threatens our very existence. n115

For many Latinas, religion has been the stronghold that has allowed them to face struggles with dignity, to accept circumstances beyond their control, and to move forward as the cornerstones of their families. Latinas frequently call on religion to give them the strength to face many of the severe challenges with which they struggle. n116 "Religion is central in the lives of Hispanic women. It is precisely their religion, their deep sense of an existential interconnection between themselves and the divine, that provides the 'moods and motivations' for their struggle for survival." n117 Latinas' struggles have intensified - they continue to be among the lowest paid and most poorly educated group in our country. n118 Latinas and Latinos alike are disproportionately harmed by welfare reform, n119 and even though their jobless rate is at a record low and their median weekly earnings have increased, n120 their hourly wages have decreased. n121

It is even worse for Latinas. "By almost any available standard, Chicanas are economically exploited not only relative to Anglo men and women, but also relative to Chicanos." n122 One writer's misgivings were more dire:

The socioeconomic political system has no use for the majority of Hispanic women, and, therefore, is not willing to invest money, time, or effort in satisfying our basic needs for food, health, housing or education. The present system views us as a dangerous sector where prostitution, theft, drugs, and AIDS flourish. n123

There is no question that Latinas' serious economic problems are exacerbated by their struggles to overcome negative stereotypes, n124 while facing other critical problems.

Often, the enemy is not the army of a cruel dictator, but the drug dealers of the neighborhood. Challenged not only by these dangers and by the secular institutions but by the very religious institutions which ought to support their work, Latinas in religion have to
face a myriad of obstacles to which ordinarily their male counterparts are not subjected. n125

There are no easy solutions and Latinas must be resourceful, collaborative and willing to utilize a multipronged approach to ma\[*999]\ n ever these challenges. For many Latinas, religion becomes increasingly important as a source of strength in facing those challenges, and a vital part of our multipronged approach. As Anthony StevensArroyo reminds us:

The indicators of poverty point in the direction of a widening gap between Latinos and the general population. With minimal progress on the educational front and almost no promise of governmental intervention in the form of welfare or similar programs, the prospects of alleviating poverty seem dim. In this environment, religion as a road to empowerment, and church institutions as tools for community organizing, become indispensable factors for improvement for the Latino future. n126

Thus, religion becomes more crucial as a solace for this world, and a beacon of hope for the next. Latinas can turn to the Lord with their problems, and seek the inner peace that is otherwise so elusive. One Latina described her relationship with God and the significance of that relationship in giving her the will to continue as follows:

I am confident that God is with me always; the more down I feel, it is as if a supernatural force would lift me up; it gives me positive ideas on how to keep going; this force helps me to realize that I am not alone. No matter how alone I am, no matter how much it seems to me that the whole world is falling on me, and that maybe I have no other means, no doors to open, that all the doors are closed, I feel something that . . . speaks to me. n127

In addition to engaging in one-on-one relationships with the divine, Latinas can and do come together in Church communities to grapple with common struggles. n128 "Religious communities, especially for women, have been among the most responsive groups in the church to issues of adult education, ministry to the poor, violence, and human rights." n129 While gathering in community is crucial, an antisubordination agenda requires more -- we must define the parameters of these communities to ensure that they are \[*1000]\ inclusive and that they address our specific needs through nonhierarchical means. To elaborate:

Our comunidades de fe must be ecumenical, inviting participation across institutional divisions among churches. We must embrace the grassroots ecumenism practiced by many Latinas who relate to more than one denomination because of their need to avail themselves of help no matter where it comes from. For others of us, our ecumenism has to do with our belief that the struggle for liberation and not the fact that we belong to the same church must be the common ground of our comunidades de fe. Our ecumenism has to include taking into consideration and capitalizing on our religiosidad popular (popular religiosity). n130

E. Summary

The materials in this Part illustrate the complexity of the relationship between Latinas and religion. Although Latinas may not be formally recognized as Church leaders, it is common knowledge that their organizational work is crucial and they are often responsible for the day-to-day details which keep the Church operational and lively. However, because of cultural and religious upbringing, they normally do not expect, or receive, recognition for their work. Herein lies a paradox that may be partly responsible for the continuing subordination of Latinas -- many Latinas do not want to create divisiveness within the Church, n131 and will gladly perform any tasks asked of them, without asking for anything in return. This, in turn, makes it difficult to mount challenges to the Church's existing hierarchy and patriarchy. Yet it is crucial to assert that challenge.

If the church were to denounce patriarchy, it would be an important moment in the process of the liberation of women. For this reason, as Roman Catholics we must continue to call the Catholic \[*1001]\ Church to repent of the sexism inherent in its structures and in some of its tenets. n132

For reasons elaborated previously, Latinas' cultural background may constrain their call for this repentance and regardless, Latinas face an uphill battle because it is unlikely that the Vatican will pronounce any change in the Church hierarchy or doctrine in the near future. Nonetheless, it is important to ask the Church to take responsibility for its position toward the oppressed. "The Christian way of assuming this responsibility is humbly to ask forgiveness from God and the victims of history for our complicity -- explicit or tacit -- in the past and in the present, as individuals and as a church - - in this situation." n133 Moving toward an antisubordination policy within the Church while using that same Church as a source of nurturing, strength and salvation, clearly requires altering the hierarchical and patriarchal structure of the Church, as well as other strategies. We can look to the Cursillo movement, liberation theology, the Latino Religious Resurgence, and other progressive movements within the Church as sources of liberation and resistance for Latinas. A remaining challenge is how to capitalize on these movements in order to alter the landscape from one where issues of antisubordination for Latinas are in the
background, to one which foregrounds Latinas' liberation and resistance.

II. Reconstructing the Relationship Between Latinas and Religion

Latinas can reconstruct their relationship with the Church by utilizing religion predominantly as a source of strength and a basis for promoting tolerance and justice. But at the same time, they must acknowledge the difficulty of excising subordination so long as religion is bound up within the constrictions of orthodoxy and institutional structures. The challenge is great.

Given the totality of historical and present circumstances, the cumulative effects of Christianity on this land cannot credibly be said to represent egalitarian respect for difference, or sincere accommodation of diversity on any of the points implicated by the recorded dogma of the various churches spawned by Judeo-Christian imperatives.

The challenge is further heightened because many in power want to preserve the status quo.

Those whose livelihood and identity depend on the structures of the old creation, that is, the structures of domination, try to prevent the new creation. The rise and liberation of the poor always shake the structures of unjust domination and oppression, and those who rely on those structures try everything within their means to keep that liberation from coming about.

Thus, Latinas face the precedent of a Church which has not always been committed to an agenda of tolerance or respect for diversity, much less a specific antisubordination agenda, coupled with a staunch bastion of Church insiders who are committed to preserving the status quo. But it is worth persisting because by altering the status quo, we liberate not only the oppressed, but the oppressors. "Those in power can . . . begin to see and appreciate the very sacredness of 'the other' of their new world and in the same process be liberated from imprisonment by their own self-declared superiority, righteousness, and arrogance."

How do we alter the status quo? We have not sufficiently explored the Church's potential to liberate Latinas and we could commence that exploration by adopting some of the pastoral suggestions offered by Church leaders at the 1968 CELAM conference, "including a call (a) to defend the rights of the oppressed, (b) to achieve 'a healthy critical sense of the social situation,' and (c) to develop 'grass-roots organizations' . . . ." What that means is that as individuals and as a Church body, we must acknowledge social justice as a goal and take seriously the exhortation in Micah "to do justice, to love kindness, and to walk humbly with . . . . God." Achieving that goal requires development of an antisubordination agenda that includes an explicit directive to liberate "doubly oppressed" Latinas.

From an ethical perspective, liberation for Latinas has to do with becoming agents of our own history, with having what one needs to live in order to be able to strive towards human fulfillment . . . . The present reality for Latinas makes it clear that in order to accomplish what we are struggling for, we need to understand fully which structures are oppressive, denounce them, and announce what it is that we are struggling for.

This is consistent with the spirit of the Virgen's request for a hermitage at Tepeyac, which has been interpreted as a "declaration that the women will no longer remain silent, passive, and subject to abuse. The introduction of the new paradigm of partnership is the beginning of the end of the patriarchal domination rooted in hierarchical structures imported and imposed by Europe."

Although the goal of liberation is quite clear, I acknowledge the danger of oversimplifying religion's potential to liberate and I recognize the difficult challenge Latinas face in reconstructing religion's potential for liberation while remaining faithful to underlying religious precepts. But this danger should not paralyze us from taking action. In fact, one Latina feminist has already laid out the goals and outcomes of liberation, providing an action plan of sorts:

Libertad has to do with being aware of the role we play in our own oppression and in the struggle for liberation. It has to do with being conscious of the role we must play as agents of our own history. Libertad has to do with being self-determining, rejecting any and all forms of determinism whether materialistic, economic, or psychological. It has to do with recognizing that the internal aspiration for personal freedom is truly powerful, as both a motive as well as a goal of liberation.

Latinas should consider other aspects of self-determination, and should critically analyze religious roles, traditions, and symbols in order to be able to better select those which liberate and reject those which oppress. One author reminds us that "the contemporary migrant woman is quite capable of casting aside religious roles and traditions which hamper her personal development while retaining roles and traditions that benefit women and in part determine her identity." And indeed, that is the
strategy that many Latinas presently use when negotiating where religion fits in their lives.

We can expand the strategy of self-definition by remembering that we can also define the Church, rather than having it defined for us. In discussing her movie, Faith Even to the Fire, n144 Jean Victor stated, "this church is our church. We may have fundamental differences, but the church is not an institution. The church is people. Theology does not come from the top and trickle down. Therefore, we stay in our church to change it." n145 If we leave the Church, it will be nearly impossible to change it. Thus, for Latinas who desire change, we must work from within and claim our own Christianity, without either giving in or giving up.

With . . . Christians active in the ecclesial base communities, in trade unions, in popular movements, in the politics which is searching for an alternative to the current forms of domination, a new type of Christianity is appearing, with its own reflection . . . , its celebrations, its songs, its historical references, its martyrs, and its capacity for mobilization. This type of Christianity is recovering the social, political, libertarian, and eschatological dimensions of the gospel. Liberation is not a category which evaporates in spiritualism, but points forward to a process by which the oppressed gradually organize and open spaces of social freedom. [*1005] To those who believe, these achievements are part of the fullness of the kingdom of God. n146

In the process of working for change and striving for the fullness of the kingdom of God in this life as well as in the after-life, we must define our own goals and create alliances with those that have common goals.

Latinas must embrace the mutuality of solidarity . . . . By culture and socialization, Latinas are not separatists; we do not exclude others from our lives and from la lucha [the struggle], nor do we struggle exclusively for ourselves. We extend this same sense of community to those who are in solidarity with us. n147

Accordingly, we must establish liberation as a goal, carefully consider what that means, and establish strategic alliances to accomplish that goal.

As part of the project to reconstruct religion in order to maximize its liberating potential, we should pay heed to the model laid down for us by the Virgen de Guadalupe. One devotee noted that although for many she is simply a model for devotional life, in fact, the Virgen holds a promise of much more, offering:

A new image and understanding of reality, of truth, of humanity, and of God. Guadalupe will give the world a new way of relating religions and peoples to each other: no longer by way of opposition but by way of synthesis, for even the most contradictory forces can be brought together creatively for the sake of a truly new humanity. n148

In other words, the Virgen provides guidance by illuminating how to synthesize liberating elements of many religions in order to respect diversity, promote tolerance and eliminate oppression. In her illumination, the Virgen offers specific alternatives to a patriarchal model.

The fathers told the Indians about hell and damnation; the Mother offered protection and comfort. The fathers spoke about [*1006] the hereafter; she spoke about the here and now. The fathers spoke and the Indians listened; she wanted to listen to all those who cry and suffer in silence. The fathers had many rules and doctrines; the Mother had simple love and compassion. In her temple, all would be equally welcomed without distinction. n149

The Virgen accordingly presents a model for the Church which focuses on solace and salvation, and on fulfillment on earth as well as in heaven. This model allows us to discard the notion that we must accept our suffering with dignity, thus freeing us to turn our attention to how to alleviate that suffering, regardless of whether it consists of physical, emotional, economic or spiritual abuse.

The Virgen's model also turns from a top-down hierarchy where God speaks and we listen, to a model where we mutually communicate with compassion. The Virgen's potential to bring balance to a religion that has been burdened and imbalanced by patriarchy has been discussed as follows:

To balance the emphasis on the fatherhood of God, she [the Virgen] emphasizes the motherhood of God - after all, only a Father-Mother God could adequately image the origins of all life. The one-sided emphasis of the missioners is thus corrected and enhanced by the Virgin Mother of God. n150

The Virgen accordingly shows Latinas how to incorporate religion into our lives in a holistic way that is not based on hierarchy, opposition, intolerance or superiority. Rather, she points us to a framework that incorporates the feminine, not to the exclusion of the masculine, but in balance with it. The Church should strive to achieve this balance by heeding lessons offered by the Virgen both to stem its alienation of Latinas, and more importantly, to acknowledge and celebrate their presence and special offerings.

Conclusion
Although religion is not a cure-all solution, I believe that its appeal for the Latinas has much to do with its ability to transcend an institutional mode and provide solace and meaning especially [\*1007] at times of crisis. As in traditional societies, religion today continues to give women a sense of purpose as well as a means of coping with demands and responsibilities of daily life. n151

Religion is experienced in many different, sometimes conflicting ways, and it offers much joy and comfort, but can also be oppressive. A challenge for Latinas is to accept and integrate religion's positive gifts while trying to diminish its oppressive elements. Clearly, the Catholic Church has been guilty of great sin in the New World and it has caused tremendous pain.

For the natives, the kindness of the missioners covered a deeper violence and a more subtle form of cruelty - definitely not intended as such, but, tragically, that is the way it functioned. Henceforth, the natives would permanently be aliens in their own lands -- deprived of everything, including their own priests. n152

It is impossible to undo or whitewash the past. However, at this point, it is time to move forward and co/recreate a Church that is meaningful for Latinas. Christianity can do that:

If it adopts a perspective of liberation and firm support for all that allows . . . oppressed peoples to develop their identities as peoples and cultures in an autonomous and creative way. The new evangelization will be the good news of eternal life if it helps, here and now, to guarantee [improvement of] the lives of the oppressed . . . . n153

To the extent that Latinas continue to consider the Church a vital part of their lives, they must reconstruct their association with the Church, fully recognizing the pain the Church has caused but at the same time moving towards a Church of liberation, social justice and community-building, and a Church that offers hope and salvation. In such a place:

God will be fully revealed . . . when the harmony of Mother-children-Father comes about and there is an end to abused women, abandoned children, and runaway fathers; when there is [\*1008] an end to patriarchal/hierarchical societies that put some down while elevating others to positions of power and prestige; when there is an end to the various structures of the Americas that keep people apart or excluded. n154

Creation of this new place is consistent with a LatCrit goal of making social institutions, including the Church and law, part of a broader antisubordination crusade, and as part of that goal, to make those institutions work for us, not against us. In closing, I stress that this Essay is not intended to promote unanimity in thought about the role of the Church for Latinas -- ultimately, it is the responsibility of each individual to determine the role of the Church, if any, in her life, and to make it workable for her.

FOOTNOTE-1:

n1 Elizabeth M. Iglesias & Francisco Valdes, Religion, Gender, Sexuality, Race, and Class in Coalitional Theory: A Critical and SelfCritical Analysis of LatCrit Social Justice Agendas, 19 ChicanoLatino L. Rev. 503, 514 (1998). This quotation captures the conflict that will be explored in this Essay. However, it assumes that the operating norm for the Catholic Church is one of oppression, and that dissident forces offer a counter-narrative. This Essay does not accept oppression as the Church's operative norm -- it instead assumes a continuous position shift, with the same church sometimes alternately, and sometimes simultaneously, oppressing and liberating.

n2 See Ada Maria Isasi-Diaz, Latina Women's Ethnicity in Mujerista Theology, in Old Masks, New Faces: Religion and Latino Identities 93, 94 (Anthony M. Stevens-Arroyo & Gilbert R. Cadena eds., 1995).

n3 Although it is more accurate to call this group "MexicanAmerican Latinas," that phrase is cumbersome, so I often use the phrase "Latinas," with the understanding that my reference point is frequently the Mexican-American Latina.

levels of church involvement, illustrating
the paradox of low levels of institutional
participation and high levels of religiosity. See
Gilbert R. Cadena, Religious Ethnic
Identity: A Socio-Religious Portrait of
Latinas and Latinos in the Catholic
Church, in Old Masks, New Faces:
Religion and Latino Identities 47, 49
(Anthony M. Stevens-Arroyo & Gilbert R.
Cadena eds., 1995).

n5 See Immigrants Turning to Evangelical

n6 Reynaldo Anaya Valencia, On Being an
"Out" Catholic: Contextualizing the Role
of Religion at LatCrit II, 19 Chicanos-

n7 Iglesias & Valdes, supra note 1, at 515.

n8 See Laura M. Padilla, Single-Parent
Latinas on the Margin: Seeking a Room
with a View, Meals, and Built-in
Community, 13 Wis. Women's L.J. 179,
199 (1998) (noting that sense that one has
duty to endure suffering with dignity is
cultural).

n9 Others have noted how critical each
step -- reconstruction and deconstruction --
is to "enable us to craft viable means of
reclaiming religion as an affirmative force
in the continuing quest for social justice
across particularities of time and place." Iglesias & Valdes, supra note 1, at 527-28.
It is precisely through deployment of these
critical steps that this Essay explores how
religion can operate as a positive force in
Latinas' quest for social justice.

n10 Padilla, supra note 8, at 205 (citation
omitted).

n11 Ada Maria Isasi-Diaz & Yolanda
Tarango, Hispanic Women: Prophetic
Voice in the Church 90 (1988) [hereinafter
Prophetic Voice].

n12 See Padilla, supra note 8, at 199.

n13 For a lengthier discussion of women's
roles in the Church and doctrine regarding
women, see infra Part I.C.

n14 See Ana Maria Diaz-Stevens, The
Saving Grace: The Matriarchal Core of
1993, at 60, 61-62 (describing subsociety
in which Catholic Latinas have interpreted
their own values).

n15 See, e.g., Gloria Anzaldua,
Borderlands/La Frontera 18 (1987); Handbooks of Hispanic Cultures in
the United States: Anthropology 255 (Thomas
Weaver ed., 1994); Alfredo Miranda &
Evangelina Enriquez, La Chicana: The
Mexican-American Woman 107 (1979)
[hereinafter La Chicana] (noting that
Chicano culture places more emphasis on
la familia); Prophetic Voice, supra note 11,
at 7 (stating that Hispanic sense of
community revolves around family);
Maxine Baca Zinn, Political Familism:
Toward Sex Role Equality in Chicano
Families, 6 Aztlan 13 (1975) (noting
"primacy" of familia in protecting
Chicanos against dominant society).

n16 Isasi-Diaz, supra note 2, at 97.

n17 Diaz-Stevens, supra note 14, at 64.

n18 See Ana Castillo, Massacre of the
Castillo wrote:

A significant component of the mestiza's
identity . . . is her spirituality . . . . This
manifests in her life in the form of
Catholicism because it is the religion she
has been taught and that is sanctified by
society . . . . This undercurrent of
spirituality . . . is the unspoken key to her
strength and endurance as a female
throughout all the ages.

Id.; see also Isasi-Diaz, supra note 2, at 98
("Hispanic culture has to do with our
'symbolic system of meanings, values and
norms,' and Christianity plays an essential
role in determining and sustaining such a
system.").

n19 See Cadena, supra note 4, at 39-40
(citing statistics from number of sources in
which range of 70-88% of Latinos perceive
religion to be very important).

n20 See id. at 40, 42.

n21 See id. at 40.

n22 See Ana Maria Diaz-Stevens &
Anthony M. StevensArroyo, Recognizing
The Latino Resurgence In U.S. Religion
68-71 (1998) [hereinafter Latino
Resurgence]; Anthony M. StevensArroyo
& Ana Maria Diaz-Stevens, Religious
Faith and Institutions in Forging of Latino Identities, in Handbook of Hispanic Cultures in the United States: Sociology 265 (Felix Padilla et al. eds, 1994).

n23 For a discussion of devotion to the Virgin Mary among Latinas/os, particularly Mexicans and Mexican-Americans, see infra text accompanying note 75.

n24 See Castillo, supra note 18, at 152; Cadena, supra note 4, at 40-41; Diaz-Stevens, supra note 14, at 74-75.

n25 Isasi-Diaz, supra note 2, at 105; see also Prophetic Voice, supra note 11, at 51 (noting how Latinas relate to "the divine").

n26 By "excessive autonomy," I mean too much self-centeredness and not enough focus on those with whom we are intimately connected, like family and community. "Survival for Hispanic Women is not a reality that each one can assure just for herself. The survival of Hispanic Women is intrinsically linked with the survival of their community and, in a special way, with the survival of the children of the community." Prophetic Voice, supra note 11, at 60.

n27 Isasi-Diaz, supra note 2, at 105.

n28 See supra note 4.


Nearly half of all immigrants today -- legal and illegal -- come from Spanish-speaking countries. Based on their high birth rates, the U.S. Census Bureau predicts that native and foreign-born Latinos will account for more than 40 percent of U.S. population growth in the next decade, compared to less than 25 percent for nonHispanic whites.

Id.


n32 See Casiano Floristan, Evangelization of the "New World": An Old World Perspective, 20 Missiology 133, 137 (1992) ("The official intentions of the conquest were twofold: to annex the newly conquered lands to the Spanish domains, and to incorporate the baptized indigenous peoples into the Catholic Church.").

n33 Certain priests and missionaries, nonetheless, had more compassion for the indigenous and attempted to work for their dignity as well as salvation. "From its very beginnings, . . . [colonized Christianity] was contradictory, because alongside the political and religious domination there were always prophetic spirits who denounced and resisted the perverse nature of the colonization in the name of the humanitarian spirit and liberating content of the Christian message, defending the Indians and condemning the evil of slavery." Leonardo Boff, The New Evangelization: New Life Bursts In, in Voice of the Victims, supra note 31, at 130.

n34 One writer noted that the oppression of the indigenous which accompanied colonization of the New World was unlike anything that preceded it. "The victims of the colonial invasion were . . . subjected to an oppression much greater than that suffered by the people of God in Egypt and Babylon, or even by the primitive church under Roman invasion. It was an incomprehensible injustice, which went beyond all known horizons, which leaped over the boundaries of the Bible!" Maximiliano Salinas, The Voices of Those Who Spoke up for the Victims, in Voice of the Victims, supra note 31, at 105.

n36 See La Chicana, supra note 15, at 39.

n37 See id.

n38 Id. at 37-39. Although indias and espanolas' religious roles were equally limited, indias and espanolas were anything but equal. The lower-class india was subject to oppression at the hands of the upper-class espanola and was deprived of many of the upper class woman's privileges. See id.

n39 See infra text accompanying notes 40-47.

n40 See Elizondo, supra note 35, at 5-8. For the complete story of the Virgen as told in the Nican Mopohua, see id at 5-22.

n41 See id. at 8. The location of Tepeyac, the hilltop where the Virgen revealed herself, is significant. "For the native peoples, it was one of the most sacred sites of the Americas. It was the sacred mountain of Tonantzin, where the feminine aspect of the deity had been venerated for many generations. It had been a pilgrimage site from time immemorial." Id. at 43.

n42 See id. at 9-20.

n43 See id. at 19-20.

n44 Id. at 20.

n45 See id. at 20-21.

n46 See Jody Brant Smith, The Image of Guadalupe 1 (1994) ("Yearly, an estimated ten million bow down before the mysterious Virgin, making the Mexico City church the most popular shrine in the Roman Catholic world next to the Vatican.").

n47 See, e.g., Elizondo, supra note 35, at x (describing masses of people visiting Guadalupe).

n48 Other essays describing the significance of the Virgin Mary have been criticized because they do not "undertake a critical examination of this Virgin's symbolic power, and how it is deployed by religiously or socially dominant forces simultaneously to rationalize and mystify the suppression, repression and persecution of female agency and sexuality." Iglesias & Valdes, supra note 1, at 519. This Essay examines the Virgen's symbolic power not for the purpose of analyzing how Virgin worship engenders inequality, but rather how it symbolizes the potential for liberation of any oppressed group. See id.

n49 In the Nican Mopohua text, Juan Diego is described as a "macehuado" or "tzintli," that is, "a low-class but dignified laborer who did the basic work of society." Elizondo, supra note 35, at 50.

n50 "Through the relationship and conversation between the Lady and Juan Diego, we can hear and experience a blessing pronounced on the poor, the meek, the lowly, the sorrowing, the peacemakers, and the persecuted of the New World." Id. at 47.

n51 Id. at 52.

n52 See Micah 4:6-7 (New American Standard).

n53 See, e.g., James 2:5 (New American Standard). Yet the Church, like broader society, often ostracizes the poor and oppressed, favoring the rich and powerful. Father Elizondo noted:

The treatment of Juan Diego by the servants and confidants of the bishop is typical of the treatment the poor still get today, not just by the church but also by all the institutions and functionaries of society: immigration officials, social security clerks, police, schools, insurance companies, hospitals . . . . They are looked down upon, made to wait, asked to come back another day after hours of patient and silent waiting, treated harshly and without respect, asked for more proof or references than anyone else.

Elizondo, supra note 35, at 55.

n54 Jesus favored those shunned by others. He came to the rescue of an adulterous woman who was being condemned by the scribes and Pharisees. When they told Him that under Mosaic law she should be stoned and then sought his advice, He straightened up, and said to them, "He who is without sin among you, let him be the first to throw a stone at her." . . . And when they heard it, they began to go out one by one, beginning with the older ones,
and He was left alone, and the woman, where she had been, in the midst . . . . Jesus said to her, "Woman, where are they? Did no one condemn you?" And she said, "No one, Lord." And Jesus said, "Neither do I condemn you; go your way. From now on, sin no more."

John 8:3-11 (New American Standard).


n59 Father Elizondo provided:

Telling the bishop to go build the church at Tepeyac - a place away from Mexico City -- was somewhat like the Risen Lord telling the disciples to go to Galilee, where they would see him. The gospel continues to break down all barriers, especially the religious idols of any religion, in places that are away from the great centers of power and glory.

Elizondo, supra note 35, at 70.

n60 When Jesus asked a Samaritan woman at a well for a drink of water, she responded "How is it that You, being a Jew, ask me for a drink since I am a Samaritan woman? (For Jews have no dealings with Samaritans)." John 4:7-9 (New American Standard).

n61 By consistently referring to Juan Diego as "my most abandoned son," the Virgen demonstrates that she understands his subordinated and oppressed position, and that she has intentionally chosen him partly because of that position and partly to liberate him from that position. See Elizondo, supra note 35, at 7-8.

n62 Id.

n63 Id. at 109.

n64 See supra text accompanying notes 46-47.


n66 Leo Grebler et al., The Mexican-American People, The Nation's Second Largest Minority 449-50 (1970) (explaining that many "immigrants came from the lower classes and the agricultural areas in which the influence of the Church in Mexico had been weakest").

n67 See id. At the time that the present Southwest was annexed to the United States, the Church there was in a tenuous state. See id. at 450. In fact, for most of the first half of the 1800s, not one Catholic bishop set foot in what is now Texas and Arizona. See Paul Horgan, Great River: The Rio Grande in North American History 547 (1954).

n68 See Stevens-Arroyo, supra note 29, at 165; see also Grebler et al., supra note 66, at 456 (arguing that Church authorities favored participation in various Americanization programs of governmental and other agencies); Latino Resurgence, supra note 22, at 58 (describing how U.S. Catholicism threatened to "Americanize" Latino
religion); Patrick H. McNamara, Catholicism, Assimilation, and the Chicano Movement: Los Angeles as a Case Study, in Chicanos and Native Americans: The Territorial Minorities 124, 128-29 (Rudolph O. de la Garza et al. eds., 1973) (describing assimilation, in terms of upward mobility into middle-class American social and economic values, as rejected goal among Chicanos).

n69 See Grebler et al., supra note 66, at 451-52. The authors noted:

In contrast to the Catholics in the Northeast and Midwest, those of Mexican background formed a subordinate population quickly dominated by largely Protestant Yankees who settled in the area during the latter part of the nineteenth century. Their Catholicism was just another cultural characteristic setting them apart from, and in many instances, sharply against the Anglo Americans. In turn, Anglos aggravated antagonisms by bringing with them a crusading Protestant zeal for converting the "poor ignorant Mexicans." . . . Institutionally, too, the Southwest Church differed significantly from the established Catholicism of the East. No firmly structured Church existed to mediate the encounter of the Mexican and Anglo cultures.

Id; see also Anthony M. Stevens-Arroyo, Latino Catholicism and the Eye of the Beholder: Notes Towards a New Sociological Paradigm, 6 Latino Stud. J. 22, 26-28 (1995) (discussing Latina/o assimilation as markedly different than earlier European Catholic counterparts). The Catholic Church was not unique in its discovery that assimilation patterns for Latinas/os are different than assimilation patterns for other immigrants such as Europeans. See Kevin R. Johnson, "Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience, 85 Cal. L. Rev. 1259, 1277-86 (1997) (discussing Latinas/os' unique assimilation patterns).


n71 See Stevens-Arroyo, supra note 29, at 165.

n72 Id.

n73 It was not until the early 1970s that the first Mexican American bishop was ordained in the American Catholic Church. See Samora & Vandel Simon, supra note 70, at 222. Latinas are also underrepresented within the Catholic Church -- they comprise fewer than one percent of the nuns in the United States. "Of the 104,000 sisters less than 1000 are Latina." Cadena, supra note 4, at 37.

n74 The Bishops' Committee for the Spanish Speaking was established in 1945, and it recognized the need to conduct both pastoral work and social work for its Latina/o constituents, particularly Mexican Americans. See Latino Resurgence, supra note 22, at 117-18.

n75 See supra text accompanying notes 46-47; see also Elizondo, supra note 35, at xix (stating that Church has recognized significance of Guadalupe); Emily Fowler Hartigan, Disturbing the Peace, 19 ChicanoLatino L. Rev. 479, 489-90 (1998) (describing Church's recognition of La Virgen de Guadalupe); Valencia, supra note 6, at 454-59 (arguing that role of La Virgen de Guadalupe was significant to Mexican American Catholic identity). One writer even stated that "I started to recognize her [the Virgen] as the foundation of Mexican identity and Mexican Catholicism. Growing up in the southwestern United States, I realized that it was her devotees, the Guadalupana societies, that had kept our people Catholic even when we had not had the services of priests and religious." Elizondo, supra note 35, at xi.

n76 Samora & Vandel Simon, supra note 70, at 232.

n77 Grebler et al., supra note 66, at 454. But see Samora & Vandel Simon, supra note 70, at 222 (asserting that Catholic Church initiated these efforts only to counter Protestant proselytizing that resulted in many Latinas/os converting to Protestantism).

n78 See Grebler et al., supra note 66, at 457, 463-67. But see id. at 468-69 (describing how Church's heightened sensitivity to larger socioeconomic issues
engendered intense opposition to and created difficulties for Church).

n79 See Latino Resurgence, supra note 22, at 122.

n80 Id. at 124.

n81 Id. at 122.


n83 Robert E. Rodes, Jr., In Defense of Liberation Theology, America, Feb. 5, 1994, at 18.


n85 Claude Pomerlau, Changing Roles in Latin American Catholicism, in 4 Latin Am. & Caribbean Contemp. Rec. 95, 95 (1986). This is in contrast with the Church's identification with military regimes in Latin America. See, e.g., Boff, supra note 33, at 130, 135.

n86 Pomerlau, supra note 85, at 96.

n87 Id. at 98.

n88 Id.

n89 See Prophetic Voice, supra note 11, at xiii; Diaz-Stevens, supra note 14, at 70. Note, however, that at least one Church document produced from the 1979 CELAM (Consejo Episcopal Latinoamericano) conference in Puebla, Mexico recognized that women were "doubly oppressed" and gave "attention to the plight of women in a way the church had not previously done." McAfee Brown, supra note 29, at 17-18. Feminist Rosemary Radford Ruether summarized the Puebla document as follows:

It goes on to affirm the equality and dignity of women in the gospel perspective. Woman is man's co-equal in the image of God and co-creator with him in continuing the work of creation . . . . In the New Testament women share equally in the prophetic gifts. They are represented by the women who understood Christ's message, such as the Samaritan woman, the women who followed Christ, who remained faithful at the cross, and who were sent to the apostles by Jesus to announce his resurrection . . . . The bishops affirm the need to use women's abilities more fully in the ministry and mission of the church, without, however, including ordination.

Rosemary Radford Ruether, Consciousness-Raising at Puebla: Women Speak to the Latin Church, 39 Christianity and Crisis, Apr. 2, 1979, at 77, 78-79.

n90 See Prophetic Voice, supra note 11, at 103.

n91 Diaz-Stevens, supra note 14, at 61.

n92 See Mary Daly, The Church and the Second Sex 15-16 (1968); Verna Sanchez, Looking Upward and Inward: Religion and Critical Theory, 19 Chicano-Latino L. Rev. 431, 432-33 (1998) ("Religion has . . . been a means for confining and limiting the roles of many segments of society, especially, but not exclusively, women.").

n93 Genesis 3:16 (New American Standard) (emphasis added). One feminista stated that "the book of Genesis is the document where we may witness the male takeover of woman's autonomy." Castillo, supra note 18, at 108.


n95 1 Timothy 2:11-15 (New American Standard).

n96 See, e.g., The Code of Canon Law: A Text and Commentary 723 (James A. Coriden et al. eds., 1985) ("Canon 1024 -- Only a baptized male validly receives sacred ordination.").


n98 See Peter Harris et al., On Human Life: An Examination of Humanae Vitae 128-30 (1968). It is ironic that the Church proscribes the use of birth control, and, based on birth rates for Latinas, it is clear
that many still use limited, if any, forms of birth control. "The rate of fertility for Chicanos is considerably higher than the rate for the society as a whole." La Chicana, supra note 15, at 108. In 1995, the fertility rate for white women was 1984, for black women it was 2427, and for Hispanic women, it was 2977. Bureau of the Census, U.S. Dep't of Com., Population Projections of the United States by Age, Sex, Race and Hispanic Origin: 1995 to 2050, 2 (1996). The rate is calculated per 1000 women, thus producing an average of 1.984 children per white woman, 2.427 per black woman, and 2.977 per Hispanic woman. A different report noted that "Hispanic women, on average, have 3.5 lifetime births, while white women have 1.7 children . . . ." U.S.-Population: Study Shows High Rate of Hispanic Fertility, Inter. Press Serv., Aug. 31, 1995, available in 1995 WL 10133984.

n99 See The Code of Canon Law, supra note 96, at 930 ("Canon 1398 -- A person who procures a completed abortion incurs an automatic (latae sententiae) excommunication."). Many Catholic Latinas still oppose abortion, either altogether or with limited exceptions. According to one survey, only 34.1% of Mexican-American women support abortion under any circumstances, 23.3% oppose it under all circumstances, 33.3% support it only in cases of rape or incest, and another 9.3% support it only if it is medically or otherwise necessary. See Rodolfo O. de la Garza et al., Latino Voices: Mexican, Puerto Rican, and Cuban Perspectives on American Politics 111 (1992) [hereinafter Latino Voices].

n100 Although single Latinas initially could not participate in Cursillos in the United States, they successfully agitated for their later inclusion. See Latino Voices, supra note 99, at 136.

n101 See Latino Resurgence, supra note 22, at 134.

n102 Grebler et al., supra note 66, at 467. For a more detailed discussion of the Cursillo movement, see Latino Resurgence, supra note 22, at 133-37.

n103 See Castillo, supra note 18, at 96.

n104 See Pomerlau, supra note 85, at 96-99.

n105 Latino Resurgence, supra note 22, at 80.

n106 But see id. at 169-71 (noting that some Latinas have influence within Church).

n107 See Cadena, supra note 4, at 49 (stating that Latinas play religious role within their families).

n108 Diaz-Stevens, supra note 14, at 70.

n109 For example,

One effort, initiated in the early 1970s, by and for Latino women was Las Hermanas. First, as a regional organization for religious serving in the Hispanic communities of the Southwest, and soon after, as a national organization including members of all Hispanic groups, lay and religious in all parts of the country, Las Hermanas's concern with grass-roots programs and women's interests gave its members a clarity of purpose and commitment.

Id. at 69.

n110 Id. at 61; see also id. at 63 (describing how some women subverted male-dominated world within confines of institutional structures).

n111 "In the local parish community, members of lay organizations . . . continue to provide a place of identification for Latina women . . . In the local community, these are often the backbone of parish life." Id. at 69.

n112 Id. at 75.

n113 Id. at 64.

n114 Latino Resurgence, supra note 22, at 81.

n115 Isasi-Diaz, supra note 2, at 95.

n116 Note, however, that Latinas often turn to popular religiosity in lieu of, or in addition to, the institutional Church or orthodox doctrine. See Cadena, supra note 4, at 43.

n117 Prophetic Voice, supra note 11, at 65.
n118 See, e.g., Padilla, supra note 8, at 197-98 (noting that in 1995, only 53.8% ofLatinas graduated from high school).

n119 One writer recently noted that "whites are leaving welfare more quickly than . . . Latinos, . . . raising crucial but sensitive questions about whether America's ambitious overhaul of its welfare system is leaving minorities behind." Laura Meckler, Study Finds Whites Getting Off Welfare Faster than Minorities, S.D. Union-Trib., Mar. 30, 1999, at A-6. Meckler also noted that "even compared with whites on welfare, . . . Latinos begin with a stack of disadvantages . . . Thirty percent of whites on welfare lacked a high school diploma, compared with 43 percent of blacks and 64 percent of Latinos." Id.


n121 See id.

n122 La Chicana, supra note 15, at 119.

n123 Isasi-Diaz, supra note 2, at 100.


n125 Diaz-Stevens, supra note 14, at 71.

n126 Stevens-Arroyo, supra note 29, at 172.

n127 Prophetic Voice, supra note 11, at 35.

n128 See id. at 6-7.

n129 Pomerlau, supra note 85, at 101.

n130 Isasi-Diaz, supra note 2, at 106.

n131 See Castillo, supra note 18, at 89 (stating that "most women in El Movimiento may not have openly rebelled against the church's teachings, if for no other reason than because to oppose the Church would mean causing conflict within her own family and community").

n132 Prophetic Voice, supra note 11, at x.

n133 Gustavo Gutierrez, Towards the Fifth Centenary, in Voice of the Victims, supra note 31, at 4. Although this quote appeared in the context of colonizers' oppression of the indigenous in the Americas, it is appropriate in this context as well.

n134 Iglesias & Valdes, supra note 1, at 524.

n135 Elizondo, supra note 35, at 18 n.24.

n136 Id. at 108.

n137 CELAM (Consejo Episcopal Latinoamericano) was founded in 1955, and its second conference was held in Medellin, Colombia in 1968. See McAfee Brown, supra note 29, at 11.

n138 Id. at 13.

n139 Micah 6:8 (New American Standard).

n140 Isasi-Diaz, supra note 2, at 101.

n141 Elizondo, supra note 35, at 107.

n142 Isasi-Diaz, supra note 2, at 103 (citation omitted).

n143 Diaz-Stevens, supra note 14, at 74.

n144 "Faith Even to the Fire" was a made-for-television documentary reviewing how the Second Vatican Council's call for social justice created a church schism, particularly respecting the role of women in the Church. See Robert Koehler, TV Reviews; Schism Underexploited in "Even to the Fire," L.A. Times, Sept. 24, 1991, at F9. By way of background, the Second Vatican Council convened in Rome from 1962-1965, with all the Roman Catholic bishops in attendance. For more detail on Vatican II, see The Teachings of the Second Vatican Council (1966). Although many of the documents produced by Vatican II "dealt with internal matters in the church's life, the longest of them, Gaudium et Spes (The Church and the World Today), grapples directly with problems of social justice . . . ." McAfee Brown, supra note 29, at 8.


n146 Boff, supra note 33, at 134.

n147 Isasi-Diaz, supra note 2, at 109.
n148 Elizondo, supra note 35, at xii.
n149 Id. at 71.
n150 Id. at 126.
n151 Diaz-Stevens, supra note 14, at 76.
n152 Elizondo, supra note 35, at xiv.
n154 Elizondo, supra note 35, at 131.
PIERCING WEBS OF POWER: IDENTITY, RESISTANCE, AND HOPE IN LATCRIT THEORY ANDPRAXIS: Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color

Donna Coker *

BIO:

* Associate Professor, University of Miami School of Law. I am grateful for the comments of my friends and colleagues Mary Coombs, Wes Daniels, Stacey Dougan, Angela Harris, Don Jones, Marnie Mahoney, Linda Mills, Linda Osmondson, Bernie Oxman, Rob Rosen, Frank Valdes, and Kate Waits. I am grateful for e-mail correspondence with Eve Buzawa, Jeffrey Fagan, and JoAnn Miller who helped me sort through research findings. Of course, I am solely responsible for any mistakes in this Essay.

SUMMARY: ... Battered women can make few positive claims for material resources because there are few positive claims available for poor people, generally. ... Strategies that increase material resources for poor women of color are likely to benefit -- or at least not harm -- other battered women in the same locale. ... Had the County Commission assessed the question of the ordinance's impact on battered women's material resources, and had the Commission investigated the position of poor women of color in the county, the ordinance never would have been enacted. ... Thus, battered women's advocates conceived of arrest encouraging policies, and particularly mandatory arrest policies, as a mechanism for diminishing police discretion that frequently operated to deny protection to battered women, especially poor women of color. ... However, given the current realities of inadequate services for battered women, inappropriate arrests of women, harsh anti-immigrant policies, and laws that punish poor mothers by removing their children, it is hard to imagine a community in which a mandatory arrest policy would be worth the risk to poor women of color. At the least, mandatory arrest policies should be adopted only when agreed upon by a local battered women's advocacy community that is representative of the various communities of poor women of color, including language, immigrant, and ethnic communities. ...

LatCrit Theory invites scholarship that centers the experiences of Latinas/os while tying those experiences to the project of social justice for all. n1 This Essay treats as central the experiences of Latinas and other women of color who are battered by intimate partners and suggests a test for evaluating anti-domestic violence measures that builds on those experiences. I argue that every domestic violence intervention strategy should be subjected to a material resources test. This means that in every area of anti-domestic violence law and policy, whether it be determining funding priorities, analyzing appropriate criminal law or arrest policies, developing city ordinances or drafting administrative rules, priority should be given to those laws and policies which improve women's access to material resources. n2 Further, because women's circumstances differ in ways that dramatically affect their access to material resources, the standard for determining the impact on material resources should be the situation of women in the greatest need who are most dramatically affected by inequalities of gender, race, and class. n3 In other words, poor women and, in most circumstances, poor women of color should provide the standard of measurement.

My proposal will not radically reshape structures of racism, sexism, heterosexism, and economic inequality that increase women's vulnerability and limit their responses to violence. Battered women can make few positive claims for material resources because there are few positive claims available for poor people, generally. n4 Rather, in a negative rights world n5 with inadequate and often punitive social services n6 and dramatic inequalities, this proposal is a limited countermeasure designed to increase wherever possible the chances of strengthening women's autonomy. The test is remedial, not revolutionary, but it provides a way to distinguish between different strategies in a manner that accounts for the different material and social conditions that face battered women.

Domestic violence laws and policies may directly provide women with material resources such as housing, food, clothing, or money, or they may
Part II.A. I review the data on arrest and recidivism for the impact of these policies on material resources for violence mandatory and pro-arrest policies. I examine In Part II, I apply a material resources test to domestic violence discourse and policy. The first is on material resources is likely to empower more material resources test. In Part I.A., I argue that a focus in Part I of this Essay, I develop the meaning of a strategy is not the allocation of material resources, we provide women with direct aid. n7 Further, we should usually prefer assessment of the impact of law and policy on women's material resources over universal assessments because the impact of a policy will always be mediated by the particular conditions facing women in a given locale. n8 We should always prefer assessment that is informed by the circumstances of those women who are in the greatest need. In most circumstances this will be poor women of color who are sandwiched by their heightened vulnerability to battering, on the one hand, and their heightened vulnerability to intrusive state control, on the other. Strategies that increase material resources for poor women of color are likely to benefit -- or at least not harm -- other battered women in the same locale.

In Part I of this Essay, I develop the meaning of a material resources test. In Part I.A., I argue that a focus on material resources is likely to empower more women because it addresses four problems of current domestic violence discourse and policy. The first is the tendency to undervalue the importance of race and ethnicity in shaping women's experiences of battering and the institutional responses they receive. The second is the tendency to ignore the way in which poverty makes women more vulnerable to domestic violence. The third is the development of increasingly punitive sanctions against batterers without evidence of increased benefits for battered women. The fourth is the pervasive and incorrect presumption that separation from the abuser equates with safety. Part I.B. describes the importance of the adequacy of women's material resources in their vulnerability to battering. Part I.C. explains the importance of having poor women of color provide the standard for analyzing the effect on material resources of any domestic violence law or policy.

In Part II, I apply a material resources test to domestic violence mandatory and pro-arrest policies. I examine the impact of these policies on material resources for poor women of color along two measures: deterrence related effects and nondeterrence related effects. In Part II.A. I review the data on arrest and recidivism for batterers of poor women of color. If arrest frequently deters batterers of poor women of color from committing future abuse, then mandatory and pro-arrest policies are likely to be resource enhancing because the result is to diminish the ways in which batterers sabotage women's economic well being. I conclude that while arrest deters some batterers, it may be less likely to deter batterers of poor women of color and may actually increase the risk of abuse for some poor women of color.

In Part II.B., I examine the possibility that arrest encouraging policies may be resource enhancing in nondeterrence dependent ways. I conclude that for some poor women of color mandatory and pro-arrest policies result in increased material resources because the police provide victims with information about and referrals to community services and other legal avenues of redress. This information, in turn, assists women in gaining access to increased material resources. The conclusions for poor women of color are uncertain, however, because research often fails to examine the particular experiences of women of color and, when race and ethnicity of victims are considered, only the experiences of African American women and white women are studied. In Part II.C., I examine the costs of mandatory and pro-arrest policies for some women of color to determine if the negative consequences of these polices out weigh the potential benefits. I identify a number of potential costs to women, but focus my attention on three severe costs: the possibility that the battered woman and her partner may suffer police mistreatment; the possibility that the victim will be arrested; the possibility that noncitizen battered women will be deported. Part II.D. concludes that priority should be given to laws and policies that mandate that police provide assistance and referrals to battered women. These requirements should be expanded to include other assistance such as emergency transportation. With regard to arrest, the gains of mandatory arrest policies are frequently offset by the costs for poor women of color. The risks of victim arrest appear to be particularly acute in jurisdictions that have adopted a mandatory arrest policy. Therefore, states should adopt policies that allow communities to determine the most appropriate arrest policy for their locale. I outline a method of assessment for local advocacy groups in making a determination of the policies that are likely to increase material resources for poor women of color in their locale. I also suggest changes in police practice that have the potential to further enhance battered women's access to material resources. The Conclusion examines the general impact of a focus on women's material resources on federal funding decisions, legislation, and services for battered women.

Throughout this Essay, I examine the particular circumstances for Latinas who are battered. I do this to underscore two related points. First, the use of women
of color as the standard by which to apply a materials resource test could operate to create an essential n10 "women of color" category that masks important differences that affect the material resources analysis. The literature on battered Latinas illustrates the importance of such differences as immigration status, migration experiences, language, and culture in understanding battered women's experiences. Second, a focus on Latinas also highlights the serious inattention given the study of battered women of color, in general, and Latinas in specific. n11 [*1014]

I. Material Resources, Domestic Violence, and Poor Women of Color

A. Class, Race, Ethnicity, and Safety in Anti-Domestic Violence Discourse and Law

The material resources test provides a means of operationalizing the feminist goal of empowering battered women n12 through addressing four problems of current domestic violence intervention strategies. The first problem is the tendency to ignore or undervalue the significance of race or ethnicity in shaping the efficacy of universal intervention strategies. n13 A focus on material resources forces an assessment of the impact of intersections n14 of class, immigrant status, race, ethnicity, and gender because these factors will [*1015] determine the degree to which a policy or law is likely to increase material resources for the women affected.

The second problem with many current domestic violence laws and services is the tendency to ignore the importance of women's economic subordination in their vulnerability to battering. n15 An unstated norm for battered women -- those that are white and nonpoor -- is created when a policy or law ignores the relationship of poverty to violence n16 and fails to account for racial differences in battered women's experiences. Influenced by the range of services that state and federal funders would pay for, it is this normative client image that is instrumental in constructing battered women's need as primarily psychological, rather than material. n17 Kimberle Crenshaw's story of the Latina, refused shelter because she was a monolingual Spanish speaker and could not participate in the shelter's English-only support groups, is an extreme example of the devastating effects of this psychological focus. n18

The third problem a focus on material resources counters is the trend to develop increasingly punitive criminal measures against batterers without evidence that these measures improve the well [*1016] being of victims. n19 This uncritical resort to increasing criminal sanctions serves to hide the social and political conditions that foster battering. n20 For example, the County Commission in Miami-Dade, Florida enacted an ordinance in 1999 that, among other provisions, requires the clerk of the court to notify the employer of anyone convicted of a domestic violence offense. n21 The sponsors of the legislation argued that "it sends a message," but regardless of the intended message, the result was direct and predictable harm for poor women of color. Professional men are not likely to lose their jobs if their boss is notified of a misdemeanor conviction, but men working in low skill jobs, where men of color are disproportionately represented, are likely to be fired. The ordinance takes money directly from poor women and their children by diminishing their possibility for receiving child support. The ordinance probably increases women's danger, as well, since unemployed men may be more likely to engage in repeat violence. n22

Miami-Dade County is hardly unique in enacting legislation that increases penalties for batterers in ways that provide no benefit -- and sometimes positively harm -- battered women. Had the County Commission assessed the question of the ordinance's impact on battered women's material resources, and had the Com [*1017] mission investigated the position of poor women of color in the county, the ordinance never would have been enacted.

The fourth problem with anti-domestic violence discourse and law is the pervasive presumption that women should leave battering partners and that doing so will increase their safety. n23 This presumption that separation equals safety is dangerous for women, and particularly so for poor women of color. First, the safety that presumptively flows from separation is largely fictive for poor women. Women with sufficient money to remove themselves some distance from the batterer may increase their safety from all but the most homicidal batterers. n24 Poor women, however, are often simply unable to hide. n25 Further, separation may create catastrophic results for poor women. Separation threatens women's tenuous hold on economic viability, for without the batterer's income or his assistance with childcare, for example, women may lose jobs, [*1018] housing, and even their children. n26 It is a cruel trap when the state's legal interventions rest on the presumption that women who are "serious" about ending domestic violence will leave their partner while, at the same time, reducing dramatically the availability of public assistance that makes leaving somewhat possible. n27 Thus, failure to acknowledge the manner in which women's access to material resources frames the separation/safety question is the first problem with the focus on separation.
The second problem with equating separation with safety is that legal actors frequently believe a corollary presumption: women's use and full cooperation with legal remedies increases their safety. n28 Women may be less sure than are lawyers and judges that legal orders and safety are equivalent, however. Interviews with battered women demonstrate that women sometimes drop protection orders or refuse to cooperate with prosecution because they were successful in using the threat of legal intervention to gain concessions from their abuser. n29 [*1019]

The third problem with equating separation with safety is that frequently the laws and services based on a separation premise devalue women's connections with their partner and their investment in building family. n30 The application of specialized legal remedies for battered women almost always presupposes separation. For example, though courts may order that respondents to restraining orders refrain from harassment and abuse without ordering the "stay-away" provisions, courts sympathetic to battered women are likely to see this accommodation as counter productive. n31 But some marriages are worth saving. Sometimes women are successful at getting their partner to stop the violence. n32 Making safety a primary way of assessing intervention strategies frequently results in policies that undermine women's abilities to evaluate various strategies for themselves n33 because it invites law and policymakers to determine what women should do to be safe.

The material resources test does not require the state to make judgments about what choices are in battered women's best interest. It operates on only one important presumption: inadequate material resources render women's choices more coerced than would otherwise be the case. n34 Thus resources should be made available to women so that, with assistance, they can make a determination about the best course of action based on their own set of circumstances.

B. Material Resources and Domestic Violence

Inadequate material resources render women more vulnerable to battering. n35 Inadequate resources increase the batterer's access to women who separate, and inadequate resources are a primary [*1021] reason why women do not attempt to separate. n36 Some battering men appear to seek out women that are economically vulnerable, n37 but even were this not so, the batterer's behavior often has a devastating economic impact on the victim's life. Abusive men cause women to lose jobs, educational opportunities, n38 careers, homes, and savings. n39 Battering renders some women permanently disabled and puts others at greater risk for HIV infection. n40 Women become homeless as a result of battering, n41 their homelessness is made more difficult to remedy because they are battered, n42 and they are more vulnerable to further battering because they are [*1022] homeless. n43 They frequently become estranged from family and friends who might otherwise provide them with material aid. n44

Cris Sullivan's research suggests that victims' resources have a relationship to experiencing renewed violence and to increased victim well being. n45 Sullivan compared two sets of women leaving a battered women's shelter. The groups were matched in terms of demographics including race, age, employment status, and severity of violence. Each group contained roughly the same number of women cohabitating with their abuser and women separated from their abuser. n46 The experimental group members were provided with an advocate who met with them twice weekly for ten weeks n47 to assess their needs and set priorities. n48 Advocates assisted women in gaining access to educational resources, legal assistance, employment, services for their children, housing, child care, transportation, financial assistance, health care, and social supports. n49 Participants in the experimental group were compared with the control group on a number of measures at different intervals over the course of two years. The women in the experimental group reported significantly less psychological abuse and depression and significantly higher improvement in quality of life and level of so [*1023] ial supports than did those in the control group. n50 Most impressive were the differences in the physical abuse measures: one out of four women in the experimental group experienced no abuse during the twenty four month follow up, while this was true for only one out of ten women in the control group. n51 Sullivan believes that what made the advocacy program succeed was that participants, not advocates, guided the direction of the intervention, and the "activities were designed to make the community more responsive to the woman's needs, not to change the survivor's thinking or belief system." n52 Thus, connection to material resources in areas that the women identified as necessary made significant differences both in terms of their ability to improve their lives and in reducing their victimization.

JoAnn Miller and Amy Krull examined victim interview data gathered in three studies of police response n53 to determine the relationship between the victim's employment status and batterer recidivism. They found that unemployed victims in one study were the victims of significantly more recidivistic violence than were employed victims. n54 While this unemployment effect was not borne out in the other two studies, the length of time the victim was unemployed correlated with recidivism in all three
Initial inquiries regarding the importance of battered women's material resources focused on the relative economic position of women vis-a-vis their battering partner and found that economic dependency on the partner was a significant predictor of severe violence. n56 And a primary reason women gave for reuniting with their abusive partner. n57 These studies of relative economic power may inadvertently rest on a middle-class norm in which nuclear family households are understood to be autonomous economic units. n58 And the dynamic between the couple is the focus of inquiry. Absolute rates of poverty are likely to be equally critical, if not more so, for many battered women. The ability to relocate or hide, for example, is related as much to absolute rates of poverty as it is to women's relative economic resources compared to that of their abuser. The importance of familial and neighborhood networks for economic survival - networks which are likely to be heavily geographically dependent -- are critical in determining a woman's ability to relocate. n59

Despite the vulnerability of poor women to domestic violence, n60 programs for battered women sometimes fail to address the needs of the very poor, n61 particularly those that are perceived as "deviant." n62 For example, some battered women's shelters refuse admission to "homeless" women because they are believed to be too manipulative, "street-wise," or anti-social. n63 Women with substance addictions may find it particularly difficult to obtain shelter that is safe and that treats addiction. Thus, women's poverty renders them more vulnerable to battering, battering deepens their poverty, and extreme poverty may place a woman outside the scope of services designed to assist battered women.

C. Poor Women of Color as the Standard

Domestic violence intervention strategies frequently fail to appreciate the ways in which race, ethnicity, immigration status, culture and language structure the responses women are likely to encounter from helping institutions, n64 the manner in which battering is understood by those around them, n65 and the manner in which women understand the abuser's behavior. n66 Establishing poor women of color as the standard for assessing the impact on material resources ensures that their needs are no longer marginalized. n67 Poor women of color should be at the center of assessment for a second important reason. The experience of poverty, and hence the manner in which poverty shapes the experience of battering, is further shaped by experiences directly linked to race and ethnicity. For example, the experience of poverty for urban African American women is qualitatively different than the experience of poverty for many white urban women. Poor African American women in urban areas are much more likely to live in neighborhoods in which overall poverty rates are high. n68 Thus, even when white women and African American women have similar incomes, their access to social services, police protection, and their exposure to general violence are significantly different. n69 The experience of battering differs, also, because of the failures of helping institutions to meet the needs of battered women of color. n70 Therefore, one cannot assess the likelihood that a given domestic violence intervention strategy will provide material resources for battered women without assessing whether it does so for poor women, who are disproportionately victims of battering, and for women of color, who are both disproportionately poor and whose experiences of battering and community responses to battering is shaped by experiences linked to race and ethnicity.

Battered Latinas. The problems that current universal anti-domestic violence policies create for many Latinas illustrate the value of the material resources test. Scholarship by Latina writers describing the experiences of Latinas who are battered by intimate or former intimate partners focuses on Latinas' material conditions, the social networks and varying family structures within which they live, and the antisubordination struggles with which they engage. n71 These antisubordination struggles involve hierarchies of race, gender, class, language, and immigrant status. n72 Battered Latinas may be forced to fight governmental institutions that are historically hostile to Latinas/os, n73 as well as social and legal structures of racism/sexism that limit their opportunities for economic stability.

Little domestic violence research focuses on the experiences of women of color and even less on battered Latinas. n74 Research pur[1029]portedly about "battered women" or "domestic violence" frequently rests on data gathered only or mainly about white women. n75 When research purports to study the experiences of "women of color" it often involves only or mainly African American women. n76 Thus the research on battered women suffers from a black/white paradigm problem in which the experiences of white women represent all women, n77 the experiences of African American women represent "women of color," and differences in experience between African American women and white women represent all racial/ethnic differences. n79

An additional problem arises in the scholarship that does focus on Latinas/os: the tendency to group
Latinas/os together without regard to important differences between groups. n80 For example, the largest random sample study of domestic violence rates among Latinos/as only interviewed those who spoke English. n81 The National Institute of Justice ("NIJ") study of police response in Miami-Dade County, Florida, a locale with significant numbers of immigrants from Caribbean and Latin American countries, grouped offenders into just three categories: "White, Black, and Hispanic." n82 This leaves one uncertain as to which category black Cuban Americans are placed, for example, and unable to identify the importance of potentially significant differences of language, culture, or economics between immigrants from Haiti, Jamaica, or Cuba and African Americans.

Domestic violence research on Latinas also frequently ignores the impact of immigration status. Undocumented women may fear that police intervention will lead to deportation proceedings. n83 Batterers who are themselves legal permanent residents or citizens use the threat of deportation to control women. [*1031]

Having left the relative safety of extended family and social networks in their countries of origin, immigrant Latinas must take the very difficult first steps into totally unknown circumstances. Their vulnerability in terms of language, documentation, education level, knowledge of laws and services, and work skills is often used by their abusers as ammunition in their terrorist practices. n84

For many undocumented women, deportation means not only economic deprivation, but also separation from children, n85 and the probability of more and even greater violence in their home country. n86 In addition, the experiences of political repression or civil war may affect the responses to battering of some Latina immigrants. n87 These experiences may foster distrust of governmental authority and most especially of the police. Additionally, this kind of multiple trauma may result in posttraumatic stress disorder in some women, n88 further complicating the victim's ability to gain economic stability.

Undocumented women are at greater risk of facing violence or the threat of violence at numerous sites including work and their neighborhood. n89 Unless domestic violence becomes severe, it makes little sense to target for criminal intervention only the violence that is perpetrated by an intimate partner. n90 Additionally, [*1032] immigrant Latinas who do not speak English are seriously disadvantaged in the courts, in their encounters with police, and in the offices of social service agencies. n91

II. Application of the Material Resources Test to Arrest Encouraging Policies

A. Deterrence Related Resources.

Battering men frequently sabotage women's attempts at economic self-sufficiency. n92 An arrest policy that deters violence, even if it did not deter psychological abuse and other controlling behavior, would likely have some impact on this diminishment of women's material resources. Therefore, if arrest encouraging policies result in specific deterrence, those policies are likely to be resource enhancing for battered women. This section analyzes the data on the specific deterrence effects of arrest for men who batter poor women of color. Arrest policies in domestic violence cases [*1033] operate in three variants: no specified policy, pro-arrest n93 (modified police discretion), and mandatory arrest (arrest is mandated where police find probable cause to believe domestic violence has occurred). n94 I refer collectively to pro-arrest and mandatory arrest policies as arrest encouraging policies.

The biggest problem for poor women of color with regard to police response has been in getting the police to respond at all. n95 Police often believe that violence is an unremarkable event in the households of poor people of color and that police intervention is therefore likely to be ineffective or unnecessary. n96 This may be explained, in part, by a police culture that constructs categories of "normal" and "deviant" people, with poor people of color more likely to be placed in the latter category. n97 Thus, battered women's advocates conceived of arrest encouraging policies, and particularly mandatory arrest polices, as a mechanism for diminishing police discretion that frequently operated to deny protection to battered women, especially poor women of color. n98 The results of the now famous Minneapolis arrest study -- that arrest deterred repeat violence better than did police mediation or separation of the parties [*1034] ties -- provided tremendous support for the pro-arrest movement. n99

The National Institute of Justice ("NIJ") commissioned studies in six other cities to determine if the Minneapolis findings could be replicated. n100 Though the findings regarding the relationship between recidivism and police intervention varied across sites in the NIJ studies, some findings were consistent: recidivism rates are high regardless of the form of police response, n101 and much of the recidivism violence goes unreported; n102 police intervention stops the immediate violent episode in most cases but is more likely to do so when there is an arrest; n103 disproportionate numbers of African Americans and somewhat lower but still
Researchers in only one locale -- Miami-Dade, Florida -- reported finding the main results of the Minneapolis study across all measures: arrest deterred violence more than did nonarrest. n105 In the remaining sites, researchers concluded that arrest was no better on average at deterring repeat violence than were other police actions studied. n106 More troubling were the conclusions of Law [*1036] that arrest had an escalating effect on the recidivism of some unemployed batterers. n107

Research that examines the relationship between community characteristics and batterer recidivism finds similarly disturbing results. A reassessment of the Milwaukee arrest study data found neighborhood characteristics to be more strongly related to recidivism postarrest than were the individual characteristics of the arrestees. n108 Men arrested for domestic violence were more likely to [*1037] recidivate if they lived in neighborhoods characterized by a combination of high rates of the following: unemployment, divorce, single mother headed households, households below the poverty line, and households receiving government assistance than were men who did not live in such neighborhoods. n109

In conclusion, arrest appears to have, at best, a modest deterrent effect and this effect may be less likely for some of the men who batter poor women, whether these recidivists are understood as unemployed batterers or batterers who reside in particularly unstable neighborhoods.

B. Arrest Encouraging Policies and Nondeterrence-Related Resources

The arrest studies focused narrowly on police response and offender behavior. n110 Battered women's advocates argue that apart from specific deterrence, mandatory, and pro-arrest policies help [*1038] provide victims with other benefits. n111 For example, arrest may result in a woman's immediate safety through cessation of the violence. n112 Arrest may provide support for the victim through police moral solidarity and disapproval of the batterer's behavior. n113 Arrest may assist women in connecting with community resources and other legal remedies and may encourage women to use those resources. n114 As a result of lobbying by battered women's advocates, many police departments that have adopted mandatory or pro-arrest policies have also adopted requirements that officers provide women with information and assistance. n115 These efforts are apparent in the studies of arrest.

Significant numbers of women interviewed in the NIJ studies stated that they were satisfied with the police response. n116 Much of this victim satisfaction relates directly to police practices of providing [*1039] women with information regarding community resources and assisting their connection with those resources. For example, the victims in the NIJ study in Milwaukee whose batterers were arrested expressed much higher satisfaction rates with police response than did victims whose batterers were merely warned. n117 The difference appears to be related to the degree to which victims believed officers gave them useful information and the degree to which warning group victims felt that officers did not listen to their side of the story. n118 Two-thirds of victims reported that officers gave them information on their legal rights or how to get assistance and fifty-six percent reported that officers recommended that victims pursue legal assistance. n119 Even more impressive are the eighty-three percent who reported that officers gave them information on shelters and women's support groups and the sixty-five percent for whom police recommended or assisted in contacting shelters. n120 By comparison, most victims in the warned (nonarrest) group did not recall that officers even told them of their right to press charges. n121

A number of smaller studies in jurisdictions with arrest encouraging policies show similar results. n122 For example, victims interviewed in a study assessing the coordinated community response in Quincy, Massachusetts where police are subject to a pro-arrest policy reported that police regularly provide referrals for restraining orders and transport victims and their children to shelters and medical care. n123 The Quincy study also finds high victim satisfaction with police response, even though significant numbers of victims op [*1040] posed arrest. n124 Further, victim satisfaction appears related to whether or not the victim was informed of her rights and given information about restraining orders. n125 In a Canadian study, researchers asked battered women for suggestions to improve police response. n126 The most common response was that police should give victims more information regarding court processes and community services available for women. n127

In jurisdictions that have adopted mandatory or pro-arrest policies, police are frequently mandated or encouraged to provide women with information regarding community resources and legal remedies, and sometimes with direct assistance in securing resources. Interviews with victims demonstrate that battered women value this aspect of policing and further evidence suggests that the information results in enhancing women's access to resources. n128 [*1041]
Conclusions regarding these findings are hindered, however, because of the inattention to women of color, particularly non-African American women. Few studies examine Latinas' use of police. n129 Most published accounts of arrest study data fail to examine possible race/ethnicity differences in victim interview responses. n130 Therefore, it is impossible to know how many Latinas initiated the call to police or how many Latinas were satisfied with the police response. A few smaller studies have looked at Latina help-seeking behavior. For example, Gondolf and Fisher reviewed data regarding shelter residents in Texas, comparing Latinas with African American women and white women. n131 The study found similar rates of overall helpseeking and, specifically, similar rates of seeking legal assistance. n132 In a study of fifty women in a Texas shelter, Mexican American women were more likely to recommend contacting the police than were white women. n133 However, another small study of pregnant Spanish speaking Latinas who sought prenatal care in a public clinic and who reported spouse abuse found that only twenty-three percent had called the police. n134

C. Negative Effects of Arrest Encouraging Policies that May Diminish Their Resource Enhancing Possibilities

For some poor women of color, the risks of arrest encouraging policies may outweigh the potential benefits. For example, the evidence that arrest may escalate violence for certain unemployed batterers or for those who reside in certain neighborhoods suggests that arrest may increase the danger for a group of women who are the least able to relocate. n135 The risks of arrest-encouraging policies go beyond potential escalation effects, however. For many poor women of color, those risks include the risk of police brutality, primarily against the batterer, but also against the victim; the risk that the victim will be arrested; the risk that police intervention will result in increased and ongoing state intrusion in the life of the victim; the risk of financial loss resulting from the batterer's arrest; and the risk of relationship loss. In addition, for some immigrant women, there is the risk that the victim, abuser, or both will be deported. These potential risks of arrest must be examined in determining whether arrest encouraging policies are likely to, on balance, enhance access to material resources for poor women of color. My analysis will focus on three serious risks: the risk of police mistreatment; the risk of victim arrest and/or ongoing police monitoring of the victim; and the risk of deportation.

The Risk of Police Mistreatment. Mandatory arrest policies can hardly be said to empower women of color if the result is that police physically or verbally abuse the victim, her abuser, or both. n136 Therefore, arrest encouraging policies cannot be evaluated without reference to the history of police misconduct towards people of color. n137 For example, "Latinos in the United States have had a long, acrimonious history of interaction with . . . law enforcement [*1043] agencies. This history is marked by abuse and violence suffered by the Latino community at the hands of police officers who have indiscriminately used excessive physical force against Latinos." n138 Marie de Santis, an attorney who represents immigrant Latinas in California, provided a compelling example of why a battered Latina may not trust the police:

In the midst of a difficult struggle to escape her husband's violence . . . Claudia called us one day enraged at what police had done with her teenage son. He and a group of his Latino friends had skipped school early one day and gone to one of their homes . . . The parents weren't home, and neighbors called the police. Squads of police came and a helicopter, too. Police barged into the house, pushed the kids to the floor, put guns to their heads, and when the kids tried to explain they weren't burglars, police screamed at them to shut up or they would be killed. At the police station, when the homeowners arrived and told the police that, indeed, these kids were all friends of their son and were always welcome in their home, police still did not stop the process, and the DA filed charges. It was only months later when a judge looked at the case that charges against the boys were dropped. Claudia escaped her husband's violence, but she and her children are left with a bitter distrust of police. n139

De Santis concluded, "women see how some police treat their brothers, sons, husbands, and neighbors, and conclude that police are the last people they'd call for help." n140 Thus, arrest encouraging policies are unlikely to empower poor women of color unless there are strong programs to prevent police mistreatment and well-publicized remedies available for when it occurs.

The Risk of Victim Arrest and Other Forms of State Control. The percentage of women arrested for domestic violence increases sharply when arrest encouraging policies are adopted. n141 Given the man [*1044] date to arrest, officers resort to dual arrests (arresting both parties), trusting the prosecutor and/or the courts to sort it out. Many of the women arrested are battered women whose violence is either in self-defense or is responsive to their partner's repeated violence against them. n142 In addition to dual arrests, sole arrests of women also climb dramatically in these jurisdictions. As Cecelia Espinoza describes, the combination of mandatory arrest laws with no drop prosecution policies has resulted in the prosecution of
women for domestic violence charges, even in circumstances where the prosecutor admits that the woman's actions -- in the overall dynamics of the relationship -- were defensive. n143 Even if the prosecutor declines to prosecute, when victims are arrested the results are devastating. Children may be placed in foster care, n144 women lose their [*1045] jobs, and batterers realize that they can use mandatory arrest policies to punish and intimidate their victim partners. n145

In response to the problems of inappropriate arrests of women victims, several states have adopted statutes that require officers to avoid dual arrests and to arrest only "primary aggressors." n146 Statutes that define primary aggressor as the party who is not acting in self-defense n147 create problems because women's violence may be reactive without meeting a legal definition of self-defense. For example, Cecelia Espenoza related the story of Paula, a battered immigrant woman from Mexico who received support from Lideras Campesinas. n148 Paula determined not to take her husband's abuse any longer and, with a baseball bat in hand, told him to leave the home. n149 He tried to return three times and each time he left after Paula threatened him with the bat. n150 Espenoza pointed out that under a mandatory arrest policy, Paula's actions would likely result in her arrest. n151 Her actions were not clearly defensive because Paula was in no immediate danger, but her threats were responsive to the domestic violence. Even in jurisdictions that have adopted a [*1046] broader definition of who is not a primary aggressor, n152 arrests of victims continue to be a problem. n153

Increased numbers of victim arrests occur in both proarrest and mandatory arrest jurisdictions, but may be more prevalent in mandatory arrest jurisdictions. n154 One small study that compared arrest outcomes in two Michigan cities may be suggestive of this difference. n155 This study compared arrest statistics in the cities of Ann Arbor with a mandatory arrest policy and Ypsilanti with a pro-arrest policy. In the mandatory arrest city of Ann Arbor, men were more likely to be arrested for domestic violence in cases in which the victim reported a history of abuse to police at the scene. n156 Women were more likely to be arrested when the police had been called to the house before. n157 Officers may categorize battered women as pathological or as abusers of the system when they "fail" to separate once "given the opportunity" to do so via police response. n158 Forced to make an arrest, they may retaliate against victims. If mandatory arrest policies are more likely to create backlash against women who "stay," then that backlash will likely be felt disproportionately by low-income women. Such a backlash may be fueled by [*1047] a tendency to treat women as pathological if they do not separate from their abusers, coupled with preexisting social stereotypes of deviance based on race and class. n159

Even when battered women are not arrested, mandatory arrest policies may increase poor women's exposure to state control. For example, some jurisdictions require that police report as suspected child abuse every domestic violence call in which children are present. n160 Poor women of color are particularly vulnerable to this form of state control. In addition, some women fear that an investigation of the abuse charge will uncover their own criminal activities. This risk is particularly great when mandatory arrest is coupled with aggressive prosecution policies. Women become involved in criminal activities as a direct result of being battered. n161 Even if this were not the case, women involved in criminal activity are rendered particularly vulnerable to violence. n162 For example, drug addicted women are particularly vulnerable both to domestic violence as well as to state violence. n163 An investigation into domestic [*1048] violence may result in the victim losing her children or in her own incarceration or both. n164

The Risk of Deportation. The Illegal Immigration Reform and Immigrant Responsibility Act provides that certain immigrants who are convicted of a domestic violence crime are rendered deportable. n165 This provision is dangerous for battered immigrant women. While the deportation provisions likely have a chilling effect on battered women who fear that a call to the police will render their partner deportable, n166 this is not its only devastating consequence. Given the increased numbers of arrests of victims under mandatory arrest policies, some battered immigrant women have been rendered deportable as a result of their conviction for misdemeanor domestic violence. Immigrant women who are primary caretakers of children are particularly likely to plea bargain in order to avoid [*1049] jail time, and thereby unwittingly render themselves deportable. n167 Maria Sanchez's story provides an illustration. n168 When her husband came home drunk, he dragged her out of their child's room, pinned her on the couch, and began beating her. Maria bit his back. Her husband called the police and Maria was arrested. She tried telling the police that he had been beating her again and that she was defending herself but, unlike her husband, she didn't speak English and the police spoke no Spanish. When she went to court, Maria signed a form, printed in English, that waived her right to counsel and entered a guilty plea to misdemeanor assault. Maria had no understanding of the forms she was signing and the court's unqualified interpreter was no help. Despite the fact that Maria's
husband had a prior record for domestic violence, despite the fact that she had endured years of her husband's abuse, Maria now faces deportation because of her domestic violence conviction.

D. Summary: Material Resources, Arrest Policies, and Alternatives

This application of the material resources test to arrest encouraging policies suggests that mandatory arrest may create significant costs for some poor women of color. These costs may outweigh the beneficial aspects of the policies, however, that calculus may vary by locale.  n169 Pro-arrest policies at the state level rather than mandatory arrest policies allow local governments to decide whether or not to adopt a mandatory arrest policy.  n170 This may provide the flexibility needed to assess the effect of arrest policies given local conditions. However, given the current realities of inadequate services for battered women, inappropriate arrests of women, harsh anti-immigrant policies, and laws that punish poor mothers by removing their children, it is hard to imagine a community in which a mandatory arrest policy would be worth the risk to poor women of [*1050] color. At the least, mandatory arrest policies should be adopted only when agreed upon by a local battered women's advocacy community that is representative of the various communities of poor women of color, including language, immigrant, and ethnic communities. n171

In determining the preferred policy in their locale, activists should examine the quality of relations between poor communities of color and the police, n172 including the presence of anti-immigrant sentiment. Relations between police and communities may be measured by a number of factors, including: the adequacy/inadequacy of police resources in a given community; n173 the frequency of police brutality, harassment, and related complaints in a given locale; the degree to which methods are in place to report such police misconduct and the efficacy of those methods; n174 the commitment of local police leadership to both racial fairness and to responding to domestic violence calls. Local advocates must also evaluate the strength of domestic violence community services for poor women of color and the degree to which state actors -- notably prosecutors and child protection service workers -- understand the circumstances of poor women of color in their locale. [*1051]

The decision whether or not to mandate that police arrest perpetrators of domestic violence does not exhaust the possibilities for constraining police action. As evidenced by women's satisfaction with police responses that provide them with information regarding services and their legal rights, police can provide women with critical links to material resources. We should encourage and expand this police action by requiring police to provide or locate transportation and other services for battered women. For example, Lawrence Sherman recommended "mandatory action" policies that require police to choose from a list of actions such as offering the victim transportation to a shelter, taking the suspect to a detoxification treatment center, allowing the victim to decide if an immediate arrest should be made, or mobilizing the victim's social networks to provide her with short-term protection. n175

The preliminary data regarding neighborhood differences in domestic violence recidivism rates suggests a focus on community based criminal interventions. n176 Models of community policing that engage community groups in establishing local police priorities may be useful in increasing women's resources. For example, in Chicago, which has a proarrest rather than a mandatory arrest policy, a number of neighborhood groups involved with city community policing efforts have determined that domestic violence is a priority issue in their neighborhood. n177

There may be other ways to meet the twin goals of mandating that police provide protection for poor women of color while promoting women's empowerment. For example, special citizen panels could be established to monitor police performance on domestic violence calls and serve as a complaint center for battered [*1052] women. n178 Anti-domestic violence work that is linked with work against police brutality may be particularly sensitive to the degree to which police are responsive to the needs of poor women of color. For example, the Philadelphia Barrio Project, n179 which focuses on police brutality issues in the predominantly Latina/o sections of the city, coordinates its work with battered women's advocates to press for adequate police response to battered women. n180 This kind of coordinated effort and community outreach means that battered women have recourse both against police inaction as well as against police brutality. Some activists and scholars are investigating the use of restorative justice programs such as community conferencing and peacemaking. n181 While these processes present challenges to establishing safety for battered women, they may widen the net of responsibility so as to increase material resources available for victims, n182 thereby increasing social supports and services for victims. n183

Conclusion: The Material Resources Test and Shifting Power for Battered Women

The most obvious impact of applying the material resources test is to shift significant monies to direct aid
for victims and to target more significant aid to poor women and especially poor women of color. There are many possible steps towards this goal. Because of the possible relevance of neighborhood disintegration to domestic violence recidivism, particular services should be focused on increasing the autonomy of women in those neighborhoods through *resource enhancement*. n184 Current legal remedies that enhance resources for battered women could be made more effective. For example, crime victim compensation requirements that victims cooperate with the prosecution of the batterer, renders the aid useless for many women. n185 In addition, compensation is frequently available for psychological counseling, but not for meeting the material needs of victims. n186 Law reform that increases criminal penalties without evidence of gains for battered women should be disfavored and law that diminishes battered women's material resources should be eliminated. n187

The material resources test should be incorporated into federal funding criteria for domestic violence intervention projects. Federal dollars should not support universal (state-wide) mandatory arrest policies, as is currently the case. Rather, funding should encourage local assessments of the impact of arrest policies on poor women of color. In addition, funding criteria should support those programs that represent broad based coalitions that are either focused on particular neighborhoods or particular racial/ethnic groups. n188 Such coalitions are more likely to have the local knowledge required to assess the situation for poor women of color. n189

Application of the material resources test may also suggest changes in the way lawyers engage in their legal representation of battered women. n190 For example, Legal Services in Tampa, Florida formed an organization called ChildNet n191 to respond to the material and social support needs of battered women clients. Jeanie Williamson, Director of ChildNet explained that staff attorneys were frustrated with the inability of legal remedies to give women freedom from abusive partners. ChildNet provides women with advocates, who assist them in locating community services including education, childcare, and job training. Similarly, Linda Mills has argued for the establishment of domestic violence commissions that would assist women with housing and job needs as well as provide legal remedies such as restraining orders. n192

Funding for domestic violence research should prioritize research that addresses the needs of poor women, and especially poor women of color. This research must escape the black/white paradigm limitations of current domestic violence research and address the particular needs of Latinas and other women of color who are frequently ignored by research.

The measure of the efficacy of any domestic violence intervention strategy must account for, as much as possible, the various forces that mediate and shape women's experiences of battering. The material resources test attempts to do this by requiring an inquiry into the likelihood that a given intervention strategy will result in increased material resources for women, and particularly for poor women of color. n193 Material resources are critically important in battered women's survival. Without the specific attention that the material resources test provides, this importance will continue to be overlooked.

FOOTNOTE-1:


n2 In this way, I hope to meet Sumi Cho's challenge that all critical race theory work should be subjected to "a kind of political impact determination test." Sumi K. Cho, Essential Politics, 2 Harv. Latino L. Rev. 433, 434 (1997).

n3 The meaning of this will vary from region to region, but I do not mean to imply that a single analysis will answer the question with regard to all poor women of color. Regional differences, as well as differences among poor women of color, will determine the outcomes in different locales. See Elizabeth M. Iglesias & Francisco Valdes, Afterword: Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas, 19 Chicano-Latino L. Rev. 503, 557 (1998) (urging use of LatCrit feminist methodology that identifies and analyzes "particular instances of subordination"); see also Elizabeth M. Schneider, Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse, 67 N.Y.U. L. Rev. 520, 531 (1992) ("In practice battered women are not all similarly situated. The variety of pressures shaping the battered woman's experience are often linked to the specific dynamics of the community in which the
abuse occurs. Thus, efforts to aid battered women must be tailored to meet their differing needs.

n4 See, e.g., Lindsey v. Normet, 405 U.S. 56 (1972) (finding that Oregon law prohibiting habitability defense to action for failure to pay rent does not violate due process of law where renters have other avenues of redress: "we are unable to perceive [in the Constitution] any constitutional guarantee of access to dwellings of a particular quality. . . ."); Dandridge v. Williams, 397 U.S. 471 (1969) (finding no violation of equal protection under mere rationality test for state to provide less AFDC benefits per child for those in households with more children than for those in households with fewer children); C.K. v. New Jersey Dep't of Health & Human Servs., 92 F.3d 171 (3d Cir. 1996) (upholding family cap on welfare benefits which denies benefits to later born children). Plaintiffs have received some relief under state constitutions. See, e.g., Childree v. Health Care Auth., 548 So.2d 419 (Ala. 1989) (noting that where indigent patients in custody of Department of Mental Health are unable to pay for their care, Alabama Constitution requires that counties be responsible for costs); Butte Community Union v. Lewis, 745 P.2d 1128 (Mont. 1987) (finding violation of equal protection guarantee under state constitution for state to eliminate benefits for general relief assistance after two months).

n5 Martha Mahoney describes the way in which law shaped feminist strategies for improving women's status towards a focus on negative rights. See Martha R. Mahoney, Victimization or Oppression? Women's Lives, Violence, and Agency, in The Public Nature of Private Violence: The Discovery of Domestic Abuse 59, 67 (1994) (stating that feminists came to focus on negative rights strategies when legal battles for positive rights failed while privacy (abortion rights) and antidiscrimination (employment, education) strategies were somewhat successful). Of course, people do have statutory rights to wealth enhancing benefits. Many of these benefits disproportionately benefit the middle and upper class. See, e.g., Regina Austin, Nest Eggs and Stormy Weather: Law, Culture, and Black Women's Lack of Wealth, 65 U. Cin. L. Rev. 767 (1997) ("Black women are not substantial beneficiaries of the principal forms of governmentsubsidized asset accumulation . . . that facilitate wealth accumulations."); Dorothy A. Brown, The Marriage Bonus/Penalty in Black and White, 65 U. Cin. L. Rev. 787 (1997) (noting that black taxpayers are more likely to pay marriage penalty while white taxpayers are more likely to receive marriage bonus).

n6 See, e.g., Martha Fineman, The Inevitability of Dependency and the Politics of Subsidy, 9 Stan. L. & Pol'y Rev. 89, 91 (1998) (stating that some government subsidies, such as tax breaks for employed families, receive no stigma, while other subsidies, such as welfare receipt, are highly stigmatized).

n7 Robert Schroeder, Executive Director for SafeSpace, one of the largest shelters for battered women in the United States, notes that there is little funding available for direct aid to women. See Interview with Robert Schroeder in Miami, Fla. (on file with author).

n8 See infra pp. 30-33 (discussing ways in which police officers sometimes improve women's material resources through providing referrals and encouragement).

n9 See Telephone Interview with Leslie Landis, Director, Mayor's Office on Domestic Violence, in Chicago, Illinois (Sept. 9, 1999) (on file with author). Landis and other women's advocates opposed domestic violence mandatory arrest in Chicago because they believed that, given the police/community relations at the time, it would have had a negative impact on women and men of color. See id.; see also E-mail Correspondence with Linda Osmondson, Director of CASA, in St. Petersburg, Florida (Sept. 18, 1999) (on file with author) (stating her opposition to mandatory arrest because of problems with police mistreating people of color).

n10 See Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 590-605 (1990) (criticizing reliance of feminist legal
theorists on gender essentialism that requires that women presume undifferentiated single identity: woman).

n11 See James Ptacek, Battered Women in the Courtroom: The Power of Judicial Responses 25 (1999) (noting that "most of the [domestic violence] research that addresses race focuses on differences between white and black women").

n12 See Linda Mills, Killing Her Softly: Intimate Abuse and the Violence of State Intervention, 113 Harv. L. Rev. 550, 555 n.24 (1999) (defining empowerment to mean "a clinical policy and programmatic posture that assumes that battered women are in the best position to decide how to respond to the violence in their lives, unless they are otherwise found incompetent."). Of course, a focus on material resources will not, alone, provide a solution to battering in the lives of poor battered women. See, e.g., Feminists Negotiate the State: The Politics of Domestic Violence 34 (Cynthia R. Daniels et al. eds., 1997) (stating that feminists negotiations with state must have two bottom lines: women's physical safety and women's economic well being). It is important to create interventions that target the social and familial networks of batterers that support their abusive behavior. See Donna Coker, Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking, 47 UCLA L. Rev. 1, 42-50 (1999) (stating that peacemaking works to disrupt familial networks that collude with batterer's sense of victimization and privilege).

n13 For example, policies mandating that police arrest whenever they find probable cause that a crime of domestic violence has occurred may benefit some women whose abusers are deterred from future violence, but arrest may escalate the violence experienced by women married to unemployed men. See Lawrence W. Sherman et al., Policing Domestic Violence: Experiments and Dilemmas 261 (1992). James Ptacek notes that little domestic violence research examines race and class. Ptacek's search of SocioFILE, a computer database containing abstracts from over 2000 social sciences journals found only 4% of articles on domestic violence or battered women mentioned class, and only 4.7% mentioned race. See Ptacek, supra note 11, at 29; see also SocioFILE (visited Apr. 15, 2000) [<http://ublib.buffalo.edu/libraries/units/lml/eresources/sociofile.htm> (on file with author). The numbers in PsycLIT, a database of psychology abstracts, provided even fewer: only 1.9% of articles on domestic violence or battered women mention class, and only 2.8 mention race. See Ptacek, supra note 11, at 29. The corollary analysis is equally important: any law, program or policy designed to assist poor women must take into account the prevalence of violence in the lives of poor women. See, e.g., Angela Browne & Shari S. Bassuk, Intimate Violence in the Lives of Homeless and Poor Housed Women: Prevalence and Patterns in an Ethnically Diverse Sample, 67 Am. J. Orthopsychiatry 261, 271 (1997) (noting that studies of poor women find they have histories of extraordinarily high rates of violent victimization).


n15 See, e.g., Ptacek, supra note 11, at 29.

n16 This normative battered woman is also heterosexual. See Phyllis Goldfarb, Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse on Intimate Violence, 36 Geo. Wash. L. Rev. 582 (1996) (noting that lesbian battered women may not be recognized as such because "recognized discourse for discussing intimate violence has emerged from the problem of male violence inflicted on female intimates"). Legal actors may also stereotype women based on class assumptions. See Judith Wittner, Reconceptualizing Agency in Domestic Violence Court, in Community Activism & Feminist Politics: Organizing Across Race, Class, and Gender 81, 89 (Nancy A. Naples ed., 1998) [hereinafter Community Activism] (finding that court personnel in domestic violence court
believed that women who dropped restraining orders were immersed in culture of violence and, as one state attorney explained, "just don't know any better").

n17 See, e.g., Karen Kendrick, Producing the Battered Woman: Shelter Politics and the Power of the Feminist Voice, in Community Activism, supra note 16, at 159 (concluding from interviews with shelter workers that "the material conditions of women's lives are often treated as if they are only potential barriers to leaving an abusive relationship. The real hurdles that women need to overcome, according to the shelter workers I interviewed, are false beliefs about their circumstances."). Similarly, Kimberle Crenshaw wrote that "counselors in minority communities report spending hours locating resources and contacts to meet the housing and other immediate needs of battered women . . . . Yet this work is only considered 'information and referral' by funding agencies and, as such, is typically underfunded . . . ." Crenshaw, supra note 14, at 1251.

n18 See Crenshaw, supra note 14, at 1265 ("The problem is not simply that women who dominate the antiviolence movement are different from women of color, but that they frequently have power to determine, either through material or rhetorical resources, whether the intersectional differences of women of color will be incorporated at all into the basic formulation of policy.").

n19 See Christopher D. Maxwell et al., The Specific Deterrent Effects of Arrest on Aggression Against Intimates 42 (National Institute of Justice) (unpublished manuscript, on file with author) ("Several experimental and non-experimental evaluations of policies intended to increase the punitiveness of the criminal justice system's response to domestic violence, such as mandatory prosecution policies or restraining orders, have yet to find many tangible gains for victims of domestic violence.").

n20 See, e.g., Coker, supra note 12, at 25-26 (describing multiple ways in which oppressive structures of racism and socioeconomic status may be related to man's decision to batter his intimate partner). Many scholars have noted the increasing resort to punitive sanctions to govern in postindustrial societies. See, e.g., Jonathan Simon, Governing Through Crime, in The Crime Conundrum: Essays on Criminal Justice 171 (1997) (arguing that increasing reliance on punitive methods of control is result, in part, of lack of faith in other governing institutions, such as community and work).

n21 See Miami-Dade County, Fla., Ordinance 99-5 (Jan. 21, 1999). The primary provisions of the ordinance require certain employers to offer battered women unpaid leave time. When pressed as to the rationale for the notification provision, the sponsoring commissioner's staff was adamant that it was not punitive, but in somewhat contradictory language argued that an employer "had a right to know that he has a batterer on his staff, because it might make a difference in assigning jobs and in other decisions." See Telephone Interview with Staff Member, Office of Commissioner Natacha Millan (notes on file with author).

n22 See Lawrence W. Sherman et al., Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence, 57 Am. Soc. Rev. 680, 686 (1992) (noting that among married and employed batterers, arrest reduced subsequent violence, but among unmarried and unemployed batterers, arrest was associated with 53.5% increase in subsequent violence).

n23 See, e.g., Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 26 (1991) (stating that battered women's "failure" to leave is seen as evidence that she is crazy or that she is lying); Julia L. Perilla, Domestic Violence as a Human Rights Issue: The Case of Immigrant Latinos, 21 Hispanic J. Behav. Sci. 107, 113 (1999) (noting that "a failure to leave the battering relationship is seen by many mainstream agencies and court systems as a woman's failure to do something for herself and her family. Agency is directly equated with leaving, and staying is perceived as victimization. This simplistic way of viewing the intricate and complex
process in each battered woman's life belies the myriad ways she may be actively working on her own and her children's behalf.

Stereotypes of Latinas as submissive may make it particularly likely that their efforts to resist their partner's control will be rendered invisible. See Donna Coker, A Narrow Strand on Which to Stand (unpublished manuscript, on file with author) (stating that social workers described Latina mother as "enmeshed" with her batterer who was accused of child molestation, despite mother's extensive efforts to comply with Child Protective Services treatment plan; her children were not returned to her as result).

Batterers do not respond uniformly to criminal sanctions or to treatment. See generally Daniel G. Saunders, Husbands Who Assault: Multiple Profiles Requiring Multiple Responses, in Legal Responses to Wife Assault: Current Trends and Evaluation 9 (N. Zoe Hilton ed., 1993). Further, some abusive men are considerably more dangerous than are others. See Saunders, supra, at 9. While advocates have developed measures for judging the lethality of individual batterers, this variability between abusers thwarts claims that a universal strategy will protect all battered women. See Barbara Hart, Battered Women and the Criminal Justice System, in Do Arrests and Restraining Orders Work? 98, 107 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (stating that creating methods to judge batterer lethality is critical to safety of battered women).

Separation enacts other costs as well. For example, "for many immigrant women who leave their network of family and friends behind when they emigrate, the prospect of being single in a foreign land is extremely daunting." Meeta Mehrota, The Social Construction of Wife Abuse: Experiences of Asian Indian Women in the United States, 5 Violence Against Women 619, 626 (1999).

Separation enacts other costs as well. For example, "for many immigrant women who leave their network of family and friends behind when they emigrate, the prospect of being single in a foreign land is extremely daunting." Meeta Mehrota, The Social Construction of Wife Abuse: Experiences of Asian Indian Women in the United States, 5 Violence Against Women 619, 626 (1999).

Batterers do not respond uniformly to criminal sanctions or to treatment. See generally Daniel G. Saunders, Husbands Who Assault: Multiple Profiles Requiring Multiple Responses, in Legal Responses to Wife Assault: Current Trends and Evaluation 9 (N. Zoe Hilton ed., 1993). Further, some abusive men are considerably more dangerous than are others. See Saunders, supra, at 9. While advocates have developed measures for judging the lethality of individual batterers, this variability between abusers thwarts claims that a universal strategy will protect all battered women. See Barbara Hart, Battered Women and the Criminal Justice System, in Do Arrests and Restraining Orders Work? 98, 107 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (stating that creating methods to judge batterer lethality is critical to safety of battered women).

Cynthia Grant Bowman, The Arrest Experiments: A Feminist Critique, 83 J. Crim. L. & Criminology 201, 205 (1992) ("If [poor women] . . . have managed to find low-cost or public housing in the inner city and to patch together support systems or social services which allow them to care for their children, they have no alternative but to remain there as sitting ducks for the abuser when he returns."). See generally Carol Sanger, Separating from Children, 96 Colum. L. Rev. 375, 517 (1996) (criticizing legal system's "active indifference to the equality of women's lives, poor or otherwise, as they manage the often incompatible demands of raising children, earning income, and pursuing individual skills and interests").

Cynthia Grant Bowman, The Arrest Experiments: A Feminist Critique, 83 J. Crim. L. & Criminology 201, 205 (1992) ("If [poor women] . . . have managed to find low-cost or public housing in the inner city and to patch together support systems or social services which allow them to care for their children, they have no alternative but to remain there as sitting ducks for the abuser when he returns."). See generally Carol Sanger, Separating from Children, 96 Colum. L. Rev. 375, 517 (1996) (criticizing legal system's "active indifference to the equality of women's lives, poor or otherwise, as they manage the often incompatible demands of raising children, earning income, and pursuing individual skills and interests").

Cynthia Grant Bowman, The Arrest Experiments: A Feminist Critique, 83 J. Crim. L. & Criminology 201, 205 (1992) ("If [poor women] . . . have managed to find low-cost or public housing in the inner city and to patch together support systems or social services which allow them to care for their children, they have no alternative but to remain there as sitting ducks for the abuser when he returns."). See generally Carol Sanger, Separating from Children, 96 Colum. L. Rev. 375, 517 (1996) (criticizing legal system's "active indifference to the equality of women's lives, poor or otherwise, as they manage the often incompatible demands of raising children, earning income, and pursuing individual skills and interests").

Cynthia Grant Bowman, The Arrest Experiments: A Feminist Critique, 83 J. Crim. L. & Criminology 201, 205 (1992) ("If [poor women] . . . have managed to find low-cost or public housing in the inner city and to patch together support systems or social services which allow them to care for their children, they have no alternative but to remain there as sitting ducks for the abuser when he returns."). See generally Carol Sanger, Separating from Children, 96 Colum. L. Rev. 375, 517 (1996) (criticizing legal system's "active indifference to the equality of women's lives, poor or otherwise, as they manage the often incompatible demands of raising children, earning income, and pursuing individual skills and interests").
put a big guilt trip on me that if I had kept the last one he gave me, I wouldn't have got hurt this time, and on and on. And he really just tore me up when I went back.

n29 See David A. Ford, Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships, 25 L. & Soc'y Rev. 313, 314 (1991) (noting that women may desire to use prosecution as power resource to negotiate more safety and more control in their lives); Adele Harrell & Barbara E. Smith, Effects of Restraining Orders on Domestic Violence Victims, in Do Arrests and Restraining Orders Work?, supra note 24, at 241 (discussing women's use of restraining orders to gain concessions from batterers).

n30 See Coker, supra note 12, at 72-73 (discussing how women whose batterers are subordinated by racist, colonizing, or economic oppression may experience conflicts that "may be understood in political terms -- you do not turn over a brother to occupying authorities -- or in deeply individual terms -- the instinct that further mistreatment at the hands of the criminal justice system will not engender compassion or empathy in a man who has been horribly mistreated by his father."; Christine A. Littleton, Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women, 1989 U. Chi. Legal F. 23, 52 ("What would legal doctrine and practice look like if it took seriously a mandate to make women safer in relationships, instead of offering separation as the only remedy for violence against women?"); Mills, supra note 12, at 585 (stating that legal actors fail to understand women's emotional connection with their abusive partner).

n31 Of course, the opposite problem still exists: courts refuse to order the stay-away provisions, even though the petitioner requests the remedy and the court implicitly rules that she met her burden of proof. See Interview with Stacey Dougan, Attorney and Director, Greenburg, Traurig/Florida Coalition Against Domestic Violence Clearinghouse Lawyers Project (describing case in which court refused to order stay-away provision of domestic violence protection order, while granting other provisions, because judge wanted parties to reconcile). n32 See Lee Bowker, Beating Wife-Beating (1983) (providing interviews with women that solved their domestic violence problems, including some that reunited with former batterer); JoAnn L. Miller & Amy C. Krull, Controlling Domestic Violence: Victim Resources and Police Intervention, in Out of the Darkness: Contemporary Perspectives on Family Violence 235, 249 (Glenda K. Kantor & Jana L. Jasinski eds., 1997) [hereinafter Out of the Darkness] (finding that victims interviewed in study of arrest effects in Colorado Springs reported that women that continued to cohabit with their abusive partner following his arrest experienced less violence than did women that separated). In contrast, other research finds that women are safest when they separate. See, e.g., David A. Ford & Mary J. Regoli, The Preventive Impacts of Policies for Prosecuting Wife Batterers, in Domestic Violence: The Changing Criminal Justice Response 181, 182-84 (Eve S. Buzawa & Carl G. Buzawa eds., 1992) [hereinafter Domestic Violence] (stating that, in study of effects of prosecution policies, women that cohabitated with their partner during six month follow up period were more likely to be battered again than were women that separated). Of course, we do not know whether these statistics reflect true rates of reabuse or merely the greater willingness of women to report abuse in certain circumstances.

n33 See Mills, supra note 12, at 585 (stating that state actors, feeling overwhelmed and helpless to protect battered women, react by developing feelings of omnipotence, thus intervening in battered women's lives as "omnipotent saviors" and acting to "usurp the battered woman's decision-making"). Mills also argues that "state actors stereotype battered women's fragility as non-cooperative in part because of their own 'guilt' at leading a more comfortable lifestyle"; their frustration with battered women for not leaving the abuser is the result of negative counter-transference. Id. at 584. Safety and autonomy are sometimes in tension. Many batterers become more violent when women leave or otherwise defy their

n34 For research that supports both the importance of material resources and the importance of allowing women to determine their own needs, see Sullivan, infra note 45 and accompanying text.

n35 See generally Ptacek, supra note 11, at 22-24 (reviewing data from various studies and finding that domestic violence is more prevalent and more severe in low-income families); Browne & Bassuk, supra note 13, at 263 (citing National Family Violence Survey finding that husband's unemployment significantly predicted prevalence of husband-towife violence); Richard J. Gelles, Through a Sociological Lens: Social Structure and Family Violence, in Current Controversies on Family Violence 31, 33 (Richard J. Gelles & Domileen R. Loseke eds., 1993) (stating that domestic violence occurs in all social and economic groups, but risk is greatest for those that are poor, that are married to men that are unemployed or that hold low prestige jobs); Angela M. Moore, Intimate Violence: Does Socioeconomic Status Matter?, in Violence Between Intimate Partners: Patterns, Causes, and Effects 90, 96 (Albert P. Cardarelli ed., 1997) (reviewing data regarding correlation of low socio-economic status and domestic violence and concluding that "women on the lower end of the economic scale are at greater risk of victimization than their counterparts at the higher levels."). This research does not support the view that domestic violence is a problem only for low-income families. See Ptacek, supra note 11, at 20-21 (describing "class myth" that domestic violence is confined to poor or working class families).

n36 See Richard Gelles, Abused Wives: Why Do They Stay?, 38 J. Marriage & Family 659, 661-63 (1976) (concluding that fewer resources wives had and less power they had, more likely they were to stay with violent husbands).

n37 See Neil S. Jacobson & John M. Gottman, When Men Batter Women 85-86 (1998) (describing "cobra" types of batterers that "engage every relationship as one in which they must dominate" and providing example of batterer who was attracted to his wife, in part, because she was new in town and had no financial means of support).


n39 I speak from my personal experience as a social worker and attorney working for and with battered women since 1978. This work includes shelter staff, coordinator of the women's portion of a community based domestic violence program, professional trainer, and counselor for battered women and for men court ordered to batterer groups.

n40 See Seth C. Kalichman et al., Sexual Coercion, Domestic Violence, and Negotiating Condom Use Among LowIncome African American Women, 7
finding in study of low income African American women in housing project that constellation of factors increased their risk for HIV infection: women who experienced sexual coercion and physical violence from partner(s) were also more likely to have used illicit drugs in their last sexual encounter and were more likely to report that they were afraid to ask their male partner(s) to use condoms because they feared he would hit them).

n41 See Zorza, supra note 38, at 422-23.

n42 See Lisa R. Green, Homeless and Battered: Women Abandoned by a Feminist Institution, 1 UCLA Women's L.J. 169, 171-73 (1991) (stating that battered women's shelters employ essentialist understandings of battered woman to refuse assistance to homeless women who are battered).

n43 See id.

n44 See id. For some poor women, family and friends do not have the means to assist them. See, e.g., Jean Calterone Williams, Domestic Violence and Poverty: The Narratives of Homeless Women, in Frontiers: A Journal of Women Studies 145 (1998) (asserting that many homeless women were homeless as result of persistent poverty, domestic violence and low-rent housing shortages, and although their families and friends were not homeless, they lacked resources to help their homeless relative).


n46 See id. at 46. Forty-five percent of the experimental group were African American women, 42% were Euro-American women, 7% were Latina, 2% were Asian American or American Indian. See Cris M. Sullivan et al., After the Crisis: A Needs Assessment of Women Leaving a Domestic Violence Shelter, 7 Violence & Victims 267, 269 (1992) (reporting on same population). Two women who did not speak English were excluded, thus demonstrating another way in which the experiences of some women are not represented in domestic violence research. See id.

n47 See Sullivan & Bybee, supra note 45, at 45. The advocate worked with the women for an average of 6.4 hours a week. See id. The advocates were trained undergraduate students who received school credit for their work. They were supervised weekly. See id.

n48 See id. at 51.

n49 See id. at 45. Of this list, only "services for children" and "social supports" arguably do not fit the definition of "material resources" for purposes of the material resources test. Ninety eight percent of the women receiving assistance reported they were somewhat or very satisfied with the project and 87% reported they were very satisfied. See id.

n50 See id. Only the difference in psychological abuse scores did not reach statistical significance. See id. at 48. Both groups of women reported that their quality of life and their social support networks had improved and that the abuse had decreased. However, the experimental group reported significantly higher outcomes. See id. The interviews to determine improvement were conducted by trained interviewers who were not the advocates, thus decreasing the likelihood that interviewees exaggerated their positive responses so as to please the advocates. Of course, this is still a danger with this kind of research.

n51 See id. at 51.

n52 See id. The project was based on the assumption that "survivors were competent adults capable of making sound decisions for themselves." Id.

n53 The studies were conducted in Omaha, Colorado Springs, and Milwaukee. They were part of a series of six replication studies, funded by the National Institute of Justice, to test the findings of the Minneapolis study: arresting batterers created greater specific deterrence than did police mediation or separation. See J. David Hirschel & Ira W. Hutchison, Realities & Implications of the Charlotte Spousal Abuse Experiment, in Do Arrests and Restraining Orders Work?, supra note
Victim interviews were conducted primarily in order to measure recidivism, but other data was collected and is now the subject of analysis. See id. This effect was found in Omaha. See Miller & Krull, supra note 32, at 246. In Colorado Springs, unemployed victims also experienced higher levels of recidivistic violence than did employed victims, but the relationship did not achieve statistical significance at the .05 level. See id.

n55 See id. It does not appear that the researchers controlled for those unemployed women whose partners were also unemployed.

n56 See Debra S. Kalmus & Murray A. Strauss, Wife's Marital Dependency and Wife Abuse, 44 J. Marriage & Fam. 277, 280 (1982) (finding that subjective marital dependency was correlated with minor but not severe violence, while objective dependency, as measured by wives' unemployment, presence in home of children under five years of age, and whether husband earned 75% or more of couple's income, was correlated with severe abuse).

n57 See Gelles, supra note 35, at 33-35 (stating that wives with fewer resources and less power were more likely to stay with violent husbands).

n58 The isolation of the nuclear family may be less severe in African American and Latina/o households. See, e.g., Noel A. Cazenave & Murray A. Straus, Race, Class, Network Embeddedness, and Family Violence: A Search for Potent Support Systems, in Murray A. Straus et al., Physical Violence in American Families: Risk Factors and Adaptations to Violence 321, 331 (1995) [hereinafter Physical Violence in American Families]. Cazenave and Straus found in their study of family violence that African American respondents were more likely to have relatives who lived within an hour's drive away, to have five or more children in the home, to have a non-nuclear family adult in the home, and to have neighborhood stability. See id. at 331. The number of years lived in the neighborhood and the number of children in a family, are related to lower rates of minor spousal violence among African Americans studied; households with five or more children experienced less violence. See id. at 333. They conclude that African American respondents "appeared to be more involved in family-kin networks than whites and those networks appear to reduce family violence as compared with whites at similar socioeconomic levels." Id. at 337-38.

n59 See Ptacek, supra note 11, at 3 (describing way in which racism reflected in opportunities for housing, employment, and services limits ability of poor African American battered women in urban areas). In addition, for women whose economic situation is marginal, economic dependency on the batterer may result even if his economic contributions are relatively minor. For example, research related to women in welfare-to-work programs finds that many women's efforts at economic viability are thwarted by abusive partners who sabotage their job and educational efforts. See Raphael, Employment, supra note 38, at 31-34. The economic dependency on men is made more difficult because of the inadequate nature of public assistance.

n60 See generally Ptacek, supra note 11; Gelles, supra note 35; Moore, supra note 35.

n61 See, e.g., Green, supra note 42, at 171-74 (reporting that shelters refuse to house battered women who are perceived as "homeless"); Williams, supra note 44, at 147 (stating that battered women's shelters may deny shelter to homeless battered women because they are identified as "street-wise", and homeless shelters may deny them entrance because they are not "homeless"). See generally Domileen R. Loseke, The Battered Woman and Shelters: The Social Construction of Wife Abuse (1992) (describing manner in which battered women's shelter workers construct real "battered women"). Concepts of deviance are informed by class, race, and gender stereotypes. See, e.g., Regina Austin, Difference/Deviance Divide, 26 New Eng. L. Rev. 877, 879 (1992) ("If the assessment [of the law breaker or norm violater] is negative when the wrongdoer is
male, it is likely to be more so if the wrongdoer is female . . . . Black women who break the rules are judged in accordance with the biases of both white supremacy and male domination.


n62 See generally Green, supra note 42 (discussing how house rules may be pretextual basis for excluding women that are different than prototypical battered women).

n63 See generally Margaret A. Baldwin, Strategies of Connection: Prostitution and Feminist Politics, 1 Mich. J. Gender & L. 65, 68 (1993) (stating that some shelters will not take women that are prostitutes); Green, supra note 42 (discussing exclusion of women from homeless shelters based on manipulative or deviant patterns of communication); Michelle S. Jacobs, Prostitutes, Drug Users, and Thieves: The Invisible Women in the Campaign to End Violence Against Women, 8 Temple Pol. & Civ. Rts. L. Rev. 459 (1999) (criticizing domestic violence services and scholarship for inattention to violence in understanding women's criminal behavior); Williams, supra note 44 (describing differences in how women in battered women's shelters understood their situation and themselves, and the way in which women in homeless shelters, who were also battered women, understood their circumstances).

n64 See, e.g., Eve S. Buzawa & Carl G. Buzawa, The Impact of Arrest on Domestic Violence, 36 Am. Behav. Scientist 558, 563 (1993) (reporting that many police officers believe that "violence is a normal part of the lives of the lower class"); Mary Ann Dutton, Battered Women's Strategic Response to Violence, in Rethinking Violence Against Women 105, 107 (R. Emerson Dobash & Russell P. Dobash eds., 1998) (describing nested ecological model for understanding battered women's experiences, including experiences with racist institutions, family histories, and individual psychology); Kathleen J. Ferraro, The Legal Response to Woman Battering in the United States, in Women, Policing, and Male Violence: International Perspectives 155 (Jalna Hanmer et al. eds., 1989) (stating that police respond differently to "deviants" than to "normals" and often see poor women and intoxicated women as former); Peter G. Jaffe et al., The Impact of Police Laying Charges, in Legal Responses to Wife Assault: Current Trends & Evaluation, supra note 24, at 99 (stating that police often divide world between "normal and deviant citizens" in order to manage cognitive dissonance caused by daily encounters with individuals whose appearance, demeanor, and surroundings contradict dominant definitions of 'normality').

n65 See Coker, supra note 12, at 44 (describing manner in which batterer's parents may blame victim for their son's violence); id. at 58-59 (describing use of Navajo creation narratives to define Navajo masculinity in gender egalitarian manner); Jenny Rivera, Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials, 14 B.C. Third World L.J. 231, 255 (1994) (noting that some members of Latina/o community have resisted addressing domestic violence because it is seen as private and potentially divisive issue).

n66 See generally Perilla, supra note 23, at 123 (describing varying experiences of Latinas who are battered and manner in which male authority is understood).

n67 For a description of the importance of these intersections in women's lives and the manner in which domestic violence programs fail to meet the needs of women of color, see Crenshaw, supra note 14. Crenshaw describes "structural intersectionality" as "the ways in which the location of women of color at the intersection of race and gender makes our actual experience of domestic violence, rape, and remedial reform qualitatively different than that of white women." Id. at 1245; see also Dutton, supra note 64, at 105, 107 (describing nested ecological model for understanding battered women's experiences). Health, disability status, age, sexual orientation, and urbanicity are other
factors that shape the experience of battering.

n68 See Douglas S. Massey, Getting Away with Murder: Segregation and Violent Crime in Urban America, 143 U. Pa. L. Rev. 1203, 1219 (1995) (asserting that hypersegregation and rising black poverty creates neighborhoods with "street orientation," meaning "a social world characterized by high levels of interpersonal hostility and aggression"). For a related but more thorough analysis, see Douglas S. Massey & Nancy A. Denton, American Apartheid (1993). For a discussion of policies that diminish the ability of African American women to control wealth, see Austin, supra note 5, at 771 ("Black women are not substantial beneficiaries of the principal forms of government asset accumulation, nor of other kinds of institutional privileges that facilitate wealth accumulation. . . .").

n69 See Ptacek, supra note 11, at 31 (citing research by Robert J. Sampson and William Julius Wilson finding that 70% of poor white New Yorkers live in nonpoverty neighborhoods while 70% of black New Yorkers live in poverty neighborhoods); see also Robert J. Sampson & William J. Wilson, Toward a Theory of Race, Crime, and Urban Inequality, in Crime and Inequality 37 (John Hagan & Ruth D. Peterson eds., 1995). Ptacek wrote:

When hospitals close in politically marginalized communities, this complicates battered women's efforts to seek help. When white racism limits the neighborhoods that people of color can live in, women's options to leave are narrowed. When businesses close and jobs leave poor communities of color, women lose economic opportunities that could help them gain independence. To treat class but not race is to ignore the effects of racial segregation on women's lives.

Ptacek, supra note 11, at 31.

n70 See, e.g., Gloria Valencia-Weber & Christine P. Zuni, Domestic Violence and Tribal Protection of Indigenous Women in the United States, 69 St. John's L. Rev. 69, 130 (1995) ("Indian women and other women of color confront the same cultural insensitivity and racism at urban domestic violence shelters as they do elsewhere. These shelters can be unaware of the cultural resources which should be used to assist Indian victims of domestic violence"). See generally Crenshaw, supra note 14, at 1262-65 (describing way in which shelters for battered women fail to meet needs of women of color); Zanita E. Fenton, Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence, 8 Colum. J. Gender & L. 1, 11 (1998) (describing manner in which racial and gender based stereotypes interact in stereotypes of women's victimization); Beverly Horsburgh, Schrdegseodinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color, 17 Cardozo L. Rev. 531, 577 (1996) ("Strategies [against domestic violence] . . . are inclined to reflect the experiences of white women and "seldom deal with the economic and workplace discrimination issues that best women of color."); Kimberly A. Huisman, Wife Battering in Asian American Communities, 2 Violence Against Women 260, 267 (1996) (noting that services for battered women frequently do not have workers who are linguistically and culturally competent to assist Asian American battered women, particularly recent immigrant women); Rivera, supra note 65 (stating that domestic violence policies and laws do not account for Latina battered women's experiences); id. at 253 (noting that shelters sometimes refuse admission to monolingual Spanish speakers and few shelters have bilingual and bicultural staff); Susan Girardo Roy, Restoring Hope or Tolerating Abuse? Responses to Domestic Violence Against Immigrant Women, 9 Geo. Immigr. L.J. 263, 286 (1995) (observing that "many shelters remain culturally biased toward English-speaking, or American women").

n71 See generally Perilla, supra note 23; Rivera, supra note 65; Jenny Rivera, Intimate Partner Violence Strategies: Models for Community Participation, 50 Me. L. Rev. 283 (1998) [hereinafter Rivera, Models for Community
n72 See Crenshaw, supra note 14; Rivera, supra note 65.

n73 See, e.g., Coramae Richey Mann, Unequal Justice: A Question of Color 137 (1993) (reporting studies finding relationship between size and economic strength of minority population and deployment of criminal justice mechanisms to control population and referring to research on Hispanics as example); Rivera, supra note 65, at 245-46 (writing that "Latinos in the United States have had a long, acrimonious history of interaction with local police and federal law enforcement agencies. This history is marked by abuse and violence suffered by the Latino community at the hands of police officers who have indiscriminately used excessive physical force against Latinos.").

n74 See, e.g., Judith McFarlane et al., Characteristics of Sexual Abuse Against Pregnant Hispanic Women by Their Male Intimates, 7 J. Women's Health 739, 740 (1998) (quoting NIH Panel on Research on Antisocial, Aggressive, and Violence Related Behaviors and Their Consequences as stating that: "An area of prime concern is the paucity of information on Hispanic, Native American, African American, and Asian involvement in aggressive and violent behavior, either as victims or as agents."). What research exists suggests that domestic violence is a significant problem for Latinas. For example, the results of one random sample study found that seven out of one hundred English speaking Latinas were severely assaulted by their husbands in the year prior to the study. See Murray A. Straus & Christine Smith, Violence in Hispanic Families in the United States: Incidence Rates and Structural Interpretations, in Physical Violence in American Families, supra note 58, at 350. Obviously, a study of English speaking Latinas/os cannot be said to be representative. For a discussion of the limitations of domestic violence research on Latinas/os because of the failure to make distinctions between groups, see infra notes 80-82 and accompanying text. A review of crime statistics concludes that Hispanic women were more likely than non-Hispanic women to be victims of violence. See Diane Craven, U.S. Dept. Of Justice, Bureau of Justice Statistics, Sex Differences in Violent Victimization, 1994 (1997) (reporting that 52 per 1000 Hispanic women were victims of violence compared to 43 per 1000 non-Hispanic women).

Because unemployment rates are high for Latinas/os and because many Latinas/os marry young, research that links unemployment and youth with higher incident rates of domestic violence suggests that many Latinas are at increased risk for domestic violence. See Bureau of Labor Statistics, The Employment Situation: January 2000, tbl.A-2 (reporting that average unemployment rate for seasonally adjusted months reported for Hispanics is about 6.2% compared to average 3.55% for whites and 8.08% for blacks); Straus & Smith, supra note 74, at 356 (reporting that 16% of unemployed English-speaking Hispanic men committed acts of severe violence against their wife within previous year, compared to 6.5% of employed men in study); Carolyn M. West, Lifting the 'Political Gag Order': Breaking the Silence Around Partner Violence in Ethnic Minority Families, in Partner Violence: A Comprehensive Review of 20 Years of Research 184, 193 (Jana L. Jasinski & Linda M. Williams eds., 1998) (stating that domestic violence rates are highest for those under 30 years of age.)

n75 See Susan B. Sorenson, Violence Against Women: Examining Ethnic Differences and Commonalities, 20 Evaluation Rev. 123, 125 ("Relatively little empirical community-based research has investigated ethnic differences and
similarities in violence against women in U.S. subpopulations. When investigated, groups typically are collapsed into White vs. non-White or Black vs. non-Black.

n76 See id.

n77 See, e.g., Berta Esperanza Hernandez-Truyol, Latina Multidimensionality and LatCrit Possibilities: Culture, Gender and Sex, 53 U. Miami L. Rev. 811, 812 (1999) ("From its inception, Lat Crit has broadened and sought to reconstruct the race discourse beyond the normalized binary black/white paradigm -- an underinclusive model that effects the erasure of the Latina/o, Native, and Asian experiences as well as the realities of other racial and ethnic groups in this country.").

n78 See Richard Hampton et al., Violence in Communities of Color, in Family Violence and Men of Color: Healing the Wounded Male Spirit 1, 20 (Ricardo Carillo & Jerry Tello eds., 1998) [hereinafter Family Violence] (stating that majority of research on violence within families studies white families). As Mary Ann Dutton wrote:

Results of research including only Anglo American women cannot be assumed to apply to women of color, women living in poverty, or women whose native language is other than English. Research on battering and its effects for disenfranchised women, such as the homeless, the seriously and chronically mentally ill, and immigrants, is necessary to capture the unique contextual influences that define the life circumstances of these groups of battered women.

Dutton, supra note 64, at 118-19.

n79 See Ptacek, supra note 11, at 25 (noting that "most of the research that addresses race focuses on differences between white and black women").

n80 See, e.g., Lisa Aronson Fontes, Conducting Ethical Cross-Cultural Research on Family Violence, in Out of the Darkness, supra note 32, at 300 (noting that cross-cultural researchers on family violence sometimes engage in "ethnic lumping" where "one subgroup is considered representative of a collection of diverse peoples, as when Mexican-Americans are studied and labeled 'Hispanics' and their experiences are presumed to be true of Puerto Ricans, Cubans, Dominicans, and other Latinos"); see also Mary P. Koss et al., No Safe Haven: Male Violence Against Women at Home, at Work, and in the Community 54 (1994) ("Hispanics in the United States originate from at least 32 countries and . . . there are significant cultural differences.").

n81 See Straus & Smith, supra note 74, at 341. This is particularly problematic because other research suggests that "acculturation" may have an escalating effect on Latino male battering, thus the study may have skewed the rates upward. See Hampton et al., supra note 78, at 12. Further, even English speakers may not have understood the forced choice responses required of the study. See id. at 20. A different kind of bias may result from the use of phone interviews, which result in the omission of the very poor and the marginally housed.

n82 See Metro-Dade County Spouse Abuse Replication Project Draft Final Report 4-21, tbl.4-6 (National Institute of Justice, 1991) (on file with author).


n84 Perilla, supra note 23, at 125.

n85 For example, Kelly describes an immigrant woman who lost custody of her child to her abusive husband. See Kelly, supra note 83, at 686 n.109. If that woman were deported, she might not see her children for a long period of time. See id. See generally Leslye E. Orloff et al., With No Place To Turn: Improving Legal Advocacy for Battered Immigrant Women, 29 Fam. L.Q. 313 (1995) (describing difficulties facing battered immigrant women).

n86 See Perilla, supra note 23.

n87 See, e.g., West, supra note 74, at 205 (stating that premigration and
postmigration history of immigrants may include experiences such as loss of property, homeland, or even people significant to immigrant's life, as well as loss of status).

n88 See Ricardo Carrillo & Rolando Goubaud-Reyna, Clinical Treatment of Latino Domestic Violence Offenders, in Family Violence, supra note 78, at 64 (noting that many Latinos participating in groups for men that batter migrated because of "war-torn situations, unbearable poverty, unemployment, or natural catastrophes"). For women, these experiences are often confounded by continuing physical assault in this country. As a result, some women develop posttraumatic stress disorder. See Dutton, supra note 64, at 107; see also Raphael, Employment, supra note 38, at 32 ("In many cases the 'culture of poverty' is nothing more than post-traumatic stress disorder . . . . Past victims have incurred permanent injuries such as damage to joints, partial loss of hearing or vision, as well as emotional injuries which compromise their capacity to become and stay employed.").


n90 As Berta Hernandez-Truyol wrote, "la familia is of sacrosanct importance in the cultura Latina." Hernandez-Truyol, supra note 77, at 816. Even when there is violence, family may provide an imperfect refuge from the alienation and abuse facing poor women in their work. See bell hooks, Feminist Theory: From Margin to Center 124-25 (1984). hooks wrote:

The vast majority of poor black women in this society find they are continually subjected to abuse in public agencies, stores, etc. . . . They are more inclined to accept abuse in situations where there are some rewards or benefits, where abuse is not the sole characteristic of the interaction. [Therefore,] . . . they may be reluctant . . . to end battering . . . relationships. Like other groups of women, they fear the loss of care.

Id.

For a discussion of the failure of white middle class feminists to recognize the importance of family in constructing a female identity for women of color and working class women that has dignity and is not wholly defined by the market place, see Joan Williams, Implementing Antiessentialism: How Gender Wars Turn into Race and Class Conflict, 15 Harv. BlackLetter L.J. 41, 75 (1999), writing that

White feminists need to be attuned to the ways that assumptions that embed class and race privilege can alienate potential allies. A tone of respect for family and for domesticity are important in a social context where gender ideals and the denial of family life have been key elements of a system of class and race oppression.

Id.

n91 Advocates for battered women report a limited number of Spanish speaking personnel at every level of legal and service systems. Police officers rely on neighbors or the victim's children for translation at the scene; there are few victim witness advocates, prosecutors, and courtroom personnel who speak Spanish. See E-mail Correspondence with Marie de Santis, Director of Women's Justice Center in Sonoma County, California (Nov. 28, 1999) (on file with author) (discussing circumstances of battered Latinas in Sonoma County, California).

n92 See generally Raphael, Employment, supra note 38.

n93 Pro-arrest policies are sometimes referred to as presumptive arrest policies.


n95 See Eve S. Buzawa et al., Role of Victim Preference in Determining Police Response to Victims of Domestic Violence, in Domestic Violence, supra note 32, at 257 (citing research of Black, 1980 and Stanko, 1989) ("White officers have tended to be less likely to arrest in cases of minority violence.")

n96 See, e.g., Lawrence W. Sherman et al., The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment, 83 J. Crim. L. &
"one nearly universal finding [in studies of police behavior] is that police attend to the demeanor or overall 'moral worth' of the suspect and victim"; Elizabeth Marie Marciniak, Community Policing of Domestic Violence: Neighborhood Differences in the Effect of Arrest 108 (1994) (unpublished Ph.D. dissertation, University of Maryland) (on file with author) (citing D.A. Smith, The Neighborhood Context of Police Behavior, in 8 Communities and Crime: Crime and Justice 313-341 (Albert J. Reiss & Michael Tonry eds., 1986)) (reporting that in study of policing behavior, police were less likely to file reports on victim's request in areas with low average household income); see also Ferraro, supra note 64, at 168-69 (finding that police respond differently to "deviants" than to "normals" and often see poor women and intoxicated women as the former).

n97 See Ferraro, supra note 64, at 168-69.

n98 See Joan Zorza & Laurie Woods, Analysis and Policy Implications of the New Domestic Violence Police Studies (National Center on Women and Family Law, 1994). The decision to push for mandatory arrest policies rather than prefered arrest policies was the subject of much debate within the movement. See id.

n99 See Lawrence W. Sherman & Richard A. Berk, The Specific Deterrent Effects of Arrest for Domestic Violence Assault, 49 Am. Soc. Rev. 261 (1984); Evan Stark, Mandatory Arrest of Batterers: A Reply to Its Critics, in Do Arrests and Restraining Orders Work?, supra note 29, at 126 (noting that "the major importance of the Minneapolis Domestic Violence Experiment was to give women's advocates who already favored arrest a powerful weapon to use with lawmakers"). It also shifted much of the public dialogue on arrest away from other argued benefits and towards a straightforward deterrence argument. This shift in the discourse regarding arrest may have created some unexpected harms, as described in this Essay.

n100 See Hirschel & Hutchison, supra note 53, at 54-55.

n101 See Sherman et al., supra note 96, at 166 tbl.9. In the Milwaukee study, the majority of suspects, whether arrested or warned and whether employed or unemployed, committed one act of recidivist violence according to Hotline reports: 66% of employed with full arrest, 72% of employed with short arrest, and 74% of employed who were warned; 64% of unemployed with full arrest, 66% of unemployed with short arrest; and 67% of unemployed who were warned. See id. Of course, the studies did not examine recidivism in those cases in which there was no police involvement. A few small research projects have attempted to do so. See Jaffe et al., supra note 64, at 9 (finding that police intervention and charging resulted in fewer subsequent assaults than police intervention with no charge or no police intervention at all). However, confidence in the results of these studies is compromised by their small sample size and the problems with comparability between "incidents" for the before/after comparison. Comparing past incident or severity rates are subject to problems of subject recall as well.

n102 See Hirschel & Hutchinson, supra note 53, at 73 tbl.5.2. In every one of the arrest studies, the recidivism rates reported in victim interviews were significantly higher than that recorded in official reporting data. See id. (finding in Charlotte study that prevalence rates reported by victims at six month interviews were almost four times greater than those recorded in arrest data); see also Franklin Dunford et al., Nat'l Inst. of Justice, The Omaha Domestic Violence Police Experiment, Final Report 41 (1989) (stating that "very little of the violent and abusive behavior associated with domestic violence appears to be captured by official arrest records" because only 4% of cases reported by victims were apparent in arrest statistics).

n103 See Dunford et al., supra note 102, at 22. The study reported that 77% of interviewed victims in the mediation group reported that police presence stopped the fight. See id. at 24. The study also found that 93% of interviewed victims in the arrest group stated that police presence stopped the violence. See id. at 25. Finally,
the study found that 87% of interviewed victims in the separation group reported that the presence of the police stopped the fight. See id.

n104 See Miller & Krull, supra note 32, at 239 tbl.19.4. Miller and Krull's assessment of data from three arrest replication study sites shows that blacks and Hispanics (studies' terms) are overrepresented in the samples relative to their representation in the general population. See id. In Milwaukee, blacks are overrepresented by a factor of 10.6 and Hispanics by a factor of 1.6. See id. In Colorado Springs, blacks are overrepresented by a factor of 6.5 and Hispanics by 3.0. See id. In Omaha, blacks are overrepresented by a factor of 9.3 and Hispanics by 1.9. See id. The same disproportionate numbers were true of the Minneapolis experiment. See Richard A. Berk, What the Scientific Evidence Shows: On the Average, We Can Do No Better Than Arrest, in Current Controversies on Family Violence, supra note 35, at 323, 329-30. The same was also true in the Charlotte experiment. See J. David Hirschel et al., The Failure of Arrest to Deter Spouse Abuse, 29 J. Res. Crime & Delinq. 7, 9 (1992) ("Non-White, lower income women (under $ 7,500) are more than twice as likely to report an incident to the police than are White, higher income (over $ 15,000) females."). Data from other sources shows similar results. See, e.g., Michael Steinman, Coordinated Criminal Justice Interventions and Recidivism Among Batterers, in Woman Battering: Policy Responses 221, 224 (Michael Steinman ed., 1991). Steinman's study focused on a county with a 96% white, middle class population. See id. The study revealed that before the county adopted a pro-arrest policy for domestic violence cases, 32% of the domestic violence arrests were people of color. See id. After the county adopted the pro-arrest policy, 27% of domestic violence arrests were people of color. See id.

However, disproportionate numbers in police reports do not necessarily result in disproportionate numbers of arrests when not under experimental conditions. For example, Zorza's examination of mandatory arrest rates for African Americans in Wisconsin found that while African Americans made up about 10% of the domestic violence incident reports, they made up only 3.9% of the arrests reports. Further, the percentage of arrests that were African Americans (1.39%) was smaller than their population percentage (3.9%). See Joan Zorza, Mandatory Arrest for Domestic Violence: Why It May Prove the Best First Step in Curbing Repeat Abuse, Crim. Just., Fall 1995, at 2, 52. Because reporting varies along race and ethnicity lines, it is difficult to know to what degree this evidences a refusal on the part of police to arrest in domestic violence cases involving African Americans and to what extent it represents a willingness on the part of African American women to call the police for incidents that fall short of what police view as probable cause warranting arrest. Of course, it may be some of both. See Ira W. Hutchison & J. David Hirschel, Abused Women: Help-Seeking Strategies and Police Utilization, Violence Against Women, Aug. 1998, at 436, 45253 (reporting that African American low income battered women were more likely to rely on police response than were white low income battered women).

n105 See Metro-Dade Spouse Abuse Replication Project, Draft Final Report 6-21 (1991). This was true across different measures of recidivism (victim interviews, hotline reports made by police at the scene, and arrest reports).

n106 See Dunford et al., supra note 102, at 34 (finding that both arrest measures and victim interviews found no significant difference in recidivism between offenders who were arrested and those separated or counseled.); J. David Hirschel et al., The Charlotte Spouse Abuse Study, 57 Popular Gov't 11, 13 (1991) (reporting no significant difference in recidivism between three treatment groups). But see Maxwell et al., supra note 19, at 42 (finding modest deterrent effect for all replication studies across sites).

n107 See Sherman et al., supra note 22, at 686 (stating that among married and employed batterers, arrest reduced subsequent violence, but among unmarried and unemployed batterers, arrest was associated with 53.5% increase in
subsequent violence); Sherman et al., supra note 96, at 147. In the Milwaukee study, Sherman found that 19% of unemployed men subjected to full arrest and 18% subjected to short arrest committed three or more subsequent acts of domestic violence within six months as measured by police calls. See Sherman et al., supra note 99, at 166 tbl.9. These rates are much higher than the 9% rate for unemployed men who were "warned" rather than arrested. See id. They are also higher than the outcomes for employed men who were arrested: 13% receiving full arrest and 6% receiving short arrest committed three or more acts of subsequent violence. See id.

Sherman's analysis is subject to a number of criticisms. See Cynthia Grant Bowman, The Arrest Experiments: A Feminist Critique, 83 J. Crim. L. & Criminology 201, 204 (1992) (stating that unemployment findings fail to account for poor women's lack of resources); Hirschel & Hutchinson, supra note 53, at 77-78 (arguing that Sherman's Charlotte study conclusion that arrest escalated violence among unemployed offenders resulted from three analytical errors: (1) he excluded victim interview data, (2) he substituted direction of findings for statistical significance, and (3) he lumped citation with arrest findings, thus exaggerating the arrest versus nonarrest differential, because citation independently had least deterrent effect). Unemployment may mask other important variables. See Sherman, supra note 13, at 261; Richard A. Berk et al., The Deterrent Effect of Arrest in Incidents of Domestic Violence: A Bayesian Analysis of Four Field Experiments, 57 Am. Soc. Rev. 698, 703, 705 (1992) ("A number of other explanatory variables could have been included, and employment and marital status hardly exhaust the list of social control indicators."). For example, unemployed men may be disproportionately younger. See West, supra note 74, at 193-95 (stating that younger men have higher rates of domestic violence). In addition, unemployed men may have higher rates of alcohol and/or drug dependence as well as mental illness. See Richard J. Gelles, Alcohol and Other Drugs Are Associated with Violence -- They Are Not Its Cause, in Current Controversies on Family Violence, supra note 35, at 182 (noting that significant numbers of batterers have alcohol and drug abuse problems); see also Terrie E. Moffitt & Avshalom Caspi, Findings About Partner Violence from the Dunedin Multidisciplinary Health and Development Study 5 (NIJ Research Brief July, 1999 on file with author) (finding that male perpetrators of domestic violence were thirteen times more likely to be mentally ill than were nonperpetrators). Significant numbers of unemployed men may also have prior criminal histories or be currently involved in crimes in addition to the battering. See Hirschel & Hutchinson, supra note 53, at 70 (finding that strongest predictor for recidivism among offender characteristic was offender's prior criminal history, while race, age, marital status and employment status were not predictive).

n108 See Marciniak, supra note 96, at 74 (analyzing Milwaukee data, which found that arrestees living in census tracts with high levels of female headed households, families receiving welfare, poverty, high divorce rate, and high unemployment had higher domestic violence recidivism rates postarrest).

n109 See id. I choose to describe the traits, rather than adopt the term used in the literature, "family disorganization", because "family disorganization" implies pathology and fails to capture the numerous structural ways in which poor women with children are systematically disadvantaged and subjected to discrimination. See Martha Fineman, The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies 107-08 (1995) (describing how single mothers receiving welfare are "lumped together with drug addicts, criminals, and other socially defined 'degenerates' in the newly coined category of 'underclass'"). A number of scholars have found similar correlations with neighborhood characteristics and violence. See Hampton et al., supra note 78, at 16 (stating that rates of violent victimization are two to three times higher in communities with high levels of "family disruption" regardless of race). Hampton et al. argued that "residential mobility or change . . . is
correlated to general violence rates, especially in the context of poverty, social dislocation, family disruption, and population density seem also to be true for intra family violence. Id.; see also Tracey Meares, It's a Question of Connections, 31 Val. U. L. Rev. 579, 589 (1997) (arguing that neighborhood social disorganization has relationship to increased criminal behavior in neighborhoods).

These findings do not point to a simplistic equation of poverty with increased domestic violence recidivism. For example, one study of arrest data found that the percentage of families in a neighborhood who live below the federal poverty line did not predict recidivism. See Rachel Ryan Rodgers, Accounting for Jurisdictional Variation in Recidivism Rates for Domestic Violence: A Re-Examination of the Domestic Violence Experiments 53 (1996) (unpublished M.S. thesis, Auburn University) (on file with author) (finding neighborhoods' poverty rates were negatively related to recidivism). Further, in the NIJ domestic violence arrest studies, cities with some measure of overall deterrence had higher unemployment rates than did cities where no overall deterrence was found. See Berk, supra note 104, at 330-31. Thus, domestic violence recidivism postarrest may not be related to neighborhood poverty, per se, or even to prevalent unemployment, but instead may be related to a constellation of factors that create social instability.

n110 See Stark, supra note 99, at 116 (criticizing Sherman's analysis for presuming that "causality is singular, universal, and unidirectional").

n111 See Bowman, supra note 107, at 204; see also Zorza & Woods, supra note 98, at 94 (stating that arrest gives victims opportunities to go to safe place and "conveys to other members of the family and all of society that certain behavior is illegal and will not be tolerated"). In addition to direct benefits to women at the scene, many advocates believe that a mandatory arrest policy may provide a useful baseline for judging police behavior and a standard from which women can agitate for better police response. See Stark, supra note 99, at 127-28 (arguing that important value of mandatory arrest policies is that baseline is created for judging police behavior).

n112 See supra note 103 and accompanying text (noting that police intervention usually results in immediate cessation of violence).

n113 See, e.g., Bowman, supra note 107, at 206 (" Arresting and removing the abuser . . . delivers an empowering message to the victim and communicates society's condemnation of the abusive behavior to children or other witnesses.").

n114 See supra notes 92-99 and accompanying text.

n115 See, e.g., Fl. Stat. Ann. § 741.29 (West 1999) (requiring that officers responding to domestic violence calls assist victims in obtaining medical care, advise victims of services available, and provide victims with information regarding their legal rights). In fact, the difference in police responsiveness to victims may be an important and unexplored difference between the Minneapolis arrest experiment and the NIJ replication studies. In the Minneapolis study, police separated parties for brief periods or made brief efforts to restore order, while in the replication studies police gave information, separation of parties was lengthier, plus mediation varied from threatening parties to more extensive conversations. Thus, the nonarrest alternatives were qualitatively different, and perhaps stronger, in the replication studies than in the Minneapolis study. See Berk, supra note 104, at 335 n.14.

Where activists work closely with police, oversee training, and are in ongoing contact with and monitoring of police response, the chances of these kinds of transfer of resources is likely much higher. See Stark, supra note 99, at 121. Police may be less inclined to provide victims with resources where proarrest policies are mandated with little police training or monitoring. See id.

n116 See Miller & Krull, supra note 32, at 244-45. Miller and Krull note that 64% of the victims interviewed in the Milwaukee study reported that, as a result of the police
action, they would be more willing to call the police again. In addition, 68% believed that the suspect was more afraid of being arrested and jailed. See id. Similarly, 82% of victims interviewed in Colorado Springs believed that the police wanted to help and that they were safer as a result of police action. See id.


n118 See id.

n119 See id. at 329.

n120 See id. Not all advice was "good" advice. Thirty two percent of victims said that police advised them on "how to get along" and 17% referred them to couples counseling, though this was not part of the official police protocol. See id. In a minority of cases, police referred victims to victim-witness counselors (twenty four percent of police reports and only 3% of victim reports, but the "bureaucratic wording of the question" may have confused victims). See id. Police transportation to shelters or hospitals was rare. See Miller & Krull, supra note 32, at 243 tbl.19.8 (finding that 3.4% of victims interviewed in Milwaukee and 2.7% Colorado Springs reported that police provided transportation to shelters or hospitals).

n121 See Sherman et al., supra note 117, at 334.

n122 See Eve Buzawa et al., U.S. Dep't of Justice, Response to Domestic Violence in a Pro-Active Court Setting: Final Report, Executive Summary (National Institute of Justice, 1999, on file with author).

n123 See id.

n124 See id. at 18 ("As a group, most victims were highly satisfied with the actions of the system and each of the component organizations. . . . This is true despite the fact that at each stage of the case many victims did not initially want aggressive criminal justice action. In fact, many victims responded consistently that they wanted neither arrest nor prosecution."). Eighty-two percent of the victims interviewed for the study reported satisfaction with the police response. See id. at 12.

n125 See id. Often, the most important predictor of satisfaction is whether the police acted in accordance with the victim's wishes regarding arrest. See Buzawa et al., supra note 95, at 264 ("One aspect of police response [in study] that most satisfied these victims was that the police responded in accordance with their preferences [regarding arrest]."). However, the strongest negative ratings for victim satisfaction with police are often from those women who believed the police should have responded more harshly with the offender. See id. at 266 (finding that all five victims who expressed dissatisfaction with police response wanted more aggressive response). Furthermore, women who wanted the police to file more serious charges than were filed may be more likely not to call the police for subsequent victimization. See Buzawa et al., supra note 122, at 16 (reporting that victims who wanted more serious charges filed in initial incident were six times more likely not to report subsequent victimization, while those who believed that criminal justice system decreased their safety were two and half times more likely to not report future incidents). Women whose partners/expartners are particularly chronic offenders also express dissatisfaction with police. See id. (stating that women who were abused by offenders with average of 18.9 prior charges were more likely to express dissatisfaction with police).

n126 See Jaffe et al., supra note 64, at 85-86 (describing positive results of study analyzing effects of crisis intervention services that focused on providing immediate assistance to battered women).

n127 See id.

n128 See, e.g., Donald G. Dutton et al., Arrest and the Reduction of Repeat Wife Assault, in Domestic Violence, supra note 32, at 121 (reporting that battered women studied told average of 2.2 people about domestic violence prearrest but, after arrest, that number increased to average of 10 people). A study by Karla Fischer and Mary Rose eloquently described the importance of police response in one woman's life:
One woman described how a supportive police officer had given her a piece of paper with information about orders of protection months before she decided to seek one. She held onto his paper, underlining relevant sections, and came to view it as reassuring while she struggled to decide how to end the abuse in her life.

Fischer & Rose, supra note 28, at 426. Fischer and Rose also reported that many women do not have positive experiences with police. See id. at 419.

n129 Those studies that do analyze Latinas' use of police often presume commonalities that may not exist. See, e.g., William H. Wiist & Judith McFarlane, Utilization of Police by Abused Pregnant Hispanic Women, 4 Violence Against Women 677, 679 (1998) (reporting on study of pregnant Latina battered women that did not control for immigration status).

n130 With one exception, I found no reviews of NIJ arrest study data that distinguished victim interview responses by race or ethnicity. See Hirschel & Hutchinson, supra note 104 (describing differences between African American women, white women, and different socioeconomic classes of women in helpseeking behavior). The small number of Latina respondents in the interviews may account for the lack of research regarding their responses. See, e.g., Miller & Krull, supra note 32, at 237-38 (revealing that in Milwaukee, Hispanics represented only 2.8% of victims interviewed; in Colorado Springs, they represented 13.6%; in Omaha, a category labeled "Hispanics/Native Americans" represented 2.9% of victim interviews).


n132 See id. However, Latinas were the least likely to contact a friend, minister or social service agency. See id. at 45. They were also more likely to be living below the poverty line. See id.

n133 See id. at 42.

n134 See McFarlane et al., supra note 74, at 740. Those who had experienced severe violence were more likely to have called the police. See id. Of those who called the police, 72% said the police were effective in helping to reduce the violence and 40% reported that arrest, taking the man away, or legal remedies were the most helpful in stopping the violence. See id. Another 24% said the services they had tried did not work because, for example, the police did not arrest or he was released within a few hours; shelters, legal aid or jobs were not available. See id. Sixtyeight percent said the resources had not made things worse. See id. Thirty-seven percent of those who used the police and 22% of those who did not reported that the abuse had ended. For the first group, 29% said that leaving, moving, separating, or the abuser being in jail were helpful in ending the abuse. See id.

n135 See supra notes 108-09 and accompanying text.


n137 See generally Mann, supra note 73 (describing history of racist legislation and racist criminal justice practices).

n138 See Rivera, supra note 65, at 245.

n139 E-mail Correspondence from Marie De Santis, Attorney, Director of Women's Justice Center in Sonoma County, California (Dec. 20, 1999) (on file with author). The Women's Justice Center serves immigrant women in Sonoma County, California. Most of their clients are Latinas who are victims of violent crime.

n140 See id.

n141 See Joan Zorza & Laurie Woods, National Center on Women & Family Law, Mandatory Arrest: Problems and Possibilities 16 (1994) (noting that "advocates report a widespread increase in
arrests of women when police departments adopted tougher arrest policies”); L. Kevin Hamberger & Theresa Potente, Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice, 9 Victims & Violence 125, 126 (1994) (finding that after Wisconsin instituted mandatory arrest, arrests of women increased by twelve-fold compared to two-fold increase in arrests of men).

n142 See Zorza & Woods, supra note 141, at 17 (finding that dual arrest increases in Wisconsin were modest following adoption of mandatory arrest law, but arrests of women climbed from 13% to 23.9% of all domestic violence arrests).


n144 See id. at 189. If arrests of women are increased by a mandatory arrest policy, the result is particularly devastating for poor women whose children are more likely to become the subject of abuse and neglect proceedings. See Gelles, supra note 35, at 34 (“poor and minority children are more likely to be correctly and incorrectly reported for child abuse, whereas white and middle-and upper-class families are much less likely to be correctly and incorrectly reported for abuse”) (emphasis in original); see also Dorothy Roberts, Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy, 2 U. Pa. J. Const. L. 112, 125-26 (1999). Roberts noted:

The injustice of the American foster care system . . . stems . . . from the large number of children removed from their homes. The class and race dimensions of foster care magnify this problem -- virtually all of the parents who lose custody of their children are poor, and a startling percentage are black. . . . Moreover, once black children enter foster care, they remain there longer, are moved more often, and receive less desirable placements than white children.

Id. Some states have begun to aggressively pursue as child abuse cases circumstances where a child witnessed domestic violence. Thus, arrest of either party may trigger a child abuse investigation. For example, as the result of recent legislation, judges in Florida are required to report suspected child abuse. See Fla. Stat. § 39.201(1)(g) (1994). Many judges interpret this mandate to include reporting instances where the child witnessed abuse. The result is to turn protection order hearings into "minidependency" hearings. See Interview with Stacey Dougan, Attorney and Director, Greenburg, Traurig/Florida Coalition Against Domestic Violence Clearinghouse Lawyers Project (notes on file with author). In addition, when the abuser physically harms the children, the mother may be blamed and even held criminally liable. See V. Pualani Enos, Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children, 19 Harv. Women's L.J. 229 (1996); see also de Santis, supra note 139. De Santis found that:

Another huge problem [for Latina domestic violence victims in Sonoma County, California] is the frequency of Child Protective Service taking custody from Latina mothers who are victims of domestic violence for failure to protect and taking custody from Latina mothers whose husbands or boyfriends have sexually molested the child . . . . Admittedly this is a problem for all kinds of women, but when it comes to Latinas, Child Protective Services removes custody from Latina mothers with impunity.

Id.

n145 See Zorza & Woods, supra note 141, at 18 ("Many of the Wisconsin battered women surveyed reported that their spouses often called the police to charge them with a crime to control them and seek revenge.").

n146 See, e.g., Ohio Rev. Code Ann. § 2935.03 (3)(b) (West 1999) (stating that "it is the preferred course of action in this state that the officer . . . arrest and detain . . . the family or household member who committed the [domestic violence] offense and whom the office has reasonable cause to believe is the primary physical aggressor"). For an analysis of various

n147 See, e.g., Fla. Stat. Ann. § 741.29 (4)(b) (West 1999) (providing that "arrest is the preferred response only with respect to the primary aggressor and not the preferred response with respect to a person who acts in a reasonable manner to protect or defend oneself or another family or household member from domestic violence").

n148 See Espenoza, supra note 143, at 196 (citing Pamela Warrick, A Life of Their Own: They Have Been the Victims of Abusive Men -- Husbands, Bosses -- And Have Spent Years Laboring in the Fields, but Farm Worker Women Are Learning How to Fight for Their Rights, L.A. Times, June 7, 1996, at E1).

n149 See id.

n150 See id.

n151 See id.

n152 See Wash. Rev. Code Ann. § 10.31.100(2)(c) (West 1999). Officers in Washington are required to consider "the intent of the law to protect victims of domestic violence, (2) the comparative extent of injury inflicted or serious threats creating fear of physical injury and (3) the history of domestic violence between the parties involved." Id. Even when the primary aggressor is defined more narrowly as the absence of self-defense, police training may encourage officers to take into account the history of the relationship in making a determination regarding which party to arrest. See Phone Interview with Detective Zaccharias, Detective, Miami Beach Police Dept. (Dec. 1, 1999) (notes on file with author).

n153 The National Clearinghouse on the Defense of Battered Women is currently gathering nation-wide data on dual arrest and inappropriate arrests of women. See E-mail Correspondence with Andrea Bible & Sue Osthoff, National Clearinghouse for the Defense of Battered Women (on file with author).

n154 See Zorza & Woods, supra note 141, at 41 (reviewing arrest data in number of states and finding that while arrests of women increase both with mandatory and pro-arrest policies, this increase is most dramatic with mandatory arrest policies).

n155 See Andrea D. Lyon, Be Careful What You Wish For: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan, 5 Mich. J. Gender & L. 253, 271-97 (1999). The study's limitations make it impossible to be certain of the factors that resulted in differences regarding arrests of women.

n156 See id. at 280.

n157 See id. The comparisons between the two cities on this measure are confounded by the fact that there were fewer cases involving prior calls in Ypsilanti. See id. Cases in which there were prior calls made up 31.9% of domestic violence calls in Ann Arbor but only 9.5% in Ypsilanti. See id. at 283.

n158 See supra notes 23-34 and accompanying text (describing separation-focused thinking of legal actors). Any discrimination against women who make repeat calls would affect large numbers of women. See, e.g., Miller & Krull, supra note 32, at 243 (finding that in Omaha study, victims reported average of four prior police calls to their home).

n159 See supra notes 23-33 and accompanying text (describing separation focus of legal actors); Ferraro, supra note 64, at 155-57 (stating that police separate people into "normal" and "deviant" categories and treat accordingly).

n160 See Telephone Interview between Captain Drew Kirkland, Portland, Oregon Police Department and Stacey Bussel, research assistant (June 6, 2000). Captain Kirkland explained that officers are required to report the presence of children at any domestic violence call. The police department's records division forwards the officer's domestic violence reports in which children were present to the state child and family protection agency. See id.

n161 See Beth Richie, Compelled to Crime: The Gender Entrapment of Battered Black Women 114-16 (1996) (describing manner in which batterers
force women into illegal sex work); id. at 120-23 (recounting manner in which batterers forced women to engage in theft); id. at 123-27 (finding that battered women developed drug dependencies in order to establish deeper connections with their drug-abusing partners). Kathleen Daly's study of women's pathways to felony court in New Haven documents two pathways that underscore the connection between abusive partners and drug use and drug related crimes. See Kathleen Daly, Gender Crime and Punishment 58 (1994) (finding that women's pathways to felony court include being in relationships with violent men and being associated with boyfriends, mates, or family members who use or sell drugs).

n162 See Kalichman et al., supra note 40 (describing intersection of drug dependency, violent victimization, and HIV status).

n163 For example, criminologist Stephanie Bush-Baskette called the "war on drugs" a "war on Black women." See Stephanie R. Bush-Baskette, The War on Drugs as a War Against Black Women, in Crime Control and Women 113-14 (Susan L. Miller ed., 1998). Others referred to the "war on drugs" as the "war on poor people." See Meda Chesney-Lind, Foreword, in Crime Control and Women, supra, at ix, xi. The "war on drugs" has resulted in significant increases in women's imprisonment, which is especially true for African-American women. See Bush-Baskette, supra, at 113-14 (arguing that war on drugs has created huge increases in number of women in prisons). The incarceration of inner city men also has a devastating impact on the status of women because they are left to cope with familial and financial burdens. See Mona J.E. Danner, Three Strikes and It's Women Who Are Out, in Crime Control and Women, supra, at 10. Also, as Tracey Meares demonstrated, "get tough" law enforcement policies "exacerbate the precursors to social disorganization." Meares, supra note 109, at 589. This exacerbation of social disorganization weakens neighborhood civic participation, lowers the quality of life in the neighborhood, and diminishes the likelihood that social and familial networks will be available to assist battered women.


n165 See 8 U.S.C. § 1227(a)(E)(i)-(ii) (1994) (stipulating that classes of deportable aliens include those convicted of domestic violence, stalking, or violation of protection orders, and crimes against children); see also Espenoza, supra note 143, at 181-83 (discussing impact of this provision on battered immigrant women).

n166 See Kelly, supra note 83, at 679-80. Additionally, a woman whose immigration status is dependent on that of her batterer becomes deportable if he is deported before she has an opportunity to petition for lawful permanent residency. See id. The deportation provision likely has a disproportionate impact on poor men of color because poor men and men of color are disproportionately the subjects of police arrest. See supra note 103 and accompanying text. Advocates for battered women in Sacramento, California, for example, report that an INS agent explained that the INS is targeting for deportation men ordered into domestic violence treatment programs, 70% of whom were Latino, and the remainder were from India, Russia, Laos, and Vietnam. See Speaking Up Newsletter (Oct. 1999) (on file with author). The deportation provision may also help some women. See Tanya Broder & Clara Luz Navarro, A Street Without an Exit: Excerpts from the Lives of Latinas in Post-187 California, 7 Hast. Women's L.J. 275, 296 (1996) (recounting story of immigrant woman who relates, "[My abuser] was sent back to prison, and I went to court and was very strong . . . I declared that he had threatened me and my child in El Salvador, that he would harm her and my parents, my family. They deported him, took away his papers, his work permit, and all of his
rights. And now, I don't think he can come back to this country anymore.

n167 Additionally, courts that order mutual restraining orders make victims vulnerable to deportation since violation of a restraining order is a criminal offense that can result in deportation. See 8 U.S.C. § 1227(a)(E)(i)-(ii).


n169 Circumstances for poor women of color may vary. For example, Marie de Santis, Director of Women's Justice Center in Sonoma County, California, reported that law enforcement in her area have an informal policy against cooperating with INS with regard to domestic violence victims. See de Santis, supra note 139. However, de Santis noted that this policy was not widely publicized. See id.

n170 Local governments may be no less likely to focus on the needs of poor women of color than do state governments, but local discretion may allow poor women of color and their allies greater access to the decision making process.

n171 As Jenny Rivera described, women of color are often called upon to present an univocal voice when part of a larger coalition. "Communities with disparately less power in the larger social structure are disparately represented in the coalition [against domestic violence] . . . ." Rivera, Models for Community Participation, supra note 71, at 295. Rivera explains how these dynamics prevent women of color from expressing the diverse views of members of their various communities. See id.

n172 See Claire Renzetti, Connecting the Dots: Women, Public Policy, and Social Control, in Crime Control and Women, supra note 163, at 188 (describing conversations with battered women of color and battered lesbians "who are reluctant to turn to help to a criminal justice system that is racist and homophobic, and they do not wish their partners to be subjected to the abuses and brutality that the police and courts have historically inflicted on minorities and homosexuals"); Rivera, supra note 65, at 245-46 (noting that Latinas/os have had "a long, acrimonious history of interaction with local police and federal law enforcement agencies.").

n173 See Rodgers, supra note 109, at 58 (finding that neighborhoods with higher general crime rates and lower numbers of police per one thousand residents had significantly higher rates of domestic violence recidivism).

n174 Jenny Rivera similarly argued that:

Extensive educational efforts . . . must be linked to mandatory arrest policies to inform the community of the policy and of the duties imposed on the police. Good faith and trust must be established by having the police work with Latino organizations and Latina advocates whose reputations and commitment to the community are well established.

Rivera, supra note 65, at 254.


n176 See supra note 109 and accompanying text. At the simplest level, focused, but low-level, police presence directed at domestic violence perpetrators may make a difference. See Jalna Hanmer et al., Arresting Evidence: Domestic Violence and Repeat Victimisation, in Policing and Reducing Crime Unit 38 (Police Research Series Paper 104, 1999) (describing study in West Yorkshire, England where wives reported decrease in violence after batterers were told that police would be keeping their homes under surveillance).

n177 See Landis, supra note 9. Critics have noted that community policing is problematic because citizens become nothing more than police cheerleaders, providing their approval for plans that originate with the police and not the citizenry. See Telephone Interview with Will Gonzalez, Police-Barrio Relations Project (Nov. 29, 1999) (notes on file with author); see also Angela Harris, Criminal Justice as Environmental Justice, 1 J. Gender Race & Just. 1, 33 (1997) ("The notion of 'community policing' can simply
put a new label on the old state-centered, police-oriented approach to crime.

n178 I am grateful to Professor Martha Mahoney for suggesting this alternative. For a somewhat similar concept, see Dwight L. Greene, Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers, 39 Buff. L. Rev. 737 (1992), recommending the development of prosecution panels to monitor prosecutorial discretion.

n179 See Gonzalez, supra note 177. These areas of the city represent some its poorest areas and are "the epi-center of the drug trade for the entire . . . Philadelphia area." Id.

n180 For example, the project produced cards for women entitled "what to do when the police won't enforce your restraining order." Id.

n181 See John Braithwaite & Kathleen Daly, Masculinities, Violence and Communitarian Control, in Just Boys Doing Business? Men, Masculinities, and Crime 189, 192-96 (Tim Newburn & Elizabeth A. Stanko eds., 1994) (describing community conferencing method for domestic violence cases); Coker, supra note 12, at 42-43 (suggesting that peacemaking may provide additional material resources for victims and peacemakers disrupt batterer's familial supports for battering).

n182 See Coker, supra note 12, at 42-43.

n183 See id.

n184 Currently, the Empowerment Zones Program is the primary urban federal policy initiative that is geographic-specific. See Audrey G. McFarlane, Race, Space, and Place: The Geography of Economic Development, 36 San Diego L. Rev. 295, 298 (1999). However, these programs may be inadequate in improving women's economic status. See id. at 343 (writing that Empowerment Zone Programs fail to address fact that "[these neighborhoods] are regarded as deviant and inferior, often are subjected to programs that are beneficial to others and less beneficial to them and . . . abandoned to suffer from a marginalization that threatens to permanently cut them off from the rest of society."); see also Austin, supra note 5, at 781 ("Government programs targeting poor women have not been aimed at improving their asset base and thereby permanently altering their class status."). Development projects that assist micro- enterprises may act as domestic violence prevention strategies because they decrease some women's vulnerability to violence. See Regina Austin, "The Black Community," Its Lawbreakers, and Politics of Identification, 65 S. Cal. L. Rev. 1769, 1807-08 (1992) (noting that states should provide assistance to informal economies in poor black communities, make available social welfare benefits that are not wage based (such as health insurance), and "support new forms of communal or cooperative ownership that break down the distinction between capital and labor"). I do not mean to suggest that economic development will keep all women safe. Some batterers are relentlessly obsessive and women will only be safe if the batterer is incapacitated or the woman is inaccessible. See Berk, supra note 104, at 335 (recommending arrest for those batterers who are particularly dangerous, accompanied by support services for the victim); Saunders, supra note 24, at 26-30 (describing differences in recidivism risks between battering men).


n186 See de Santis, supra note 139. De Santis noted:

A huge problem is that the California Victim Assistance Program, which is overflowing with money, prioritizes counseling. Well maybe that's fine for victims who have sufficient resources in other areas; transportation, housing, food, childcare, etc. But with poor women who desperately need the basics to bridge out of the violence, Victim Assistance is useless. We beg and beg and the most we ever get is $ 100. It's disgusting.

Id.

n187 For example, IIRAIRA's domestic violence deportation provisions diminish women's resources and should be repealed.
See supra notes 165-68 and accompanying text. Some advocates for battered women have urged repeal of these provisions, while others support a compromise measure allowing for deportation only when the victim agrees, or when the prosecutor proves that it is necessary to secure the victim's safety. See Telephone Interview with Leslye Orloff, Attorney, NOW Legal Defense Fund (notes on file with author); see also Espenoza, supra note 143, at 215 (arguing that IIRIRA provisions for deportation of those convicted of domestic violence charges should be repealed).

n188 Jenny Rivera notes that to the extent that funding priorities are for programs that have a history of domestic violence work, "programs developed by women of color which are community-based may proceed in the funding process at a disadvantage because of their inexperience and insufficient history . . . ." Rivera, Multiple Consciousness, supra note 71, at 508. The current criteria for federal Violence Against Women Act funds stresses the importance of serving "underserved populations." See 42 U.S.C. § 10402(a)(2)(C) (1999) (requiring states receiving federal grants for anti-domestic violence efforts to develop state plans that address needs of "populations underserved because of ethnic, racial, cultural, language diversity or geographic isolation."); id. § 10418(c) (requiring grant applicants to include "opinion leaders from each sector of the community" in planning service programs).

n189 Though it is beyond the scope of this article to examine programs that are not currently understood to be domestic violence interventions, the importance of the links between women's poverty and violent victimization has important implications for other programs, as well. For example, programs for community development and community policing should recognize the importance of violence and violence prevention in bolstering women's wealth. See Raphael, Welfare Dependency, supra note 38, at 202 (stating that welfare-to-work programs must recognize importance of domestic violence in thwarting women's educational and job opportunities); see also Browne & Bassuk, supra note 13, at 271 (arguing that services for poor women must recognize prevalence of violence in their lives).

n190 See Margulies, supra note 38, at 1096 (contending that lawyers for poor battered women must engage in what is often understood as "social work," such as providing transportation, information about community services, and emotional support).

n191 See Phone Interview with Jeanie Williamson, Project Director, ChildNet (Mar. 1, 2000) (on file with author). ChildNet's funding restrictions require that eligible clients have a child under the age of five or be pregnant. See id. A second organization, SafeNet is available for any battered woman client. See id. The services are similar. See id.


n193 The material resources test might help us sort through a number of other domestic violence intervention strategies. For example, the material resources test may be applied to "no-drop" prosecution policies that mandate prosecution of domestic violence offenses regardless of the victim's preferences.

Maria L. Ontiveros *

BIO: 
* Professor, Golden Gate University School of Law. This Introduction has benefited greatly from the suggestions of the students in my Advanced Labor & Employment Law Seminar at Golden Gate: Kristina Hillman, Beth Mora, Ian Selden, Carol Galan, Emile Davis, Juan Araneda, and Shari Vollimas. My research assistant at Santa Clara University School of Law, Samantha Blevins, provided expert assistance throughout. I appreciate the folks in the San Mateo County Health Department, who talked with me about the condition of Latina/o immigrant workers in the coast-side community. Finally, thanks are due, as always, to Kevin Johnson for his support and encouragement.

SUMMARY: ... The two examples of transformative resistance I discuss are farm worker unions and transnational citizenship. ... I. Farm Worker Unions and California's Agricultural Labor Relations Act ... Although there are still some farm labor camps in the hills, construction was recently completed on a second complex of beautiful, affordable farm worker housing. ... When asked to explain why the coast-side built such excellent farm worker housing or provides any of the other services for the Latina/o community, interviewees responded with answers such as, "We have a social consciousness" or, "We have a sensitivity to the lack of adequate housing because we recognize the value of these workers to the community and the political will to bring it about. ... 

[*1057]

Forge ('forj) vt:
1. To fake or falsify.
2. To move forward.
3. To form or bring into being.
4. To create, especially with the use of fire. n1

LatCrit Theory was born, at least in part, out of our desire to understand Latina/o identity. Although there are externally constructed stereotypes for Latinas/os that view the group monolithically and, in many ways, negatively, there are other constructs that we ourselves can claim and that are more positive. n2 This insight [*1058] reflects experiences of Latina workers that I have found in my research -- experiences in which Latina workers use their ethnic and gender identity, as well as their class identity, as forms of strength and empowerment, bases for collective action and community with which to fight oppression. n3 Although being a working woman of color may expose us to the worst type of treatment (being oppressed as a woman, as a person of color, and as a woman of color), it also is a basis for empowerment and resistance. n4

On a parallel level, there are many situations whereby United States law does not adequately provide for the identity which Latinas/os wish to claim. This could result in a form of oppression where Latinas/os are either prohibited from doing something or are only allowed to do it if they are willing to alter their identity to fit the legal norms. This Introduction and the articles in this cluster examine another possible result. They examine instances in which, in response and resistance, Latinas/os are forging solutions that go around and between existing legal structures. Often these solutions draw on our strengths and reflect our claimed identities. In this way, Latinas/os empower themselves by forging their own identity. In several instances, the resistance goes further and actually transforms the existing legal order and legal theory.

As an introduction to this cluster of articles, this Essay examines two areas related to farm workers, in which Latinas/os have forged their own identity. Latinas/os forged these identities, which were not directly contemplated by United States law, as a form of resistance because the identities offered by United States law were not identities desired by the farm workers. More importantly, these identities are transforming the United States legal system and our understanding of labor unions and citizenship. The two examples of transformative resistance I discuss are
farm worker unions and transnational citizenship.

I. Farm Worker Unions and California's Agricultural Labor Relations Act

Under federal law, the National Labor Relations Act n5 authorizes workers to form unions and to bargain collectively with their employers. Workers join together to form a labor union when they suffer harsh working conditions or want to have an influence on the terms and conditions of their employment. Unfortunately for farm workers, they are specifically excluded from the act and, therefore, have no federal right to join unions. At the same time, farm workers need unions because they suffer from low pay, deplorable working conditions, racialized and gendered exploitation, intentional pitting of workers against each other, depending upon their ethnicity, and oversupply of labor spurred by statute. n6 In California and other states, Latina/o farm workers that wanted to band together to improve their conditions sought an identity that was not allowed by law, although it was available to most other workers.

Beginning in the 1960s, Latina/o farm workers in California forged their own collective identity by uniting to form the United Farm Workers union. n7 They ignored the law because it would deny them the identity that they desired. Significantly, these workers formed a new type of union, one that was responsive to and reflective of their identities not just as workers but also as Latina/o immigrant workers. In the United States, unions have developed an agenda that focuses almost exclusively on the wages, hours, and narrowly defined terms and conditions of employment. n8 As a result, unions do not focus on issues outside of the workplace, and membership is defined narrowly as the payment of the portion of union dues that directly goes toward bargaining for improved economic conditions at work. n9 The United Farm Workers was completely different. It did not focus solely on issues limited to the workplace. Instead, it set up credit unions, schools, automobile parts co-ops, and burial insurance funds. Further, its message went beyond simply asking for more money. It was a demand for dignity, respect, and the right to participate in the workplace. It included a demand that its members be treated as human beings.

Its tactics and strategies were also different. In addition to working to improve workplace conditions, it stressed nonviolence, community building, education about the rights and responsibilities of citizenship, and community service. n10 Membership in the union meant membership in a community committed to these same goals.

By forging a collective identity as the United Farm Workers, Latina/o workers affected more than their own terms and conditions of employment. Their demand for the right to unionize was so strong that it forced a change in California law. In order to give farm workers the right to organize and in direct response to the United Farm Workers, the California legislature passed the Agricultural Labor Relations Act (ALRA) in 1975. n11 The ALRA is the most extensive and most favorable of any state law regulating farm workers. n12 Its passage represents the recognition of the importance of unionization/collective action for farm workers. Because it is tailored specifically to the needs of agricultural workers, n13 it can serve as a model for federal regulation of farm workers or for other sector-specific labor law reform. n14 The struggle for representation in the fields continues today, including contested ballots for strawberry pickers in Watsonville, California, Washington apple growers, and migrant workers in Florida. Labor organization can and is leading to substantive improvements in these workers' lives.

The United Farm Workers could also fuel a reevaluation and possibly a transformation in our understanding of unions and collective action. Instead of viewing the United Farm Workers as labor history, it may actually be the blueprint for labor's future. n15 The labor movement is finally beginning to understand the importance of organizing immigrant workers and of identity issues in organizing. n16 More importantly, there are changes emerging in the understanding of what a union is and what it means to be in a union.

Paul Johnston, a sociologist affiliated with the Citizenship Project, n17 described the transformation as follows:

Significantly, in contrast to past history, this resurgent unionism is opening the doors of labor to immigrant workers, and also taps into the energies of civil rights and other social justice movements. Particularly evident is a new commitment to organizing, . . . a revitalized and growing labor movement in building maintenance, agricultural and hotel and restaurant industries, and surges of organizing among Latina/o immigrants in other low wage industries as well; [successful strikes] . . . , a wave of "living wage " initiatives, . . . a steady pattern of militance among graduate student employees; among other temporary employees and other occupational groups, a variety of new worker associations . . . [increased number of elections]. . . sharply intensified grassroots mobilization . . . the beginning of global solidarity . . . and now in community after community across the United States, the emergence of a great variety of creative new labor/community organizing projects and coalitions addressing social and economic justice
In this way, the United Farm Workers can move us to a new vision of unionism. This new vision of unionism, at its boldest, helps us to understand a new definition of "citizenship." As workers become involved in unions, they become involved as citizens in the broadest sense. Paul Johnston brought these ideas together when he wrote:

"Documentation," Dual-Resident Workers and Transnational Identity

Since the passage of the Immigration Reform and Control Act of 1986, United States law has required that in order for people to work in the United States they must be able to provide "documentation" that they have the right to work here. n20 These requirements reflect a circumscribed set of legal rules for who is allowed to legally work here. In general, they require people to become citizens or to follow very specific guidelines to qualify within one of the limited categories or statuses available. With respect to Latina/o farm workers, in particular, the United States has set up regimes at the intersection of immigration and labor law that allow immigrants to work in agriculture under very strict requirements. These requirements oppress workers because they guarantee an oversupply of labor, n21 while providing little or no legal recourse for the workers to have their grievances addressed. n22 Most importantly, they are designed to deter settlement or empowerment because they provide for only temporary legal residence.

In response to the requirement of documentation, Latina/o workers have set up their own systems to meet the requirement for legal documentation, while not actually changing their legal status. The systems rely primarily on the use of false documents: the documents may be fakes or forgeries purchased from "paper mills." n23 Alternately, the documents may be real, legitimate documents borrowed from a family member or friend. n24 These practices are so prevalent that one community worker I interviewed said that she routinely asks clients whether their documents are chueco (Spanish for "crooked"). n25 In these ways, Latina/o workers forge (or falsify) their identities to circumvent restrictive laws.

On its face, the law facilitates these types of arrangements because the statute does not actually prohibit the employment of someone who does not have the right to work here. It only requires employers to make a good faith effort to check documents. The employer has no liability for accepting reasonably genuine documents. In fact, the law forbids an employer from engaging in selective acceptance of documents. n26 By crafting the statute in this way, employers are able to continue to have access to an immigrant workforce, while the country is able to state it has strengthened its immigration laws. n27 The law results from the contradiction of a nation that wants to be border free in economic areas, while border tough on immigration issues. n28

The development of "paper mills" and a network for borrowing documents exemplifies transformative resistance because it has allowed Latina/o workers to forge a dual-resident or transnational identity not contemplated under United States law. These workers have rejected the notion that they must choose to become a United States resident or citizen in order to work here. They have also rejected the notion that their connection to the United States must be temporary and transitory. Instead, they have embraced an identity that allows them to maintain strong ties both in the United States and in Mexico. As a result of this identity, they are creating communities in the United States that are more stable and that, in turn, provide for more participation and better treatment in the United States. On a grander scale, they are forging a new notion of citizenship that is broader in at least two respects: in terms of who is included as a citizen, and of citizenship as something more than naturalization.

Scholars in the field of citizenship theory have been noting these trends on a national scale. Maria de los Angeles Torres wrote that citizenship identities are shifting from a border identity, with two identities coexisting side-by-side in the same person, to a transnational or hybrid identity in which the host and home countries are transformed, as well as the person and his community. She wrote:

The expansion of the political space to include multiple states suggests that the concept of a citizen bound to a single nationstate must also change. A transnational political identity, or...
citizenship, would better accommodate the rights of individuals who for a myriad of reasons cross the frontiers of multiple nation-states and whose lives are affected by decisions made by more than one state. n29

Mexico is recognizing this reality and moving towards a system of dual nationality. n30 The struggle for migrants to attain the rights of citizens in both countries is a struggle for civil rights parallel to the 1960s Civil Rights Movement, which can also be viewed as a citizenship movement for Black Americans struggling for their citizenship rights. n31 The rights for which immigrant workers struggle are the "right to travel freely; right to quit without being deported; right to union representation; right to health and social services; right to education; right to political voice in community; right to cultural recognition and selfexpression; and right to eventually become a permanent resident." n32 These rights are essential to a transnational citizenship identity, and immigrant workers seek them in both the United States and Mexico.

This newly forged citizenship identity expands the notion of citizenship to something beyond naturalization. The transformed notion of citizenship focuses on participation in public institutions, including civil-legal, social welfare, political, economic, and educational domains. n33 The Latino Cultural Studies Working Group, including Renato Rosaldo and others, has been working since 1987 to construct a theory of "cultural citizenship." In this theory, cultural expression is used to claim public or political rights and recognition, thereby allowing Latinas/os to maintain cultural identity [*1066] and claim citizenship rights at the same time. n34 This transforms the notion of "culture" and "citizenship," because "culture" is usually viewed as something different from the norm, and "citizenship" as something assimilated into the norm. Cultural citizenship is a form of resistance that brings ethnic or cultural practices into the mainstream, to be validated as the activities of "citizens" or full members of our society. These struggles to expand the notion of citizenship are working, leading empirical sociologists Peter Schuck and Rogers Smith to conclude that:

New "social contracts" are being negotiated in the United States every day between undocumented aliens and United States society contracts that cannot be nullified through claims about nationality and sovereignty. Courts have had to accept the fact of undocumented aliens and extend to these aliens some form of legal recognition and guarantees of basic rights. Various decision have conferred important benefits of citizenship on undocumented aliens, clearly undermining older notions of sovereignty. n35

Latina/o immigration in the community where I live exemplifies this type of transnational identity. I live on the semirural San Mateo County Coast around the town of Half Moon Bay, California. n36 My community has a very close connection to a small village in Jalisco, known as Camichines. The Half Moon Bay area has a population of about 28,000, and approximately one out of every five people is Latina/o, mainly from Mexico. Approximately seventy percent of the coast-side's Mexican population comes from Camichines. n37 Of the 1500 people who live in Camichines, almost all are of working age leave to work in the United States. Most [*1067] emigrants go to Half Moon Bay, although a few do venture to Salinas, California or Chicago, Illinois. n38

Some of the immigrants choose to make Half Moon Bay their permanent home because they believe that they and their children will have better lives, with more opportunities for employment. Others return to Mexico because of the slower paced, less materialistic lifestyle, or to avoid crime and gangs. Many of these inm/emigrants, however, fit into a third category. They maintain close ties to both Camichines and Half Moon Bay. They live in Half Moon Bay most of the year, but maintain a home and crops in Camichines, which they visit for holidays and family celebrations. They may plan to retire in Mexico (or not), and, in the meantime, can experience the best of both worlds. Like many Mexican immigrants, they are unwilling to abandon their nationality, even as they create lives in the United States. They are creating transnational identities. n39

This close connection has had a transformative impact on both Camichines and Half Moon Bay. Approximately seventy to seventy-five percent of the Camichines economy is dependent upon the [*1068] United States. Although there is still poverty, no market and only three telephones in Camichines, there are modest homes (all with electricity), cars, and satellite dishes. At Christmas time, there is a huge influx of cars with California license plates, Half Moon Bay High School letterman's jackets, and children speaking English. n40

The immigration pattern has also had a profound effect on Half Moon Bay. Latina/o immigrants form a strong, close-knit community, in which everyone knows each other; they are either related or good friends. The community is also extremely stable -- families are here -- not just single men or single mothers raising children. n41 Even when residents get jobs far outside the area, requiring three or four hour commutes by bus, they choose not to move away from
the coast. The Latina/o community has struggled to become integrated into the larger community, so that it affects the daily cultural life of the city. n42 The influence is seen in the inclusion of Spanish language pages in the local weekly paper, seasonal festivals, soccer leagues, the first Spanish language immersion program in the County, Mexican restaurants and grocery products, and Quincenera programs at the Catholic church.

Latinas/os and issues that concern them also fare better on the coast-side, when compared to similar immigrant groups in other parts of the county. The public health indicators are quite good. n43 Although there are still some farm labor camps in the hills, construction was recently completed on a second complex of beautiful, affordable farm worker housing. Newspaper coverage of possible street harassment by day workers gathered at the town's central plaza displayed sensitivity to the gender and culture issues, including the importance of a gathering place in Mexican culture, the real threat posed to women by street harassment, and the possibility that female tourists may react differently to groups of Mexican men than they would to other men. On the whole, Half Moon Bay has become a welcoming home for Latina/o immigrants.

I believe that part of the reason coast-side residents fare so well is because of the close-knit Mexican community that has resulted directly from the immigration pattern described above. Although the immigration pattern has resulted in a large number of immigrants, the truly significant aspect of the pattern goes beyond the numbers. Because the immigrants have a transnational identity, with a community both here and in Mexico, they have more confidence to be themselves and certain advantages flow from that confidence. The specific social mechanisms that lead to better conditions are "capacity" and "connectedness." n44 Capacity, which is internal to the immigrant community, refers to a client's ability to find, understand, and effectively use services. Although capacity can be determined by intelligence or financial resources, it also has a social aspect which results from a support system that helps a client effectively utilize services. "Connectedness" is an external dynamic that results when a confident Latina/o community is integrated into the larger community. Such a Latina/o community participates in community activities in a manner that causes the larger community to view farm workers as fully realized human beings who contribute to the community and who deserve decent treatment.

Interviews with San Mateo County public health care providers, social workers, and administrators reveal that coast side Latina/o immigrants do a better job of using and following through with health care services than similar immigrants in other parts of the county because of what these professionals call "client capacity." Dr. Virginia Blashke, for instance, credited the fact that her patients have often seen others in their community helped through use of a treatment that she might prescribe. n45 These same people can help the patient answer questions or dispel fears about the treatment. She explained that this type of support only exists in stable communities where people settle and know each other. She also credits the presence of family units, rather than single mothers, as a major source of the stability. Public health nurse Julia Wilson says that over ninety percent of her patients follow through in some way, because they have the support and confidence to do what is necessary. n46 The "capacity" to utilize health services is the same type of "capacity" necessary to take full advantage of the educational system, the labor marker, and other social services, and is certainly a factor that contributes to the community's success.

Immigration patterns have also led to success because of the way people external to the community react to them. They are treated well because they have a special "connectedness" to the rest of the community. When asked to explain why the coast-side built such excellent farm worker housing or provides any of the other services for the Latina/o community, interviewees responded with answers such as, "We have a social consciousness" or, "We have a sensitivity to the lack of adequate housing because we recognize the value of these workers to the community and the political will to bring it about." n47 Alternately, it was explained that "people recognize the need and recognize the importance of the Hispanic community." n48 When pushed as to why our community has made this connection when others have failed to, Wilson suggested that it was because more of our community has a "connection to the population." The connection to the population comes from the fact that the soccer clubs, churches, preschools, and public schools are so well integrated. The Latina/o community participates in these activities, I think, because they feel "at home" and part of the community. Further, their participation seems qualitatively different because they express themselves, in all their humanness, in these activities, and the larger population comes to know and value them as people and as people who are important to the community. Such participation would not occur if the immigrants felt isolated or less confident, and they would not fare as well if they were not so well connected to the rest of the community. n49
What do we have on the San Mateo county coast then? Latina/o immigrants have forged a new identity, one that allows them to live in both Mexico and the United States and allows them to be both Mexican and American. They are part of a Mexican community and part of an American community. This new identity gives the immigrant community confidence, capacity, and connectedness, so that they are treated well and contribute to the economic, cultural, and social aspects of our community. They exemplify transnational citizenship, an identity created through transformative resistance.

The situation of most farm workers, however, falls far below that described here. Most live in poverty and substandard housing, exposed to pesticides, and denied access to basic social services like health care, education, and food stamps. More important for this analysis, mainstream society treats them as outsiders and does not recognize or value their humanity and culture. The coast-side represents an exception from this pattern and an ideal to which other communities may aspire. n50

II. Transformative Resistance in the Areas of Work, Class, and the Law

The articles in this cluster provide other examples of what can be categorized at attempts at transformative resistance, although their [*1072] success varies. In the area of work, William Tamayo highlights ways in which Latina/o and Filipino farm workers have been pushing the Equal Employment Opportunity Commission to transform Title VII into a law that goes beyond the "black v. white" framework that does not fit their experience. Blanca Alfara, California Rural Legal Assistance, and a Tamayo-trained EEOC staff are also transforming the law of workplace harassment in a way that better fits the reality of immigrant women who are harassed sexually and racially at the workplace. n51 The Association of Latin American Gardeners of Los Angeles, described by Christopher David Ruiz Cameron, used in his words "a UFW-style campaign to set a high moral tone." He also argues that the fight of the urban agricultural workers may help to transform theories of assimilation, healthconsciousness, and environmentalism. Finally, turning to the relatively privileged workers who are law professors, Pamela Smith argues for resistance by untenured professors in the form of breaking silence and speaking of one's experiences with discrimination. Such action can help to transform our audience, our institutions and our willingness to reach out to help each other. In the broader field of class, Tanya Hernandez argues against those who would seek to use class-focused attacks on racism, rather than race-focused attacks on racism. Based on her analysis of the Cubean experience with class-based redistribution measures, she argues convincingly that such an approach cannot transform our understanding of racial oppression.

The final two articles in the cluster deal with the possibility of transformative resistance in the law. Larry Cata Backer discusses the attempt of "outside scholarship" to transform the legal opinions of state and federal court judges. He argues that courts shun outsider scholarship and will continue to do so until outsiders adopt theories that assimilate into the dominant norms. The key to the empowering function of transformative resistance is that the law changes in response to the resistance, not the other way around. If the resistance changes instead, we risk being successful at the cost of asserting our identity. The theory developed by Professors Kevin Johnson and George Martinez attempts to walk the line of utilizing doctrinal analysis to transform the law, while still [*1073] centering an important aspect of self-claimed Latina/o identity: bilingual and language rights. If their theory is adopted, their work will serve as one more example of transformative resistance.

Conclusion: LatCrit Professors as Latina/o Workers

In this Introduction, I have focused on those aspects of identity that have been forged by workers themselves, in opposition and resistance to, the identity which the law would have created. I see these actions as a form of empowerment and strength, where there could easily have been discrimination and oppression. I also see this resistance as transformative -- it can and is changing the legal order and legal theory. I see LatCrit as another example of Latina/o workers forging their own identity. We are also workers. The dominant paradigm would seek that we, as "Law Professors," would act in a certain way. We would teach certain subjects, in a certain style. We would write on certain subjects, in a certain way. We would act in a certain way. We would teach certain subjects, in a certain way. We would write on certain subjects, in a certain style. We would go to existing conferences, replete with panels of "talking heads." Instead, we have created LatCrit to support ourselves as we determine what classes we want to teach and what styles we want to use. We have LatCrit symposia that feature our writing, our topics, our styles. At our conferences, we take cultural/economic tours, host spiritual dancers, discuss problems of indigenous people and farm workers, and have talking circles. We are forging our identities as Latina/o law professors, to empower ourselves and to resist those who would deny us.

FOOTNOTE-1:

n1 I appreciate the aspect of LatCrit that encourages and honours investigation and recitation of family history. My paternal
grandfather, Tomas Ontiveros, was a fireman and brakeman on a railroad on a Mexican hacienda. My maternal grandfather, Manuel Luna, was a blacksmith on the Mexican railroads, and he brought his family north to Texas, following the railroad. My father, Pete Campos Ontiveros also worked in the railroad yards before World War II, doing a variety of jobs in and around Houston, Texas. I knew none of this until my son, Henry Manuel Ontiveros Fassinger, developed into a train fanatic. These four are the embodiment of the fourth definition in the title of this Article, and I dedicate this work to them.

n2 Maria de los Angeles Torres, Transnational Political and Cultural Identities: Crossing Theoretical Borders, in Borderless Borders 169 (Frank Bonilla et al. eds.,1998) [hereinafter Borderless Borders]. "Social and political identities have at least two important dimensions: how societies construct an individual's or a group's identity, and how the individual or community constructs its own identity." Id. at 171.

n3 I believe that the same dynamic holds true for other groups of women of color.

n4 See, e.g., Mary S. Pardo, Mexican American Activists: Identity and Resistance in Two Los Angeles Communities (1998). She has described her study as "strength oriented, rather than strictly problem oriented." Id. at 8.


n7 Edid, supra note 6, at 27-43. Although workers had tried earlier to form unions, early attempts were crushed. Id. at 27-32.

n8 This agenda has been set in part by the terms of the statute, by the Court, and by union leaders. See 29 U.S.C. § § 8(a)5, 8(d) (1994) (requiring bargaining over wages, hours, and terms and conditions of employment); First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 679 (1981) (reserving entrepreneurial decisions to "unencumbered" managerial discretion); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 734, 742 (1963) (defining membership as "whittled down to its financial core").


n10 Edid, supra note 6, at 36.


n12 LeRoy & Hendricks, supra note 6, at 530-36.

n13 For a discussion of how the ALRA varies from the NLRA, with provisions geared to farm workers, see Tracy E. Sagle, The ALRB -- Twenty Years Later, 8 San Joaquin Agric. L. Rev. 139 (1998).


n16 See generally Christopher David Ruiz Cameron, The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers, 53 U. Miami L. Rev. 1089 (1999); Maria L. Ontiveros, Race and Class: Understanding
Connections and Charting Directions (unpublished manuscript, on file with author).

n17 The Citizenship Project, headquartered in Salinas, California, is a project started in 1995 by Teamsters Local 890 to expand citizenship, social, economic, educational, and political participation among the Latina/o community in which union members and their families live.


n18 Id. at 7.

n19 The documents can either show that the person is a United States citizen or that, even if he or she is not a citizen, that he or she is in a status category that gives him or her the right to work here (i.e. has a visa which allows employment or is a legal, permanent resident or has a "green card"). In order to qualify in either category, a person usually has to provide two documents: one with a photograph that identifies the worker by name, and a second that shows that the named person has the right to work here. Although a United States passport can perform both of these functions, most people have two documents (i.e. a driver's license and a social security card, birth certificate or green card).


n23 As long as an employer does not question the physical resemblance of the worker to that provided in the papers, one person can easily pass as another.

n24 Interview with Rosa Carreno, community worker in Half Moon Bay, California (June 30, 1999) (notes on file with author).


n26 Johnston, Anti-Bracero, supra note 21.

n27 Johnston, Citizens of the Future, supra note 21, at 4. Johnston incorporated a concept from a popular 1997 song by Los Tigres del Norte, in which they sing of the need to "caben dos patrias en el mismo corazon," or, make a place for two countries in the same heart.

n28 Sassen, supra note 2, at 3. Johnston incorporated a concept from a popular 1997 song by Los Tigres del Norte, in which they sing of the need to "caben dos patrias en el mismo corazon," or, make a place for two countries in the same heart.

n29 Johnnston, Anti-Bracero, supra note 21.

n30 Johnston, Citizens of the Future, supra note 21, at 3. Johnston incorporated a concept from a popular 1997 song by Los Tigres del Norte, in which they sing of the need to "caben dos patrias en el mismo corazon," or, make a place for two countries in the same heart.

n31 Johnston, Anti-Bracero, supra note 21.

n32 Johnston, Anti-Bracero, supra note 21.

n33 Johnston, Citizens of the Future, supra note 21, at 4. Johnston argues that various social movements, including the labor movement, the environmental justice
movement, and the women's movement are all working to challenge and extend the boundaries of citizenship. Paul Johnston, A New Citizenship (visited Apr. 26, 1999) <http://members.cruzio.com/johnston/newcitart.htm> (on file with author).

n34 See generally Latino Cultural Citizenship (William V. Flores & Rina Benmayor eds., 1997).

n35 See Sassen, supra note 28, at 66.

n36 The area described in these paragraphs includes the towns of (from north to south) Montara, Moss Beach, El Granada, Half Moon Bay and Pescadero. Except for Half Moon Bay, we are considered unincorporated San Mateo county.


n38 Half Moon Bay is not the only city with a "Mexican Connection." See Sam Quinones, No Se Puede Volver a Casa, Hemispheres Mag., Dec. 1998, at 94. The title of the article is Spanish for "You Can't Go Home Again." See id.; see also Bettina Boxall, Migrants' New Roots Transform Rural Life, L.A. Times, Apr. 20, 1999, at A1 (discussing lives of migrant workers in California). After studying small villages in central Mexico, Sam Quinones found that: "Half the village of Totolan, Michoacan, lives in Glendale, California. A good part of Jarip lives in Stockton, California. Ocampo, Guanajuato, is a virtual extension of Dallas, Texas. Several hundred people from Tzintzuntzan, Michoacan, work in Tacoma, Washington, or on fishing boats in Alaska." Quinones, supra, at 98. Juan-Vicente Palerm, director of the U.C. Institute for Mexico and the United States, who has studied demographic changes in 200 small farm towns in California, made note of Poplar, California, which is full of people from the Mexican state of Colima. He concluded that "many little farm communities have become basically Mexican towns where anywhere from 70% to 90% of the population are Mexican immigrants or children of Mexican immigrants." Boxall, supra, at A1.

n39 These same feelings are found in other paired towns, which include people like Bonifacio Caballero, who said:

We are going to return, my wife and I, to enjoy what we have left of life. . . I want to be buried in Mexico. I want them to take me to the graveyard with a mariachi band. That's not too much to ask. I want to be buried in my land.

Quinones, supra note 38, at 103. They also have residents like Caballero's daughter, Maria Caballero, who said "I don't think I can live [in Mexico]. I'm used to the conveniences here, big stores, supermarkets." Id. Others, like Francisco Aguilar, envision having dual citizenship in the United States and Mexico and living "part here, part there, like we've always done because you spend so much time in the United States that you feel part of it." Id.

n40 Other Mexican towns have also been affected by the "American Connection." In 1997, Mexican emigrants sent about 4.7 billion dollars to Mexico. Quinones, supra note 38, at 99. In one town, Nuevo Chuipeuaro, approximately 70% of the money for public works, such as the church, roads, museums, plazas, museums and cemeteries, comes from north of the border. See id.

n41 Interviewees noted this as a marked contrast to other parts of the county with similar demographics.

n42 This same transformation is taking place in other cities, as well. In each of these towns, immigrants are creating an identity which incorporates both their Mexican and their United States selves: developing soccer teams and creating town squares; singing Spanish choral pieces at the annual orange blossom festival; buying homes; revitalizing school lunch and community-sponsored health insurance programs; opening new high schools named the "Home of the Aztecs", and; seeing their children graduate from United States colleges and take jobs outside the fields. Boxall, supra note 38, at A1.

n44 In addition to the "capacity" and "connectedness" attributable to dual resident immigration patterns, other factors may help explain the relative success of coast-side Latina/o immigrants. Certainly, natives of Camichines might cite their own history of self-determination, based on their participation in the Mexican revolution and their willingness to be among the first places to fight for the right to own their own land. Even today, many residents return to Camichines to oversee the harvest of their own sugarcane fields in Mexico. Community Worker Rosa Carreno noted that coast-side Latina/o immigrants are people who "come with a purpose" -- they come to work, to help themselves and their families. Other factors include unusually responsive and caring politicians who have roots in the community and the relatively small, isolated nature of the community, which means that we all have to live with and rely on one another.

n45 Interview with Dr. Virginia Blashke, Coastside Health Center, San Mateo County Health Services (June 30, 1999) (notes on file with author).


n47 Interview with Brian Zamora, Director of Public Health and Environmental Health (June 16, 1999) (on file with author). The Environmental Health Department monitors agricultural employee housing.

n48 Wilson Interview, supra note 46.

n49 Betty Liu, Migrant Workers Reap Harvest of Resentment and Racism, Fin. Times, Sept. 15, 1999 (describing hostility and violence aimed at Latina/o immigrants in Tennessee); see also Boxall, supra note 38, at A1 (describing hostility directed towards Latina/o immigrants against other Latina/o immigrants that arrive without any tie to community).

n50 Even within my community, it must be emphasized that people constantly work and battle to forge the community which we have. Further, things here are still not perfect. Farm labor camps still exist in the hills. Young Latinas/os drop out of school at rates that are far too high, and there is a growing number of recent residents who do not have a connection to the Latina/o population (primarily commuters who work "over the hill" in Silicon Valley).

n51 For ways in which the current law of "sexual harassment" does not fit immigrant women's experience, see Maria Ontiveros, Three Perspectives on Workplace Harassment of Women of Color, 23 Golden Gate U. L. Rev. 817 (1993).
FORGING OUR IDENTITY: TRANSFORMATIVE RESISTANCE IN THE AREAS OF WORK, CLASS, AND THE LAW: The Role of the EEOC in Protecting the Civil Rights of Farm Workers

William R. Tamayo *

BIO:

* J.D., University of California, Davis 1978; B.A., San Francisco State University 1975; Staff and Managing Attorney with the Asian Law Caucus, a public-interest law firm in San Francisco from 1979 to 1995. Regional Attorney, U.S. Equal Employment Opportunity Commission, San Francisco District Office, June 1995 to present. The District covers Northern and Central California, Hawaii, American Samoa, Wake Island, Guam, and Commonwealth of the Northern Mariana Islands (CNMI). With over 16 million people (roughly 25% Latino, 15% Asian Pacific American, 8% African American), the District's largest industries include agriculture, Silicon Valley, major tourism, a massive service industry, banking and finance, and the billion dollar garment industry of Saipan (CNMI).

SUMMARY: ... The campaign began training the staff of California Rural Legal Assistance ("CRLA") on the law of sexual harassment and joined with Lideres Campesinas, a farm worker women's leadership network to conduct trainings in the Salinas area and the central valley. ... More importantly, the case also sent a strong message to an industry that the EEOC long ignored, and opened the door for other farm worker women to step forward to file claims or charges. ... Furthermore, advocacy by the disability rights movement in the farm worker and minority communities is still in an embryonic stage. ... Realistically, very few lawyers in the private bar will take on farm worker or other immigrant employment matters. ... As EEOC Chairwoman Ida Castro stated, "with farm worker women, we are dealing with perhaps the most vulnerable sector of the workforce. ... The stakes involved are captured by a female farm worker's statement describing the impact of years of harassment: ... Overcoming decades of neglect of farm worker issues by the civil rights community and by the EEOC is a daunting challenge. ...

[1075]

The agricultural industry is one of the nation's largest industries and employs nearly one million farm workers, a large percentage of whom are women. Many are immigrants and some are undocumented, making them especially vulnerable to workplace violations including sexual harassment. Female farm workers have recently complained about sexual harassment in the fields to the U.S. Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcing the nation's laws against employment discrimination. This Article traces the historical lack of protection for farm workers under U.S. law, and the reasons for the EEOC essentially ignoring this large workforce. Despite this embarrassing legacy, this Article notes that the EEOC has undertaken significant steps to address the civil rights of farm workers through active investigation and prosecution of agricultural employers.

The role of equal employment opportunity laws is very simple but critical. Equal opportunity insures that people can work, and consequently, determines workers' quality of life. Issues such as whether there is food on the table, whether their children will have clothes, whether they will have a roof over their heads, and whether they can do their work free of harassment are all at stake. Although these may seem like basic humanitarian concepts, equal opportunity is a radical concept, an aberration, when viewed against the backdrop of U.S. law and social practice. After all, [1076] for the last thirty-five years after the passage of Title VII of the Civil Rights Act of 1964, has private employment discrimination on the basis of race, color, sex, national origin, and religion been unlawful. And not until 1992, under the Americans with Disabilities Act ("ADA"), was it unlawful to deny employment opportunities in the private sector on the basis of disability. n1

While the civil rights movement fought for these laws, the movement has had an ambivalent attitude toward farm workers -- an ambivalence deeply rooted in our nation's history. The Wagner Act of 1935, now known as the National Labor Relations Act ("NLRA"), did not cover farm workers. n2 The lack of coverage reflected a racial, national origin, and class bias against Mexican
and Filipino farm workers. Mexican farm workers had been a large part of the agricultural workforce in the western part of the United States. However, during the Depression of the 1930s, hundreds of thousands were repatriated or deported. n3

Professor Antonio Rios-Bustamante noted:

Both repatriation and voluntary returns were the results of the systematic campaign against Mexicans by local authorities and private agencies. Methods used to repatriate Mexican workers included persuasion, intimidation, violence, and forced repatriation. Through these methods, approximately 500,000 people left the country. n4

The start of World War II required farm workers (significantly white in the 1930s) to shift from agriculture to the military or warrelated industries. This left a vacuum in agricultural employment and growers once again looked to Mexico for labor.

Professor Rios-Bustamante described the bracero program as follows: [*1077]

The renewed interest in securing Mexican labor gave rise to the Emergency Farm Labor Program. Known as the bracero program, it was established through the 1942 Bilateral Agreement between the United States and Mexico. It gave U.S. business and government more regulation over Mexican labor. In June 1942, the State Department and the Mexican government signed an agreement for the importation of 50,000 Mexican workers. . . . n5

Between 1953 and 1956, the bracero program increased greatly, reaching a total of 445,000 workers in the Southwest and Michigan. By 1959, twenty-five percent of this country's southwestern workforce was Mexican.

The bracero program, which lasted nearly twenty years beyond World War II (when it was supposed to end), ensured growers of a vulnerable Mexican workforce and effectively stymied union organizing. n6

Despite the lack of coverage under the NLRA, farm workers have organized and won contracts through strikes and sacrifice. For example, in Hawaii, the International Longshoremen's and Warehousemen's Union ("ILWU") organized thousands of Japanese and Filipino sugar cane cutters and pineapple pickers in the 1930s and 1940s. Farm workers in Ohio and North Carolina gained union contracts through the Farm Labor Organizing Committee, and farm workers also formed unions in Texas and Arizona. In 1975, largely due to the efforts of the United Farm Workers ("UFW"), the California Agricultural Labor Relations Act became the first state law that recognized the bargaining rights of farm workers. But generally, there has been minimal labor law and virtually no equal employment law enforcement in the agricultural industry.

Agribusiness is one of California's largest industries, employing nearly one million people annually, while nationwide the industry [*1078] employs over one and a half million people. n7 California's top six agricultural corporations alone have thirteen billion dollars in annual sales. n8 And recently, the industry has catered not only to domestic markets, but also to the expanding global markets in Canada, Europe, and Asia. The industry also has available a ready supply of immigrant labor from Latin America because of hardships in Mexico and Central America, the latest brought on by Hurricane Mitch. n9

Despite the size of this industry, there were very few EEOC cases in agriculture. Additionally, there were no sexual harassment cases filed in court until September 1998, when the EEOC's San Francisco office filed a lawsuit against a Salinas area labor contractor on behalf of two Latinas. n10 This lack of involvement reflects in part the Commission's traditional focus on the discrimination issues of African Americans in urban areas, with much less attention given historically to the concerns of Latinas/os and Asian Americans. n11 To a certain extent, the EEOC was understandably driven by a "black v. white" framework, much like the rest of the civil rights community in analyzing and addressing issues of racial minorities. n12 [*1079] That framework, unfortunately, could not address the other issues of nonblack minority workers or the xenophobia and "racialized patriotism," that drove public policy and debate, thereby resulting in the further political isolation and vulnerability of immigrant workers. Consequently, the EEOC did not significantly respond to the changing phenomena in the workplace over the last decade or two, changes that industries' expansion, international and domestic instability, and global migration prompted.

Compounding this problem was the fact that by the 1990s the EEOC was sometimes viewed by civil rights advocates as irrelevant, poorly trained, ill-prepared to address the discrimination issues of the decade, and indifferent to the civil rights concerns of new Americans and emerging communities. And the impact of this perceived dysfunction was felt by farm workers -- an extremely vulnerable population that oftentimes is nonwhite, noncitizen, and non-English speaking. Additionally, it is a population that often cannot vote, that has little money, that may have the worst jobs, that is unorganized, that may live in fear of deportation, and if deported may face extreme poverty, persecution, or both. And on top of that, it is part of a sector that is
blamed for everything: unemployment, disease, crime, drugs, etc. In essence, this population is ten times more vulnerable than others, and consequently makes the challenge to the EEOC that much more important.

But where there is challenge, there is also opportunity. I believe the EEOC has at least planted the seeds for significant enforcement in the agricultural industry. In 1995, the Commission began developing its National and Local Enforcement Plans. As part of [*1080] the local effort, EEOC staff met with farm workers and their advocates in Fresno, California. We were told that hundreds, if not thousands, of women had to have sex with supervisors to get or keep jobs and/or put up with a constant barrage of grabbing and touching and propositions for sex by supervisors. A worker from Salinas, California eventually told us that farm workers referred to one company's field as the field de calzon, or "field of panties," because so many supervisors raped women there. While these stories were horrendous, the women's complaints were not surprising. The number of harassment charges filed with the EEOC and state agencies has risen from just under 7000 in fiscal year 1991 to nearly 16,000 in fiscal year 1998. And those charges represent just the tip of the iceberg.

Soon after that meeting, our office launched an education and outreach campaign. The campaign began training the staff of California Rural Legal Assistance ("CRLA") on the law of sexual harassment and joined with Lideres Campesinas, a farm worker women's leadership network to conduct trainings in the Salinas area and the central valley. Subsequently, CRLA's senior staff attorneys gave an important presentation to the leadership of the EEOC's West Coast offices regarding the agricultural industry, its structure, the players, and the projected labor needs.

In 1996, Blanca Alfaro went to the CRLA office in Salinas and complained that she had been fired. It was eventually learned that a hiring official and other supervisors had sexually harassed her and then terminated her for protesting. Her case was eventually referred to the EEOC. I promptly organized a training session for EEOC staff on credibility assessments of rape and other sexual harassment victims that are non-English speaking immigrants. Drawing upon my experience representing political asylum applicants and scores of battered immigrant women, I emphasized that it was an abuse of discretion for a federal agency to discredit a witness without other relevant credible evidence. n13 And, in cases in which [*1081] the only witnesses to harassment are the victim and the harasser, properly crediting the victim's testimony is absolutely crucial.

In addition, trainers from a rape crisis organization and the San Francisco Police Department's Rape Unit discussed methods of interviewing rape victims and harassers. Misinterpretations of body language, eye-to-eye contact or the lack of it, and the consequent erroneous credibility assessments when the charging party was an immigrant woman could have devastating consequences. Thus, challenging the cultural limits and culturally based assumptions of staff was necessary to properly investigate Alfaro's and other potential victims' charges.

After months of investigation the EEOC concluded that Blanca Alfaro had indeed been harassed and retaliated against and that her boyfriend was also terminated in retaliation. The company, Salinasbased Tanimura & Antle, the largest lettuce producer in the U.S., denied the allegations. n14 While the matter was under litigation review, the U.S. Supreme Court issued key rulings on sexual harassment holding that an employer is vicariously liable for the harassment of a supervisor if it results in a tangible employment action, and is liable for other harassment (hostile work environment) if the employer failed to exercise reasonable care to prevent and promptly correct any sexual harassment, and the victim unreasonably failed to use the preventive or corrective measures provided. n15 [*1082]

After months of negotiation with our office, CRLA and the Women's Employment Rights Clinic of Golden Gate Law School, Tanimura & Antle signed a significant consent decree in February, 1999. While making no finding of liability, the consent decree provided for $ 1.855 million for Blanca Alfaro, Elias Aragon, and a class of farm workers that officials may have harassed or retaliated against. n16 Farm workers can file claims until July 31, 1999. The EEOC will review the claims and award money from the fund. The decree also provided for extensive training of managers, supervisors and employees. The employer agreed to not rehire the alleged harasser and the employer has reprimanded others. To its credit, at a joint press conference, Tanimura & Antle stated that it wanted to move forward, to set a new tone in the industry and to ensures that victims of harassment could complain without fear of retaliation.

This $ 1.855 million award is likely the largest sexual harassment award in the agricultural industry, and not surprisingly, California, Arizona, the Latina/o press, and the Wall Street Journal gave the case significant publicity. The Associated Press photos of Blanca Alfaro holding her five-year-old daughter and of company VicePresident Mike Antle behind the EEOC seal said a thousand words. n17
More importantly, the case also sent a strong message to an industry that the EEOC long ignored, and opened the door for other farm worker women to step forward to file claims or charges. n18 Yet, there are still barriers to overcome. One major factor is workers' immigration status and the fear it creates for some discrimination victims. Undocumented immigrant women workers or women workers that have undocumented members at home, may fear that an employer will retaliate against a complaining employee by calling the Immigration or Nationalization Service ("INS") and have her deported. Thus, in weighing the abuse on the job versus the potential that she and her children may face dire consequences of poverty or persecution in her home country if deported, she may feel compelled to endure the abuse. [*1083]

However, Title VII protects undocumented workers, and furthermore, immigration status is irrelevant in finding liability in sexual harassment cases and in awarding damages. When employers threaten to deport an employee after an employee complains of a labor or employment rights violation, this constitutes unlawful retaliation. Thus, advocates must ensure that immigration status, immigration law, and the INS are not used as weapons in the hands of a violating employer. The last thing that we can afford is a perception that filing charges with the EEOC can lead to deportation. That chilling effect would only embolden harassers and encourage them to harass without any fear of punishment. n19

But, aside from matters of sexual harassment, there are other issues of age, sex, national origin, and disability discrimination that we must address. n20 I only note that given the enormous potential [*1084] for physical injuries, there are likely many disabled farm workers who could perform their jobs with some accommodation n21 and many more that have had a history of disability and were consequently and unlawfully denied future employment. n22 One obvious barrier is that many minorities are not aware of their rights under the Americans with Disabilities Act ("ADA"). According to the National Organization on Disability, less than ten percent of minority people with disabilities know about the ADA, and it took three years for the ADA to be translated into Spanish. n23 Furthermore, advocacy by the disability rights movement in the farm worker and minority communities is still in an embryonic stage. n24

Given the imbalance of power between growers and farm workers, government can play a critical role in helping farm workers. Realistically, very few lawyers in the private bar will take on farm worker or other immigrant employment matters. Recent restrictions prevent rural legal services programs from participating in class actions and obtaining attorneys fees, thereby negating substantial investment in drawn out litigation. And thus, in many cases the EEOC may be the only recourse.

But having previously been co-counsel in litigation challenging governmental misconduct against immigrants I understand the fear and distrust in immigrant communities. n25 Accordingly, some may ask, why should farm workers trust the government after the government has so long neglected and sometimes abused them?

Obviously, a victory like EEOC v. Tanimura & Antle is significant, but much more needs to be done to win that trust. The EEOC must build relationships and partnerships and achieve more [*1085] victories. That commitment includes being open to criticism, suggestion and debate about methods, approaches and frameworks.

Being relevant and meaningful to the lives of farm workers and other underserved communities requires the recruitment of staff, despite Proposition 209, with the necessary bilingualism, biculturalism, awareness of the social demographics, industrial trends, community ties, and skills to build relationships and partnerships. n26

The EEOC must gain an institutional understanding of the workforce and industrial trends. It must dare to be creative, and must not be marginalized by its own intransigence or neglect. That marginalization would further marginalize the populations we are required by law to serve. As EEOC Chairwoman Ida Castro stated, "with farm worker women, we are dealing with perhaps the most vulnerable sector of the workforce. Accordingly, the EEOC must be vigilant and will continue to address issues in the agricultural industry."

The stakes involved are captured by a female farm worker's statement describing the impact of years of harassment:

I have a lot of fear that things will happen to me. I'm not the same any more. I don't have the same happiness as before. I don't want this to happen to my daughter or other women. It's just ruined my life completely. I haven't talked to a doctor because I don't have medical insurance. I have endured it alone. We are poor women, from the fields. We just want to have work and happiness, to give what you can, not to get a fortune. And they betray all that. And sometimes I can't stand it. . . . I'm stumbling and stumbling.

Overcoming decades of neglect of farm worker issues by the civil rights community and by the EEOC is a daunting challenge. Yet, in an industry filled with
millions of vulnerable workers -- especially non-English speaking immigrant women -- it is imperative that civil rights agencies devote adequate resources and make the industry a priority. As this article attempts to illustrate, the EEOC, the agency charged by law with protecting these workers' civil rights, has at least planted the seeds for stronger enforcement in [*1086] agriculture, and those seeds will grow as the EEOC builds partnerships with farm workers and advocates.

FOOTNOTE-1:


n2 The NLRA was passed during the Depression to give needed federal support to employee organizing and to collective bargaining. See The Developing Labor Law 26 (1992). Section 2(3) of the NLRA excludes the following groups from the term "employee" for coverage: (a) agricultural laborers, (b) domestic servants, (c) independent contractors, (d) supervisors, (e) employees subject to the Railway Labor Act, and (f) public employees whether federal, state, or local. See 29 U.S.C. § 152(3) (1994).


n4 Id.

n5 Id. at 26.

n6 Filipinos had been a major part of the agricultural workforce in the 1920s and 1930s. See Harvard Encyclopedia of Ethnic Groups 359 (Stephen Thernstrom ed., 1980) (indicating that Filipino agricultural workers numbered 5603 in 1920 and more than 45,000 shortly before 1930). However, the Philippine Independence Act of 1934 (Tydings McDuffie Act) stripped Filipinos of their status as noncitizen nationals of the United States and regarded them as aliens for most purposes under the immigration laws. See Cabebe v. Acheson, 183 F.2d 795, 799 (9th Cir. 1950) (citing § 8(a)(1) of Tydings McDuffie Act). The act served as an exclusionary law by reducing Filipino immigration to a quota of 50 per year. See Philippine Independence Act of 1934, 48 Stat. 456 § 14 (codified as amended at 48 U.S.C. § 1244 (1994)). This divestiture of noncitizen national status was challenged unsuccessfully in Rabang v. Boyd, 353 U.S. 427, 433 (1957).


n8 See Big Six Produce Companies, in 5 Rural Migration News No. 1 (Jan. 1999).

n9 In early 1993, the World Bank announced that 100 million people were living in countries other than their places of birth and international migration had reached epic portions. See The Seekers, 257 Nation 124, 124 (1993). Soon after, the United Nations High Commissioner for Refugees reported that there were over 44 million refugees in the world. See Paul Lewis, Stoked by Ethnic Conflict, Refugee Numbers Swell, N.Y. Times, Nov. 10, 1993, at A6.


n11 Of 110,000 cases in its inventory in 1995, less than five percent of the cases were filed by Latinas/os or Asian Americans. Less than 10% of the cases alleged national origin discrimination.


Many scholars of race reproduce this paradigm when they write and act as though only the Black and White races matter for purposes of discussing race and social policy with regard to race . . . . If one conceives of race and racism as
primarily of concern only to Blacks and Whites, and understands "other people of color" only through some unclear analogy to the "real" races, this just restates the binary paradigm with a slight concession to demographics . . . . This paradigm defines, but also limits, the set of problems that may be recognized in racial discourse.

Id.; see also Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post Structuralism and Narrative Space, 81 Cal. L. Rev. 1243, 1267 (1993) ("To focus on the blackwhite racial paradigm is to misunderstand the complicated racial situation in the United States."); Adrienne D. Davis, Identity Notes Part One: Playing in the Light, 45 Am. U. L. Rev. 695-96 (1996) ("A historical assessment of the relationship of other groups of color to a black/white paradigm reveals the paradigm as not only undescriptive and inaccurate, but debilitating for legal analysis, as well as civil rights oriented organizing.") (footnote omitted); Richard Delgado, Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary, 75 Tex. L. Rev. 1181, 1185-86 (1997) ("The black-white binary . . . assumes that you are either black or white. If you are neither, you have trouble making claims or even having them understood in racial terms at all."); Perea, supra, at n.2 (noting works that discuss inadequacies of black-white binary); Deborah Ramirez, Multicultural Empowerment: It's Not Just Black and White Anymore, 47 Stan. L. Rev. 957, 957-59 (1995) (arguing that civil rights struggle focused on black-white dichotomy); 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, 7-9 (1995) (stating that although civil rights movement ultimately benefited many minority groups, initially it failed to protect nonblack minorities).

n13 Under federal case law, it is an abuse of discretion (requiring reversal) for an administrative agency to discredit a witness if there is no credible evidence to support that conclusion. See Nasseri v. Moschorak, 34 F.3d 723, 726 (9th Cir. 1994) (noting that credibility findings must be supported by "specific, cogent reasons"); Turcios v. INS, 821 F.2d 1396, 1400 (9th Cir. 1987) (holding that evasiveness in answering questions does not necessarily establish lack of credibility; an examiner must evaluate untrue statements in light of all circumstances in case); McMullen v. INS, 658 F.2d 1312, 1318 (9th Cir. 1981) (stating that finding of lack of credibility must be reasonably supported by evidence).

Obviously, the rapist (supervisor) will either deny that the rape happened or state that the sexual activity was consensual. Those statements, alone, however are rarely sufficient to discredit the witness. As the Ninth Circuit Court of Appeals cautioned:

The [fact finder] must not only articulate the basis for a negative credibility finding, but those reasons must be substantial and must bear a legitimate nexus to the finding. Thus, there must be a rational and supportable connection between the reasons cited and the conclusion that the victim is not credible. In cases of this nature, where the principal and frequently only source of evidence is the petitioner's testimony, it is particularly important that the credibility determination be based on appropriate factors.

Aguilera-Cota v. INS, 914 F.2d 1375, 1381 (9th Cir. 1990).

The fact finder must have a legitimate, reasonable and articulable basis to question a party's credibility. See id. at 1382. At the same time, it must be remembered that "minor inconsistencies, minor omissions, or misrepresentations of unimportant facts cannot constitute the basis for an adverse credibility finding." Id.

n14 Tanimura & Antle had $1 billion in annual sales. See Big Six Produce Companies, supra note 8, at 1 (noting that Tanimura is relatively new, lettuce-based company).


Since the filing of the Tanimura consent decree, scores of women farm workers have filed EEOC charges against other growers and labor contractors.

Not too long ago, the U.S. Supreme Court noted that, "application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892 (1984) (holding that undocumented workers are covered by NLRA). The National Labor Relations Board noted:

If full remedies are not granted, the illegitimate economic advantage to unscrupulous employers that knowingly employ undocumented workers has an even deeper corrosive effect on congressional policies respecting the workplace; undocumented aliens are extremely reluctant to complain to the employer or to any of the agencies charges with enforcing workplace standards for fear that they will lose their jobs or risk detection and ultimately deportation by the INS. Thus, workplace abuses can occur in secret and with relative impunity.


On October 22, 1999, the EEOC released its "Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws," which emphasizes that the EEOC will not ask immigration status, will seek to obtain full remedies for all workers, and will pursue retaliation charges against employers who threaten deportation or otherwise use immigration law to undercut civil right law. See EEOC Compl. Man. (BNA), Notice No. 915,002 (Oct. 22, 1999).


The Americans with Disabilities Act, 42 U.S.C. § § 121011213 (1994), prohibits discrimination on the basis of disability, a record of disability or perceived disability. See id. § 12112. Furthermore, if an employee has a disability, the employer may be required to provide a reasonable accommodation to the employee providing that she can perform the essential functions of the job. See id.

See Patricia Kirkpatrick, Ships Passing in the Night: Disability Rights and Minority Activism, 4 Third Force, No. 1, 28 Mar./Apr. 1996.

Unemployment is so extreme among minority people with disabilities . . . because of exclusionary practices and attitudes, dual or triple discrimination of employers and vocational rehabilitation providers (due to race, gender, and/or disability), inaccessible work environments and inadequate levels of education").

See id.

See International Molders & Allied Workers, Local 164 v. Nelson, 799 F.2d 547, 550 (9th Cir. 1986) (noting that
district court delayed 18 months before granting immigrant plaintiffs' injunction and case took four years to get to trial).

n26 In 1999, EEOC office in San Francisco recently hired the staff attorney of Lideres Campesinas, and the San Antonio and Houston officers hired two attorneys from Texas Rural Legal Aid and two attorneys from the Mexican American Legal Defense and Education Fund.
FORGING OUR IDENTITY: TRANSFORMATIVE RESISTANCE IN THE AREAS OF WORK, CLASS, AND THE LAW: The Rakes of Wrath: Urban Agricultural Workers and the Struggle Against Los Angeles's Ban on Gas-Powered Leaf Blowers

Christopher David Ruiz Cameron *

BIO:

* Associate Dean for Academic Affairs and Professor of Law, Southwestern University School of Law, Los Angeles. A.B. 1980 University of California, Los Angeles; J.D. 1983 Harvard Law School. My thanks to Kevin Johnson, Roberto Corrada, and Mary Romero, who encouraged my early attempts to summarize the ideas presented here. Thanks also to the folks who attended Fourth Latina/o Critical Theory Conference in Lake Tahoe, California, and commented on the presentation that became this Article. This project was made possible by the generous support of the Trustees of Southwestern University School of Law. Valuable research assistance was provided by Matthias Wagener (Class of 1999).

SUMMARY: ... In this Article, I argue that the leaf blower ban is to urban agriculture what the dreaded short hoe was to farm agriculture - namely, a way to enforce Latina/o invisibility and to subvert attempts by Latinas/os to assimilate into Anglo society. ... Stooping not only wrenches the back, but also ensures that the laborer, usually a Mexican immigrant, works without having to be seen, or heard, in the case of the leaf blower ban. ... Indeed, like the short hoe, the leaf blower ban was sold to the public not as a means of racial oppression, but rather as benign guidance. ... First, they delayed for about a year and-a-half implementation of the City Council's initial adoption of a leaf blower ban, which may have persuaded officials to reduce violations of the new law from misdemeanor to infraction status. ... Sometimes, as in the case of the gas-powered leaf blower ban, these attempts fail. ... In the case of Los Angeles's leaf blower ban, the principles of assimilation that immigrant Latinas/os are charged with failing to adopt are health-consciousness and environmentalism, as evidenced by the comments of supporters of the ban. ...

HIGHLIGHT: If you really want to help the campesino, get rid of el cortito -- the short-handled hoe. n1

[*1087]

Introduction

A few years before he died, my abuelo came to live with us for the summer. Grandad, who was then eighty, was slowly succumbing to Parkinson's Disease, and he needed somebody to look after him while my grandmother packed up their retirement home in Tucson. They were returning to the Los Angeles area, where they had met and married and raised a big family. They were coming back because L.A. was where most of us still lived and could more easily help care for Grandad.

Grandad and I spent a lot of time together that summer. It was the sort of time that we had not shared since those hot summers when I was a kid and he used to pick up my brothers, Paul and Vince, and me to go swimming after he finished his shift at midafternoon. [*1088] We looked forward to those summers because time with Grandad meant not only swimming, but also driving his 1953 Chevrolet -- at about eight miles per hour -- around an empty parking lot afterward. Then it was off to the abuelos' house for dinner. He was fifty and vigorous and worked two jobs and already had eleven grandchildren. I was barely ten and wondered what made him go.

This particular summer, however, we did more talking than swimming. By then, most of Grandad's vigor was gone. We spent a lot of time in the kitchen talking about his life and friends and how they both turned out. We also spent a lot of time trying to keep him from falling and breaking an arm or a hip. Parkinson's had made his leg muscles stiff, which sometimes caused him to trip. So he shuffled around the house. As I took care of the kids and chores, I tried to keep an eye on Grandad so that I could catch him if he fell.

One afternoon an elderly Anglo man came to the door. He had stopped by to promote his landscaping business. Like most folks in my neighborhood, I was paying a Latino man who worked for himself to mow
the grass and trim the shrubs. But the Anglo man, who
like Grandad was eighty -- "eighty years young,"
according to his literature -- was excited. In fact, he
was a lot more energetic than Grandad, who was
taking a nap. He was excited because he had looked
over my front yard and was certain that his gardeners
could do a better job for less money than I was now
paying.

While the Anglo man was delivering his spiel,
Grandad shuffled up behind me. I didn't hear him
before he interrupted the Anglo man. "Will you do all
the work yourself?" he asked. "Heavens no," came the
reply. "I have a couple of Mexican fellas do it." I put
my arm around Grandad and said, "You know, we're a
couple of Mexican fellas." Without batting an eye, the
Anglo man added: "They're very hard workers, the
Mexican fellas, they just need some guidance. I show
them how they can make more money working for me." After that, whenever I helped Grandad with some
simple task, he would wink at me and say, "I just need
some guidance." n2 [*1089]

In this country, there is never a shortage of people in
positions of power that are prepared to offer "guidance" to Latinas/os, especially Mexican Americans, who are thought to need or want it. Recently, the City of Los Angeles, where I work and study the employment problems of Latina/o workers, decided to codify some of this "guidance" into law. During a year-and-a-half of contentious debate, the City Council adopted, then amended, an ordinance banning the use of any "gas powered blower" to remove grass and leaves from lawns and walkways. n3 Each violation of the ordinance is punishable by a fine not to exceed $ 100. n4 -- a sum that represents about ten percent of a gardener's average monthly income of $ 1000. n5 Other California cities and towns joined Los Angeles by enacting their own laws banning leaf blowers. n6

In this Article, I argue that the leaf blower ban is to
urban agriculture what the dreaded short hoe was to
farm agriculture -namely, a way to enforce Latina/o
invisibility and to subvert attempts by Latinas/os to
assimilate into Anglo society. A farm worker using a
short hoe must bend over to work. Stooping not only
wrenches the back, but also ensures that the laborer,
usually a Mexican immigrant, works without having to
be seen, or heard, in the case of the leaf blower ban.
And if he is not seen, then his wishes, to be accorded
the privileges and immunities of full assimilation into
our society that white immigrants tend to expect, do
not have to be recognized. Indeed, like the short hoe,
the leaf blower ban was sold to the public not as a
means of racial oppression, but rather as benign
guidance. Prominent advocates of the ban argued that,
by foregoing gas-powered blowers in favor of rakes or
brooms to ply their trade, Latina/o gardeners would
pollute the environ [*1090] ment less and actually
lead healthier, more spiritually fulfilling lives. n7

What follows here is the story of how Latina/o
gardeners were oppressed by, and how they eventually
resisted, Los Angeles's ordinance outlawing the gas-
powered blower.

I. Subordination of Latina/o Gardeners

Tending the front and back yards of the landed gentry
of Los Angeles is primarily the work of as many as
65,000 Latina/o immigrants, nearly all of whom are
men. n8 By any measure, their work does not pay
well. The average gardening crew, consisting of two
to three men, charges $ 15 to $ 25 per yard and works ten
to twenty yards per day. At these piecework rates, the
average gardener earns $ 250 per week, $ 1000 per
month, and $ 12,000 per year. He works eight to
twelve hours a day, six days a week, and all without
overtime, paid vacation, or health insurance. If he does
not work, then he does not get paid. n9

The compensation of the average Latino gardener
places him at the forefront of the low-wage economy
that has supported the boom of the 1990s in California,
and especially, in Los Angeles County. In 1998,
Latinos accounted for 28% of the state's workforce but
earned only 19% of its aggregate income. By contrast,
whites accounted for 53% of the state's workforce yet
earned 62% of its aggregate income. n10 The fact that
gardeners are often con [*1091] sidered self-
employed small business owners rather than wage
earners, the name economists use is "microentrepreneurs" n11 -- does not improve their take-home pay. A 1996 survey of 110,000 Latina/o-
owned businesses in greater Los Angeles showed that
half of these businesses post annual revenues under $ 10,000. n12 In a state where Latinas/os are projected
to make up fortythree percent of the workforce by
2025, n13 these figures are cause for concern that
most Latinas/os, whatever their occupation, are
forming the key part of a burgeoning, and perhaps
permanent, low-wage underclass. n14

An important tool of the gardener's trade is the
gasoline-powered blower, which is used primarily to
remove grass and leaf trimmings from freshly mowed
lawns, clipped hedges, and wind-blown walkways. The
blower, a twelve-pound machine, n15 is strapped to
the gardener's back. Working with a nozzle attached to
a lead hose, the gardener blows the trimmings into
piles that he can conveniently sweep up and dispose of
before he loads his pickup truck and drives off to the
next job.
Gardeners estimate that it takes two to three times longer to clean a yard using rakes and brooms than it does to use a single leaf blower. n16 Hiring more men for the crew might accomplish the task in less time, but many experienced gardeners believe that even long-time clients would balk at paying more money to boost the payroll. n17 One gardener estimated that having to give up the leaf [*1092] blower would cost him about $250 per month, a sum equal to as much as one fourth of the average gardener's income. n18

During the 1980s and 1990s, the sights and sounds of backpack-carrying Latino men using gas-powered blowers became familiar to Californians living in cities and suburbs the length of the state. Indeed, the notion of hiring professional hands to do work that dad, brother, or the neighbor's kid used to perform for pocket change was something new. Once a luxury confined to the enclaves of the rich and famous, hiring gardeners soon spread even to the homes and apartments of the middle class. n19 In metropolitan Los Angeles, the hired gardener became common not only in the affluent communities of Bel Air, Brentwood, and Pacific Palisades, but also in such working-class communities as Lakewood, a community developed during the 1950s to house aerospace and defense plant workers. n20 When the hired gardener arrived, so did his leaf blower.

Not everyone welcomed this transformation. By 1996, more than forty California cities and towns had passed ordinances banning or restricting the use of leaf blowers. n21 Many residents complained about the cacophony of noise and dust created by power mowers, motorized weed-whackers, and gas-powered leaf blowers. In Los Angeles, they made a well-publicized attempt to do something about it.

Since at least 1990, Council Member Marvin Braude, who represented Brentwood and other Westside communities, had unsuccessfully championed an outright ban on all uses of gas-powered blowers. Braude, a self-styled environmentalist, felt that the machines posed unacceptable noise and air pollution hazards. Six years later, however, Braude decided that he would accept substantial [*1093] restrictions on the use of blowers rather than an outright ban on all uses.

In May 1996, Braude sponsored a measure prohibiting the use of gas-powered blowers within 500 feet of a residence. Braude's measure won approval from the City Council, n22 but the Council delayed enforcement for what would turn out to be another year and-a-half. n23 By then, Braude had retired, but his successor, Council Member Cindy Miscikowski, took up the cause. In December 1997, the Council agreed to reduce the penalty from the status of a "misdemeanor" punishable by a fine of up to $1000 and six months in jail to the status of an "infraction" punishable by a fine of up to $270. n24 On February 13, 1998, the ban took effect.

II. Resistance by Latina/o Gardeners

Faced with substantial support among Council members from the moment Braude's new measure was introduced, Los Angeles's Latina/o gardeners decided not to submit without a fight. Their resistance found voice in an organization called the Association of Latin American Gardeners of Los Angeles, a sort of unrecognized union of gardening contractors and wage-earning crew members who were the targets of the proposed ban. The association's energetic leaders, general secretary Alvaro Huerta n25 and president Adrian Alvarez, n26 were quoted frequently by the news media and became adept at offering sound bites that rallied gardeners to the cause. They also organized impressive, if not always successful, political, legal, and extralegal actions worthy of the United Farmworkers and other long-established unions. [*1094]

A. Political Action: Before the City Council

If having to face the fifteen members of the Los Angeles City Council was not enough of a challenge for Latino gardeners, then having to fight the battle in the Entertainment Capital of the World certainly had to be. Only in Hollywood can the involvement of a handful of celebrities garner attention for a cause that might otherwise be ignored by an indifferent municipal electorate. So the Association of Latin American Gardeners of Los Angeles had to prepare to respond to testimony from television stars who spoke not only in their roles as residents of Los Angeles's affluent Westside, but also in their capacity as "experts" on the deleterious effects of gas-powered leaf blowers.

With a flair all their own, the celebrities offered three arguments. First, they argued that the devices are bad for the environment. Peter Graves n27 worried about the noise and air pollution caused by gas-powered blowers. After stepping to the podium while lawmakers hummed the familiar theme to his TV show, he testified:

Leaf blowers are bad. They call them leaf blowers, because, indeed, they do blow leaves around and around and around. But they also blow other things around [such as fungus]. Are we going to put masks on our kids? In some areas of the world, plants, flowers and trees, and their arrangements together, have deep religious and philosophical meanings. n28

Graves did not explain why he had ad-libbed about religion, philosophy, and botany, nor did he explain
what they had to do with the relationship between banning a tool of the gardeners' trade and environmental protection.

Second, the celebrities argued that gas-powered blowers are bad for the gardeners' physical health. Meredith Baxter n29 ticked off statistics about the dangers of using the devices, which she claimed expose gardeners to fire, smoke, and noise hazards. She testified: "It flies in the face of all rational thinking to continue using blow [*1095] ers." n30 Baxter, who apparently read from her own unedited script, barely finished before she was followed by City Council President John Ferraro. "If we give everyone the same time we gave you," he said, "we'll be in here till tomorrow." n31

Third, the celebrities argued that the machines are bad for the gardeners' spiritual health. Julie Newmar, n32 suggested not only that the gardeners were ignoring the threat to their own health, but also that manufacturers of blowers were exploiting gardeners' ignorance. She told one newspaper: "These men are shuffling to the tunes of their manipulator. Your souls are being bought. The corruption should be banned. This is destructive technology run amok. I can't work in my office at my job anymore. Millions of people work at home. Don't we count?" n33

Newmar especially seemed to enjoy the spotlight and proved to be the quotable favorite among reporters. When the City Council was about to vote on reducing the penalty for violating the new ban from a misdemeanor to an infraction, she urged lawmakers to stand firm. "It isn't that you people don't have character and integrity," she purred. "It's just hard to see beyond the voting cards." n34 Later, after the Council had voted to reduce the penalty anyway, she hissed that TV viewers "will see this oppressive miscarriage of justice because of the sycophants at City Hall." n35

Latino gardeners and their allies responded to each of these arguments. As to the argument that blowers are bad for the environment, Adrian Alvarez, president of the association, conceded the point. n36 But Alvarez contended that an outright ban was a smokescreen for discrimination against the Latino men who do physically demanding work of gardening. He said it was not a solution "when you deprive people of a fundamental tool" in earning a living. n37 Alvaro Huerta, general secretary of the association, added: [*1096] "[The ban is part of a] series of attacks against the Latino immigrant. All they want to do is work, and [the City Council] is creating this hostility." n38

Taking sides with the gardeners, a number of elected officials were more to the point. State Senator Richard Polanco compared the government's regulation of pollution by gardeners to its regulation of pollution by automobile manufacturers and concluded that Latinas/os were being singled out for disparate treatment. "We have not banned cars when we wanted them to be quieter or cleaner. . . . We simply force manufacturers to make quieter, cleaner cars. But when it comes to the tools of poor, immigrant gardeners, they just ban their tools. That is fundamentally unfair and wrong." n39

An outright ban seemed particularly puzzling because the ordinance that eventually took effect did not apply to gas-powered lawn mowers and edgers, which are certainly as loud as gas-powered leaf blowers. These instruments continued to be regulated by a separate ordinance that restricts, rather than outlaws, the use of hand tools, construction equipment, and other power tools to the hours between 7:00 a.m. and 10:00 p.m. n40

As to the argument that the machines are bad for gardeners' health, Alvarez rejected the notion that city officials should substitute their judgment for that of the workers themselves. "We're tired of the classism, the paternalism, the implication and assumption that gardeners can't think on their own," he said. n41

Finally, as to the argument that gas-powered blowers are bad for gardeners' spiritual health, the gardeners responded with a public demonstration of their own high moral standards. Invoking the commitment to nonviolent civil disobedience of Cesar Chavez and the United Farm Workers, the association organized barefoot marches along downtown streets to City Hall to make the point [*1097] that laws passed there had caused them suffering; they circled City Hall carrying brooms; they held a candlelight vigil for one of their own who died in an automobile accident while returning from a protest. n42 A particularly sobering moment came when a group of gardeners vowed to fast until death on the grounds of City Hall unless the mayor and the Council took action to address their grievances. n43 Disaster, not to mention a public relations nightmare, was averted when the association and city officials worked out a compromise under which the Council agreed to help the gardeners find replacement machines. Still, the ban remained in effect. n44

After the ban had been enacted by the City Council over the objections of Latino gardeners, the association took the fight to the state capitol in Sacramento. n45 There they found an ally in state Senator Polanco, who carried a bill that would have preempted local leaf blower legislation throughout California except for municipalities where voters had adopted such laws by
initiative. n46 Polanco's bill passed the state assembly, but was killed in committee in the state senate. n47

Although the association did not succeed in derailing the ban, its efforts at resisting this form of subordination cannot be considered a failure. These efforts not only raised the public's awareness of the gardeners' plight, but also were the likely reason why the status of the offense, together with its concomitant penalties, was reduced from a misdemeanor to an infraction.

B. Legal and Extralegal Action: Before the Courts and in the Streets

Latino gardeners did not limit their resistance to lobbying lawmakers. Adopting a creative mixture of traditional and nontraditional political, legal, and extralegal tactics, they also took their case before both the courts and the court of public opinion.

As noted above, the gardeners' nontraditional tactics -- the barefoot march, the broom sweep, the candlelight vigil for a fallen comrade, the hunger strike -- set a high moral tone and probably [*1098] had at least three positive effects. First, they delayed for about a year and-a-half implementation of the City Council's initial adoption of a leaf blower ban, which may have persuaded officials to reduce violations of the new law from misdemeanor to infraction status. Second, these tactics won a modest pledge by the Council to help gardeners search for alternative tools, such as the electric blower. Third, and perhaps most important, they brought together dispersed Latina/o workers, who otherwise would suffer the indignities of their collective oppression without even knowing each other. To the extent the gardeners had any latent political power, they learned that they could only exercise it by working together.

The results of using traditional legal tactics were more mixed. On the one hand, a challenge that the leaf blower ordinance lacked a rational basis under equal protection principles was rejected. n48 This was unfortunate, because the argument made eminent sense. Whereas in the past Los Angeles had merely limited the use of other noisy and smelly tools of the gardeners' trade, such as lawn mowers and weed whackers, to certain hours of the day, the city was now banning the use of gaspowered leaf blowers at all times within 500 feet of any residence. n49 Rejecting Los Angeles's reasons for regulating the use of leaf blowers differently from other equipment, at least one other city considered choosing time-of-day rather distance limits. n50

On the other hand, a challenge that the ban on "gas-powered" leaf blowers did not affect equipment powered by methanol, a mixture of gasoline and alcohol, was sustained. n51 As a result, the tickets of two gardeners who each had been fined $270 for using methanol-powered leaf blowers were dismissed. The judge found the law to be indeterminate, a factor that, in this instance anyway, worked [*1099] in favor of Latino gardeners. n52 Association general secretary Huerta hailed the ruling not only as a victory, but also as an opportunity for further resistance. "Finally, justice prevails. We feel this is going to be very problematic for the city because they don't know if we have one methanol leaf blower out there or 10,000." n53

By mixing nontraditional and traditional tactics, the gardeners were able to call attention to the equities of their cause. This, in turn, helped them persuade lawmakers to reduce the severity of the ban, and perhaps, helped persuade the courts to construe ambiguities in the ordinance in favor of the gardeners.

III. Some Observations About the Rakes of Wrath

The story of subordination of and resistance by Latina/o gardeners facing Los Angeles's ban on gaspowered leaf blowers illustrates at least two themes that Latina/o Critical Theory n54 has developed to explain the effect of laws and legal institutions on Latinas/os, and vice versa: the historic invisibility of Latinas/os in American culture, politics, and society, and the notion that the white ethnic model of assimilation, which is so widely adhered to by whites, does not necessarily work for nonwhites including Latinas/os.

A. Latina/o Invisibility

The rule of law has played an important role in enforcing the historical invisibility of Latinas/os in the United States. n55 Particularly striking is a symbolic parallel between the struggles of the rural agricultural workers whose cause has been championed by the [*1100] UFW and the urban agricultural workers whose cause was taken up by the Association of Latin American Gardeners of Los Angeles.

For years, the most prominent symbol of oppression for urban agricultural workers was el cortito -- the short-handled hoe. n56 The short-handled hoe caused the farm worker who was assigned to use it to bend over at an unnatural angle, thereby wrenching his back and neck. Generations of mostly Latino farm workers were crippled from daily use of short-handled hoes to cultivate crops. n57 Of course, a laborer who is bending over finds it difficult, if not impossible, to plot conspiracies against management, or to do anything except till the soil. If he stands upright, then he must not be working, and can be readily identified and punished. Thus, the short-handled hoe makes the farm worker invisible.
Similarly, Los Angeles's ban on gas-powered leaf blowers makes urban agricultural workers invisible by silencing them. The ban forbids gardeners to work quickly and efficiently by forcing them to work silently. Substituted for the whirring of gas-powered motors is the scraping of rakes and brooms. These sounds tell us that those Latinos are working long and hard, and are too occupied to plot subversion or any other activities that might cause trouble. These sounds tell us that the men remain safely invisible. n58

But why punish laborers simply for answering the call of the market place? One sociologist almost captured the sentiment when she observed: "There seems to be an element of hypocrisy here. It's sort of an unfair placing of blame on the gardeners. The gardeners are here working because there's a demand for their services. . . . We like our beautiful lawns but we don't want to pay for them." n59

In truth, it's not the paying we mind -- after all, the price tag is a bargain -- but rather, having to see and hear the people that are [*1101] working to be paid. A democratic and multicultural society has little choice but to embrace all the people who constitute it. Attempts to make them invisible are bound to be resisted. Sometimes, as in the case of the gas-powered leaf blower ban, these attempts fail.

B. White Ethnic Assimilation Model

Discourse about laws affecting Latinas/os often devolves into the assertion that for an immigrant to give up the culture of her national origin and to become assimilated into mainstream American life is not only a good thing, but also a thing attainable by all immigrants, irrespective of background. But as Kevin Johnson, Sylvia Lazos, George Martinez, and others have argued, this adherence to the white ethnic assimilation model is misplaced. Wrote Professor Lazos:

The White ethnic immigrant story portrays America as a classless and raceless society, and it hides that individuals from a lower class and with subordinated racial social identities have very different life chances from those who can claim Whiteness. . . . Racial minorities become the targets for all of America's ills. Not surprisingly, Whites have very little empathy for racial minorities and the poor which allows them to distance themselves from the problems of race and poverty. n60

In the case of Los Angeles's leaf blower ban, the principles of assimilation that immigrant Latinas/os are charged with failing to adopt are health-consciousness and environmentalism, as evidenced by the comments of supporters of the ban. For example, even diehard liberals on the City Council bought the false dichotomy between preserving the environment and preserving the jobs of poor Latina/o gardeners. Council Member Jackie Goldberg, long a champion of the working class, threw up her hands:

I am depressed that the hardships will fall on those on whom the hardships always fall on heaviest -- those marginally em [*1102] played. But I do believe there are major health issues involved in this, and I can't find a way around it. n61

Sponsors of the ordinance, including Council Member Miscikowski, denied that their intent was to divide the city along race or class lines. n62 To them, the real issue was the quality of life, not discrimination against immigrant Latinas/os. n63

Of course, some supporters were less kind. Standing outside City hall, a thirtysomething professional man, looking angry, interrupted a reporter who was interviewing a gardener: "Why don't you ask him why he doesn't use a rake and a broom? Is he too lazy? I use a rake and broom." n64

This last cut may be the unkindest of all. The notion that immigrant Latinas/os have not adopted, or already brought with them, good old-fashioned American values such as hard work is an insult to every gardener who works ten to twenty yards per day for low wages and no vacation or benefits. In fact, it is an insult to working Latinas/os everywhere. And it puts to rest the idea that the white ethnic assimilation model always works for nonwhites too. The story of how industrious, low-wage workers fought back against an attempt to blame them for the side effects of something we all want vividly illustrates the folly of assuming that everyone in our society is equally served by the prevailing model of assimilation.

Conclusion

I began this Essay with a story about my abuelo. While Grandad was living with us, about two years before he passed away, he woke up early one morning from a nightmare. I found him disoriented and walking around his room. After I tucked him back into bed, with some help, he recalled that, in his nightmare, he had balled up his fists and was swinging wildly.

What was he trying to hit?

"I was at work," he said, closing his eyes and recalling his many years as a journeyman printer. There were long hours, and some [*1103] of his bosses didn't appreciate having a Mexican American working there. "I was swinging at them, trying to hit back."

"You were trying to hit your boss?" In real life, so far as I knew, Grandad was a quiet man who never took a poke at anyone.
"I was angry because there was so much work. And I didn't like it. But I was going to do it. I could take it. I could take whatever punches they were throwing." His eyes were still shut and he was still throwing simulated counter-punches.

"So you fought back?"

"Yes. I fought back. I fought back by never quitting, never saying I couldn't do it all, never walking away."

"And are you glad you stayed with it?"

"Well, it didn't make me a better person." Then he opened his eyes. "Maybe that's why today I need so much guidance."

**FOOTNOTE-1:**


n3 The ordinance states:

No gas powered blower shall be used within 500 feet of a residence at any time. Both the user of such a blower as well as the individual who contracted for the services of the user, if any, shall be subject to the requirements of and penalty provisions for this ordinance. Violation of the provisions of this subsection shall be punishable as an infraction in an amount not to exceed One Hundred Dollars ($100.00) . . . .


n4 See id.

n5 See infra note 18 and accompanying text (noting gardener's average monthly income).


n7 See infra notes 41-47 and accompanying text (discussing proponents' view that ban was good for environment and gardeners' health, and gardeners' opposition to that view).


n11 See, e.g., Medina, supra note 9, at 1.


n13 See id.

n14 See, e.g., Cameron, supra note 10, at 1099 (noting risks of creating permanent Latina/o underclass); see also Maria L. Ontiveros, Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law, 33 U.C. Davis L. Rev. 1057 (2000) (noting that "the labor movement is finally beginning to understand the importance of organizing immigrant workers and of identity issues in organizing"). Mary Romero has studied this underclass among Chicanas who serve as domestic housekeepers in the Southwest. See generally Romero, supra note 8 (discussing Chicanas employed in domestic service and interaction of race, gender, and class).

n15 See, e.g., Ferguson, supra note 12, at 46A.

n16 See, e.g., Daniel Yi, Leaf Blower Users Hail Loophole, L.A. Times, Aug. 2, 1998, at B1 (quoting gardener Jose Perez, who stated, "The blower takes less time to get the job done, about 20 minutes. If I used a rake, it would take me three to four hours.").

n17 See Medina, supra note 9, at 1 (remarks of gardener Arnaldo Castillo); Boxall, supra note 9, at A1 (remarks of gardener Ramon Reyes).

n18 See Medina, supra note 9, at 1 (remarks of gardener Solomon Sanchez).

n19 See, e.g., David Rieff, Los Angeles: Capital of the Third World 105 (1991) ("Even an activity as recreational as gardening has been transformed, in L.A., into one that requires the services of a gardener. But that was no problem. Los Angeles is now a place where a middle-class person can live in a First World way for Third World prices, at least for domestic help.").

n20 See Boxall, supra note 9, at A1 (discussing experience of longtime Lakewood, California, resident and author Don Waldie).

n21 See, e.g., Wilgoren, supra note 6, at A1. Among the mostly affluent communities of Southern California that adopted such restrictions were Beverly Hills, Claremont, Dana Point, Laguna Beach, Lomita, Palos Verdes Estates, Santa Monica, and South Pasadena. See id.

n22 See id. at A1.


n25 See, e.g., Hiestand, supra note 23, at N1 (discussing association's successful argument that ban on gas-powered blowers did not include methanol powered blowers). Hiestand quoted one gardener opposed to the ban as saying: "Finally, justice prevails. We feel this is going to be very problematic for the city because they don't know if we have one methanol leaf blower out there or 10,000." Id. (quoting remarks of Alvaro Huerta).

n26 See, e.g., Jeff Leeds, Possible Leaf Blower Ban Solution Offered, L.A. Times, Aug. 18, 1998, at B3 (noting remarks of Adrian Alvarez on manufacturer's untested electric leaf blower alternative that; "If it's going to be battery-powered, if it's going to be solar-powered, we have no problem that. Just don't offer us a broom and a rake. That's a cruel joke.").

n27 Peter Graves played a secret agent on the 1960s drama Mission: Impossible.

n28 Wilgoren, supra note 6, at A1 (quoting Peter Graves).

n29 Meredith Baxter played a suburban mom in the 1980s situation comedy Family Ties.
n30 Wilgoren, supra note 6, at A1 (quoting Meredith Baxter); see also Patrick McGreevy, Leaf-Blower Ban OK'd on 9-6 Vote, L.A. Daily News, Jan. 7, 1998, at N1. McGreevy quoted a proponent of the ban: "We're all victims of this machine and most especially the gardeners who have to suffer from the use of it." Id. (quoting Peter Graves).

n31 Wilgoren, supra note 6, at A1 (quoting Council President John Ferraro).

n32 Julie Newmar played Catwoman in the 1960s TV spoof Batman.

n33 Orlov, supra note 24, at N1 (quoting Julie Newmar).

n34 Chu, supra note 24, at B1 (quoting Julie Newmar).


n36 Chu, supra note 24, at B1 ("We recognize that leaf-blowers make noise. We have never denied that.").

n37 Id.


n39 Carolyne Zinko, Leaf Blower Bill Sputters, Dies as Gavel Falls, S.F. Chron., Sept. 2, 1998, at A13 (quoting remarks of state Senator Polanco); see also Jill Leovy, Leaf Blower Ban Backers Gird to Fight Bill, L.A. Times, Feb. 21, 1998, at B1 (quoting remarks of Polanco aide Bill Mabie: "If the government wanted to regulate oil refineries, they would probably give them five years to comply with the new rules. But when you are talking about a poor gardener, they just ban their tools.").

n40 See Los Angeles, Cal. Ordinance 161,574 (Sept. 8, 1989), codified at Los Angeles, Cal., Code § 112.05 (1986).

n41 Orlov, supra note 24, at N1 (quoting Adrian Alvarez).


n44 See Leovy, supra note 38, at B1.

n45 See Leeds, supra note 26, at B3.

n46 See Zinko, supra note 39, at A13 (citing Los Altos, Piedmont, and Santa Barbara as examples).

n47 See id.

n48 See, e.g., Judge Upholds Ban on Leaf Blowers, L.A. Times, Mar. 17, 1998, at B4 (reporting denial of request for writ of mandate). According to Judge Robert H. O'Brien: "The record indicates that the application of the regulation to gas-powered leaf blowers has a logical and reasonable basis. There is no denial of equal protection under the law." Id.

n49 See Los Angeles, Cal., Code § 112.04(a) (1986) (banning use of "any lawn mower, backpack blower, lawn edger, riding tractor, or any other machinery" between hours of 10:00 p.m. and 7:00 a.m.).


n51 See Hiestand, supra note 23, at N1.

n52 See id. (quoting Municipal Court Judge Elizabeth Allen White, who ruled that, because law was open to interpretation, she was obligated to adopt interpretation "more favorable to the offender"); see also George A. Martinez, Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980, 27 U.C. Davis L. Rev. 555 (1994) (analyzing how indeterminacy may be used either for or against Latinas/os at discretion of decision maker).

n53 See Hiestand, supra note 23, at N1.

n54 For an introduction to Latina/o Critical Theory, see Francisco Valdes, Foreword: Under Construction -- LatCrit Consciousness, Community, and Theory,

For a similar sentiment, see Boxall, supra note 9, at A1 (quoting Lakewood, California, resident Don Waldie, commenting on mowing lawns as child).

An especially poignant moment during the Second Latino/a Critical Theory Conference, which was held in San Antonio, came when Professor Olga Moya of Texas Tech University School was introduced as a panelist. Professor Moya was presented with the gift of un cortito, which was intended as a symbol of her childhood as a farm worker and as a child a family of farm workers. She was so moved by the unpleasant memory that she was momentarily unable to speak.

See, e.g., Ferriss & Sandoval, supra note 1, at 206.


Boxall, supra note 9, at A1 (quoting University of Southern California Sociology Professor Pierrette Hondagneu-Sotelo).


McGreevy, supra note 30, at N1 (quoting Council Member Goldberg).

See id. (quoting Council Member Miscikowski).

See Wilgoren, supra note 6, at A1 (quoting remarks of ban opponent and Council Member Rudy Svorinich: "While it's a qualify of life issue to some people in the city, it's a livelihood issue for other people in the city.").
FORGING OUR IDENTITY: TRANSFORMATIVE RESISTANCE IN THE AREAS OF WORK, CLASS, AND THE LAW: The Tyrannies of Silence of the Untenured Professors of Color

Pamela J. Smith *

BIO:

* Assistant Professor, Boston College Law School; J.D., magna cum laude, Tulane University College of Law; M.B.A., with honors, University of St. Thomas; B.S. magna cum laude, DeVry Institute of Technology. After graduating from law school in 1992, Professor Smith clerked for the Honorable Robert H. McWilliams of the United States Court of Appeals for the Tenth Circuit, sitting in Denver, Colorado. Thereafter, she became associated with the Dallas, Texas, law firm of Thompson & Knight, where she practiced civil litigation, intellectual property, and computer law. She became affiliated with Boston College Law School as an Assistant Professor of Law in 1995. In 1998, she became a Visiting Law Fellow at St. Hilda's College of Oxford University.

This Essay is part of a much larger project on my experiences as a new African American female professor at Boston College Law School ("BCLS"). See generally Pamela J. Smith, Failing to Mentor Sapphire, 10 UCLA Women's L.J. (forthcoming Winter 2000) $ (hereinafter Smith, Failing to Mentor Sapphire$ ); Pamela J. Smith, Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender & Authority, 6 Wm. & Mary J. Gender & L. 53 (1999) $ (hereinafter Smith, Teaching the Retrenchment Generation$ ).

I would like to thank Isabelle Gunning (Southwestern University School of Law), Margaret Chon (Seattle University School of Law), Joyce Hughes (Northwestern School of Law), Wendy Brown Scott (Tulane University School of Law), Elaine Shoben (University of Illinois College of Law), Raymond T. Diamond (Tulane University School of Law), Derrick A. Bell, Jr., Pamela Edwards (CUNY School of Law), and many others for their insight and support.

SUMMARY: ... Untenured professors of color sought sanctuary one evening so that in the company of each other, we could reveal our individual experiences. ... Part II discusses the price of silence, especially for professors of color on the tenure track. ... Thus, if tenure is the goal and professors of color remain silent because they believe in the tenuous promise of tenure, not only is legal academia losing much needed voices about the experiences of tenure track faculty of color, but we may ultimately lose these voices forever due to the damage done to them on the tenure track. ... Like Professor Anita Hill, many professors of color must overcome this learned silence because "there is no healing in silence." The silence professors of color are experiencing is also impinging on our psychic space, using up valuable energy and resources we need to create scholarship and to advocate for ourselves and for others. ... Silence will not be enough to remove the tenure vulnerability those of us that are on the tenure track experience. ... Granted, tenure vulnerability appears to demand complete acquiescence to the tyrannies of silence. ...
my essay because it was in this meeting of tenure vulnerable people of color that I found the most safety, but also the most fear.

But for an epiphany in 1998, I would not have been willing to risk telling my experience at LatCrit IV. I would have been too afraid to share. I would have perhaps been afraid to be in the company of people talking about their not-so-good experiences. It appears that many people who were at the evening meeting of untenured people of color were also afraid, to varying degrees. But as the meeting took shape, we all realized individually and as a group that it was time to share, at least some of our experiences. So, we went around the circle, with each person speaking of his or her tales of woe. Each person had the opportunity to move beyond the surface language that fear demands. We had to move beyond the "It's okay," "I'm fine," "It's all good," and "I'm having no problems" language of fearful strangers on the tenure track.

It was at this meeting that we all discovered that we had several things in common despite the fact that we were of different ethnicities and ages, and worked at different schools and in different regions of the country. We learned that we all faced race-and gender-based biases, though perhaps in different ways. Negative evaluations seemed to be a common strand. Excessive new course preparations another. Pure race and gender hostility from students and colleagues proved to be another common denominator. Failure to credit critical race theory as viable scholarship another. Tense encounters with White colleagues and administrators was also another common theme. The failure of senior White colleagues and administrators to respond in a protective or affirming way in the face of student or colleague hostility was another. There were many other common experiences.

The most common experience, however, was that each of us had thought, at one point, that we were the only ones having negative encounters. We also thought that others were having a much better time because they were at better schools or because they had other colleagues of color at their schools. As we heard each others' trials and tribulations, we all kept saying things like, "but I thought you were doing well" or "I though you were at a good school and these types of things did not happen there."

Many, if not all, of us, are among the most talented young legal scholars in legal academia, but our home institutions disrespected, devalued and denigrated our contributions to legal academia. Unfortunately, racial hostility was occurring in these environments whether we spoke of it or not and whether we were afraid or not.

As we listened to one sad tale after another, several questions remained that many of us could not answer: Why hadn't we told anyone? Why did each of us feel that we were alone? Why were we so ashamed of our experiences? Why were we so afraid to speak? We did not find many answers to these questions that evening and I do not have definitive answers now. I do, however, argue in this Essay that we were silenced, feeling alone and feeling ashamed because of the tyrannies of silence, which demand silence and fear in exchange for the tenuous promise of tenure at some point in the future. As a result of our fear of not getting tenure and of being seen as problematic among our peers of color, many of us succumbed to the tyrannies of silence. Individually we learned the heartaches that go along with fear, the isolation that is its companion. The attendant belief that it was you rather than your institution. The attendant demand that one has to remain emotionless and forgiving in the face of continuous racial aggressions. Together we learned that it was not us, that we were not alone and that the very institutions that were harming us were the same ones depending on our silence. Yet, beyond our group that evening, many of us remained silent, unable to articulate our fears to other junior or senior professors of color.

This Essay attempts to bridge this silence by analyzing the silence and the barrier that tenure requires of those that are tenure vulnerable. Part I of this Essay discusses the risks of speaking if one is tenure vulnerable and explores how other factors exacerbate tenure vulnerability. Part II discusses the price of silence, especially for professors of color on the tenure track. Part III discusses breaking one's silence by changing the audience from one's institution to external environments through scholarship. Part IV, and the conclusion of this Essay, discusses how senior colleagues of color can help junior colleagues of color break the tyrannies of silence.

I will not identify any of the participants at the evening LatCrit IV meeting because unless we each choose to speak and tell our own stories, no one else should force that decision upon us. Despite this, in this Essay on fear and silencing, I write to encourage people of color to write about the unique trials we continue to face in legal academia. We need to know that we are not alone. As professors of color face trials and tribulations in academia, one of the most difficult challenges we face is telling others about it. This has most certainly been one of my most difficult challenges in trying to live with what happened to me at Boston College Law School ("BCLS") since I began teaching in 1995. I experienced serial racial hate-mail, a racial flyer, a racial meeting, institutional nonresponsiveness and a host of other behavior that
has greatly affected my ability and desire to stay in legal academia. Yet, I remained silent. Unfortunately, my silence did not protect me. In fact, it may have had the opposite effect, making me more vulnerable. The risks of speaking in the face of race and gender vulnerability are discussed below.

1. Risking Speaking

Breaking the silence for me was analogous to breaking the silence in any abusive relationship. Before one can speak of one's experiences, one must first withstand the denial, the fear, the anger, the cover-ups, and the emotional black mail that is part and parcel of the express and implied warning "don't air our dirty laundry." Further, before one can speak, one must balance the risks, that is, the rewards one may obtain from one's institution if one remains silent versus the punishment that one may receive from one's institution if one speaks. n7 This part of the essay discusses the risks of remaining silent versus the risks of speaking in the face of fear.

I have struggled over the last couple of years trying to figure out why I received so much negative student attention and hostility and so little institutional support. Not only was I at a "good" school, I had Black colleagues. I was not a pioneer Black woman. Black women had been at BCLS since the late 1970s. n8 Yet I experienced racial hostility beyond belief. For most of my four years in legal academia, I remained silent despite racially hostile treatment.

It was difficult to decide to tell the story of the racial aggressions I experienced. After all, I had to overcome the institutional rhetoric that somehow I was at fault; that somehow I was really doing things to students to cause their hostility; that somehow I was to blame for negative evaluations, racial hate-mail and other negative encounters; and that I was too different and that my differences caused the student hostility. I had to overcome the fear of stigma -- that others in legal academia outside of my institution would believe that I was incompetent due to extreme negative student evaluations. n9

I had to overcome the belief that I could control the racism and sexism that was in peoples' hearts. I had to overcome the belief that if I could just change this or that, I would not face hostility, or at least not escalating hostility. Perhaps most importantly, I, like anyone on the tenure track, had to overcome the fear that by telling my tale I was risking any opportunity I had to obtain tenure at BCLS or anywhere else. But as I continued to experience hostility, I realized that each incident of hostility increased my tenure vulnerability.

Further, the longer I was silent about the experiences, the more vulnerable I became within my institution and within legal academia as a whole. And, given the fact that I am Black and female, I was tenure vulnerable when I started. I understand now, given my experience at BCLS that "just as one often must pay a penalty merely for being a Black woman, so too one may incur sanctions or penalties as an untenured professor." n10 Thus, for women of color, the penalties for existing in legal academia are multifaceted. You are penalized because you are of color, because you are female, and because you are tenure vulnerable. Yet, as I learned at the LatCrit IV meeting of untenured professors of color, gender is rarely a true point of privilege for men of color. They too are vulnerable because of their gender, though in different ways. [*1111]

My race and gender vulnerability will never change. As I contemplated whether to speak and write about my experience, I hoped that I could minimize or diminish my tenure vulnerability. Perhaps I could just wait and speak after attaining tenure. But, when my nonacademic friends asked me "what will happen if you write about this experience," I realized that my race and gender caused and in fact increased my tenure vulnerability. Accordingly, I could not wholly diminish my tenure vulnerability unless I suddenly became another race and another gender. Further, all of my negative experiences individually and collectively made me that much more tenure vulnerable. Each negative action was in effect a no vote on my ability to obtain tenure at BCLS in the future. At least one of the negative incidents occurred within six months of my arrival at BCLS. Being called a "bitch" by a senior colleague and administrator does everything to exacerbate one's tenure vulnerability. n11

When I realized that I had been and would continue to be tenure vulnerable, I was able to articulate an answer to the question, "what will happen if you write about this experience?" I answered:

What can they do to me that is bad that has not already been done? Not protect me from a racist flyer and racist hate mail? Done. n12 Attempt to allow a White male visitor to compete with my core bread and butter Computer Law class in the same semester? Done. Not provide me funding (or delay funding) for all, opportunities to interact with the main university? Done. Not provide me institutional support, despite numerous requests? Done. Keep me isolated from many, if not all, opportunities to interact with the main university? Done. Not provide me funding (or delay funding) for scholarship, conferences and research assistants? Done. Put me in the smallest, most inaccessible office in the building? Done. Ignore memoranda and e-mails...
sent on a whole host of topics, especially those on race and gender hypersensitivity and hypercriticality that are revealed in negative student evaluations? Done. Attempt to postpone my research leave after everyone else who was eligible? Done. Refuse to pay for summer research assistance? Done. Delay funding for presentations where I am speaking on works-in-progress or on my areas of teaching expertise? Done. It has all been done and negative things keep happening!

Thus, regardless of whether I speak or not, I am already tenure vulnerable due to all of these negative experiences and more. Indeed, throughout my four years at BCLS, I have already borne many of the risks associated with being Black, female, and tenure vulnerable. n13 The combination of my Blackness and femaleness allowed students and colleagues to engage in hostile activities. n14 These activities and my resulting silence increased rather than diminished my tenure vulnerability.

Yet, I remained silent. Clearly, my silence had not protected me from any of the above negative activities. It had not prevented any of the above negative actions from occurring or from reoccurring. My continuing silence did not cause the students or the institution to treat me as if I were a valuable member of the [*1113] community. It did not decrease my risks for future negative treatment. My silence did not make it likely that I would receive tenure.

Silence helped the perpetrators. It did not help me. Nor, do I imagine, has it helped any professor of color that has experienced racial denigration.

Despite the host of negative actions that have already occurred, there is, of course, that last negative action. That is, BCLS could ultimately deny me tenure. n15 Perhaps, in spite of all of the negative activities that have already occurred, there is a tenuous promise of tenure, which I may obtain if I just remain silent. At some point one has to bear public witness to the continuous racial micro-aggressions, despite of or because of the risks. Certainly, I want tenure, but not if the price is my continued fear and silence in the face of continuous racial aggressions and institutional disrespect. We each must make this choice: continued acquiescence to the tyrannies of silence or recognize the risks of speaking and speaking anyway. At least on this point and for now, I choose to speak.

While I do not desire the visibility that speaking requires, I accept that visibility is part and parcel of speaking truthfully about the past. I realize that:

In the cause of silence, each of us draws the face of her own fear -- fear of contempt, of censure, or some judgment, or recognition, of challenge, or annihilation. But most of all, I think, we fear the visibility without which we cannot truly live. Within this country where racial difference creates a constant, if unspoken, distortion of vision, Black women have on one hand always been highly visible, and so, on the other hand, have been rendered invisible through the depersonalization of racism. Even within the women's movement, we have had to fight, and still do, for that very visibility which also renders us most vulnerable, our Blackness. For to survive in the mouth of this dragon we call america, we have had to learn this first and most vital lesson -- that we were never meant to survive. Not as human beings. And neither were most of you . . . , Black or not. And that visibility which makes us most vulnerable is that which also is the [*1114] source of our greatest strength. Because the machine will try to grind you into dust anyway, whether or not we speak. We can sit in our corners mute forever, while our sisters and our selves are wasted, while our children are distorted and destroyed, while our earth is poisoned; we can sit in our free corners mute as bottles, and we will still be no less afraid. n16

This last statement is particularly true for me. Although I remained silent about the racial aggressions that occurred, I was still afraid. I hoped that somehow if I was silent enough or good enough bad behavior would stop. It never did. Further, by being silent I had lost sight of the one immutable truth in academia. Because I am a Black woman, I am tenure vulnerable. Silence made me more rather than less vulnerable. Because we are professors of color we are tenure vulnerable. Silence, fear, and invisibility do not change that fact. While breaking the silence about my negative experiences adds to my vulnerabilities, speaking does not create my vulnerabilities. My vulnerabilities exist whether I speak or not.

Perhaps it is true that "the first goal for Black women professors must be to achieve tenure." n17 Many of us try to believe that on the other side of tenure there is freedom from silence and fear. I do not believe a safe harbor exists.

As I was seduced into continuing to exchange my silence for the tenuous hope of tenure, I realized that the bargain was a farce. Given the constant threats that implied that I would not get tenure if I did this or because I did or did not do that, successfully obtaining tenure was uncertain when I began teaching at BCLS.

This uncertainty increased the first time my tenure was expressly or impliedly threatened, and each of the above activities was an express or implied threat to my tenure. One simply cannot experience administrative refusals to pay for a research assistant or fund travel to present works-in-progress and not realize that the institution is not investing a great deal of time or
resources toward one's future tenure success. One cannot ignore the institution's refusal to discount negative student evaluations [*1115] when they are preceded by a racial flyer, serial racial hate-mail, and a racial meeting, without realizing that the institution is not willing to provide institutional support or protection to ensure that tenure is possible. In light of these events, and many more, the tenuous promise of tenure may not be enough to remain silent in the face of constant and continuous institutional denigration. Thus, if tenure is the goal and professors of color remain silent because they believe in the tenuous promise of tenure, not only is legal academia losing much needed voices about the experiences of tenure track faculty of color, but we may ultimately lose these voices forever due to the damage done to them on the tenure track.

In essence, the promise of tenure may not be enough for some professors of color to stay in academia. Collectively, we must begin to ask: how many voices have we lost due to the uneven and silencing bargain that being on the tenure track requires? How many more voices are we willing to lose?

In order to value the voices being lost due to the silencing of those on the tenure track, the ability to speak must be protected and affirmed continuously despite the risks. We must begin to value speaking as much as we value tenure and the other advantages that are attendant upon being in academia. As we begin to value speaking, our resistance to the fear will increase. After all, we must resist the fear of speaking and the fear of visibility that speaking requires.

Further, if one remains silent in the face of institutional racism and sexism, that is, statements, actions, and instances of nonresponsiveness or inaction by individual administrators, then one is impliedly acquiescing to private acts of racial and gendered violence. Perhaps in my institution people were emboldened to say and do racist and sexist things because of the disparities in power. Given their position of power as a dean, senior colleague, or White student, and my position as a very new, untenured, but tenure track Black woman, perhaps they were relatively confident and comfortable in the belief that, though I was constantly and readily threatened, I would remain silent so as not to place my tenure at risk. n18 Accordingly, acts of racism and sexism would remain a private secret between the me and the school rather than be public knowledge as it should. Silence could only exist if I participated in it. Two decisions had to be made regarding whether racist incidents would be kept private. One was made by the perpetrator. The other was made by me. By keeping private acts of racial hostility secret, people of color will continue to pay the price of silence, above and beyond tenure. This price is discussed below.

II. Recognizing The Price of Silence

Silence has several prices that those that are afraid must pay. One price is that it keeps those in need isolated from those that can provide solace and affirmation.

By keeping private acts of racial violence secret, my silence isolated me from the very people that could have understood my story, provided me with strategies to survive and succeed at BCLS, and lent me a sympathetic ear. But, based on past experiences, especially as an academically successful law student, I had learned that Black people can be as brutal, if not more so, to Blacks that do not fit in. n19 I am well aware of some of the isms that separate professors of color, for example, prestige, n20 ethnic bias, socio-economic class status preference, n21 sexism, and homophobia, to name a few. I know how difficult it is to form true coalitions [*1117] when fear is a cementing tool. And since I was experiencing constant assaults within my institution, I responded in a self-protective way. I assumed I would not "fit in." After all, I was experiencing bad things at this "good school" with a critical mass of people of color and well-known rhetoric for community and equality. If the rhetoric of community and equality was believed, then surely I was the problem. Hence, when I began to experience blatant racist behavior, I felt I had no place to turn, no where to go, and no one to confide in. One of the prices of acquiescing to institutional silencing is isolation.

Perhaps if I had not expected positive treatment and equality at BCLS, I would not have internalized the hatred when bad incidents happened. Perhaps I would have felt safe enough to attend the 1996 Northeast People of Conference Color, held in Boston, which discussed the trials and tribulations of professors of color. n22 But at that time in 1996, I still did not believe that the ugly things were happening and still hoped that they would not continue. Most of the incidents were too fresh to discuss. n23 Further, I felt too unsafe to seek safety in the bosom of other professors of color. Unfortunately, silence breeds more fear, which breeds more silence. In essence, a vicious circle of fear and silence results. This conclusion is what we must communicate to novice professors of color. We must tell them to learn to speak vigorously throughout their entire academic careers. Silence is a seductive enemy.

As I look back at the consistent racial and gendered assaults that I experienced at BCLS, I continue to ask myself why I did not figure out sooner that my
environment was a racialized one. I can only say that I wanted to believe and did believe the rhetoric that there was a community, that people at BCLS believed in and practiced equality, and that there would be and was a level playing field. I wanted to believe that in a racialized country, city and state, I had found a racial oasis. I found it difficult to believe that I had been so wrong. In the face of racial incidents, I did not question my initial decision, I questioned my conclusion. My silence prevented me from obtaining valuable information that could have affirmed the conclusion that the environment was racial and could have perhaps given me strategies to succeed and excel. The longer I remained silent, the easier it was to believe that my initial hope that BCLS was a safe environment was correct and that my new conclusions were inaccurate. Thus, one of the inevitable prices of silence is self-doubt. Speaking allows one to receive affirmation that racism is occurring and is not controlled by one's individual actions. Silence allows one to cling to unrealistic hopes that institutions are not racialistic at their core.

While my experience defied my initial and continued hopes and beliefs that BCLS was a safe environment, I clung to the hopes and beliefs nonetheless. Why did I believe this? I do not know. In fact, I have yet to develop a satisfactory answer for myself when I ponder why I allowed so many racial things to happen without quitting or walking away, why I continued to believe that this could not be happening at this good school, and that somehow if I just informed the right person in the right way all of the ugliness would go away. One author's answer resonates with me, however. He opined that:

As a defense we look at life through our rose-colored glasses, rationalizing and pretending that things are not so bad after all, but the day after day -- tragedy after tragedy strikes and confuses us, our pretense fails to aid or dispel the nagging feeling that we cannot have security in an insecure society, particularly when one belongs to an insecure caste within this larger society. n24

Silence affirms the myth of security and safety in racialized environments. Silence affirms the myth that if one is experiencing racialized hostility, it is you rather than the system. After all, if the problem of racial hostility is not systemic, then there are safe or safer places to work. If there are safer places to work, then surely the horrible things that are happening to you in what is perceived as a safer place are not happening, right? Wrong. The LatCrit IV evening meeting of untenured professors of color shattered that myth. Many of us were at schools that could be consid [*1119] ered safer places. We were at good schools, most of which are highly ranked. Yet we were experiencing racial hostility. As I listened to these wonderful untenured professors of color that are well-respected scholars and that are having problems at "good" schools (by rank or reputation as having collegial environments), I realized that many of us are fooling ourselves. We still had on those rose colored glasses that allowed us to believe, despite our experiences, the myth of security and safety in racialized environments. One of the prices of silence, therefore, is this continued belief and a requisite inability to critique the system.

Silence also takes a very personal toll. Certainly, I am understandably angry and bitter at the racialistic treatment I have suffered at the hands of students and colleagues at BCLS. My years of fear and silence impacted my ability to write and speak in general. The racism I experienced silenced my scholarly voice for several years. Until I decided to speak about my experiences, I found it difficult to speak in scholarship at all. In fact, the fear caused me to edit every word in every article, thereby taking me much longer to complete scholarship that would help my tenure bid. I still find it difficult to finish scholarship, because I worry whether it will be harshly critiqued and criticized. It took me years to learn how to speak freely when I was growing up as a young woman. I am now relearning that skill. It took me less time to remember that I had a right to better treatment, that I deserved and was worthy of equal treatment, and that I was worthy and deserving of publications and tenure.

The fear, silence, and negative treatment have taken a psychic, emotional and physical toll on my overall health. Perhaps, then, bitter is not strong enough a word to describe how I feel about the negative treatment. The intensity of the following excerpt resonates with me on the days I am most angry, especially as I revisit instances of racist and sexist micro-aggression I repressed.

Bitter am I? . . . That is mild. This affair has cemented my . . . acquired cynicism, robbing me of most of my innate black hope for true integration . . . . It has banished me to nightmarish bouts of sullenness. It has made me weld on a mask, censor every word, rethink every thought. It has put a face on the evil that no one wants to acknowledge is within them. It has made [*1120] me mistrust people, white and black. This battle has made me hate. . . . n25

I know, however, that bitterness and hate destroys you and does nothing to provide the strength needed to survive and succeed as people of color that live and work in a racialistic and disaffirming world. I have learned that lesson slowly as I healed. Through continuous healing, I have developed the courage to set
forth my experience as a 1L Property Professor, who is African American and female. n26

I have found some of that courage in the writings of other Black women academics. n27 My courage was solidified as I talked over strategies to survive and excel with other women of color at the University of Iowa's Critical Race Feminism conference in November 1998. n28 In unburdening my experience when initially talking to these women, I felt stronger and less afraid. It was also the first time since I began teaching in 1995 that someone told [*1121] me that my emotional and mental stress was rational and normal given the intensity, consistency, and ugliness of my experiences as a new law professor. And I heard them. My desire to reach out to others was solidified when I met with other tenure vulnerable professors of color at LatCrit IV. It was at this conference that I realized that the increasing hostility that is pushing many talented professors of color out of legal academia was not just attacking me, a Black woman. It was attacking Black men, Asian men, White women, Hispanic women, and many others all over the country. It was also silencing all of us.

I also learned that the fear of negative "tenure consequences" was silencing most, if not all, of the untenured professors of color who gathered at that evening meeting at LatCrit IV. Even when we gathered together as tenure vulnerable professors of color, we were still afraid. We spoke in hushed tones, gathered closely together at a conference where we were supposed to be safe. I am sure many of us wondered whether we could trust each other and whether it was safe to speak of our pain in public. Some of us spoke hesitatingly of institutions changing standards for tenure; administrators constantly forcing us to do new course preparations and; racial hostility from students; being afraid that we would be denied tenure. We spoke of the lack of mentoring we were receiving within our institutions, often despite the fact that there were other professors of color within our institutions. n29 We spoke of consistent refusals to acknowledge our efforts in many regards and how our efforts were either ignored or criticized. We spoke of our silence. This silence and silencing was the one true thing that we shared, despite different ethnicities, different institutions, different regions of the country, different marital statuses, different genders, different linguistic abilities, different sexualities, different areas of scholarship, and different circles of academic friends. [*1122]

Regardless of our ethnic difference, people of color have a history of being silent in the face of rabid racism. This apparently has not changed today despite the fact that many of us have the accoutrements of success that were denied our ancestors. I understand this fear personally. My reticence and fear of telling my story is perhaps similar to historical silence surrounding Black women and the painful trials and tribulations Black women face. As one commentator stated of Anita Hill, who was forced to tell her story of sexual harassment at the hands of now Justice Clarence Thomas:

The magnitude of her courage to tell her story is revealed most effectively when viewed against the historical reluctance of Black women to draw attention to their inner lives. Because of the interplay of racial animosity, class tensions, gender role differentiation, and regional economic variations, Black women as a rule developed a politics of silence and adhered to a cult of secrecy. They cultivated a culture of dissemblance to protect the sanctity of the inner aspects of their lives. The dynamics of dissemblance involved creating the appearance of disclosure, or openness about themselves and their feelings, while actually remaining enigmatic. Only with secrecy, thus achieving a self-imposed invisibility, could ordinary Black women acquire the psychic space and gather the resources needed to hold their own in their often one-sided and mismatched struggle to resist oppression. n30

Like Professor Anita Hill, many professors of color must overcome this learned silence because "there is no healing in silence." n31 The silence professors of color are experiencing is also imping on our psychic space, using up valuable energy and resources we need to create scholarship and to advocate for ourselves and for others. In fact, by remaining silent, people of color can never expect to be whole. Indeed, "you're never really a whole person if you remain silent, because there is always one little piece inside you that wants to be spoken out." n32 [*1123]

Silence also does not benefit the victims of racial microaggressions. It only benefits the perpetrators. Colleagues and administrators that participate in the private acts of racial wounding or that allow the racial wounding to occur need to be internally and externally held responsible for their actions and inaction. n33 The institution of legal academia needs to be held responsible for failing to provide a safer environment for people of color. It is the hostile environments in many law schools that is causing legal academia to be a revolving door for professors of color.

Without affirmatively exposing private acts of racial wounding, the force of express and implied race/sex discrimination is borne by the silent victims of the behavior, alone. By informing others [*1124] about
the incidents that I experienced and that others may experience, information not previously known is shared. Further, my experience stands to affirm the experiences of others.

Furthermore, if professors of color do not affirmatively expose private acts of racial wounding, these private acts of racial disrespect eventually become public in numerous insidious and indirect ways. People of color must realize that the effects of private acts of racist and sexist micro-aggressions become public as the professor of color experiences more and more disrespect that is noticeable by others within the environment. Students soon realize who is vulnerable and who they can attack through negative student evaluations, racial meetings, hate mail, racial flyers, and other hostile encounters inside and outside of the classroom. Colleagues and administrators take notice of who is not being invited to sit on important committees, who is not being invited to give colloquia, and whose accomplishments are lauded and whose are ignored. As a result, fewer positive benefits flow to the person others perceive as institutionally vulnerable.

As my experience shows, the negative treatment only escalates. Funding for research assistant assistance and travel is delayed or denied. One is asked to teach a new course that is not within one's prior preparation of scholarship. Memoranda asking for institutional support and other resources are simply ignored. Administrators began to expressly justify negative student evaluations by saying that one is too different or that negative teaching evaluations are a sign of poor teaching made worse by race and gender. Visitors are allowed to compete for a small number of students for core seminars like Computer Law. Other important resources that scholars need to write and give presentations are denied, delayed or funneled elsewhere. In essence, the disrespect that is shown to a professor of color that gave rise to the private acts of racial wounding spills over into the entire institution, without the professor of color having any control over what may then be escalating disrespect, devaluation and denigration. Private acts of racial wounding ultimately, therefore, become public acts of racial wounding.

By deciding to be the one to affirmatively disclose these private acts of racial wounding, a professor of color may accomplish necessary institutional reform, not only in his or her school, but in legal academia as a whole. Perhaps with this new information, untenured professors of color can bring internal and external pressure on colleagues and administrators, such that private acts of racial wounding are stopped, uninformed hunches of incompetence are informed, biases revealed, and negative evaluations discounted or eliminated. In writing and publishing this Essay, therefore, I heed the advice of Derrick Bell, who said long ago that we "must learn that silent suffering does not beget reform, and the minorities who complain of unfair treatment are sounding an alarm for all." n34

By telling of our lived experiences with racial wounding, we do a public service by warning other professors of color that in many respects, legal academia remains hostile to the successes of some professors of color.

Personally, while my Essay setting forth my experience at BCLS attempts to sound an alarm for others, and purports to inform external and internal colleagues, it is also an opportunity for me to heal and to overcome the embarrassment and silence that resulted because I faced escalating institutional hostility. It is important for me to speak because I benefit. "I have come to believe over and over again that what is most important to me must be spoken, made verbal and shared, even at the risk of having it bruised or misunderstood. That the speaking profits me. . . ." n35 I am, therefore, the primary beneficiary of my renewed voice.

Writing about my experience is also an opportunity for me to encourage other people of color to speak about their experiences. Speaking is a powerful weapon against institutional racism and sexism, as well as intentional acts of institutional silencing. Speaking also empowers us as individuals and as a group. We must learn to speak in spite of and perhaps because of our fear.

We can learn to work and speak when we are afraid in the same way we have learned to work and speak when we are tired. For we have been socialized to respect fear more than our own needs for language and definition, and while we wait in silence for that final luxury of fearlessness, the weight of that silence will choke us. n36

While silence benefits the perpetrators of racial micro-aggressions, speaking profits us. Speaking allows us to aggressively resist the fear that the tyrannies of silence demand.

Moreover, breaking the silence allows those that are silenced or are being silenced to choose who their audience will be, based on how receptive the audience will be and how transformative they expect the message will be. After all, speaking to an audience that is not willing to hear your message is just as silencing as not speaking at all.

III. Changing Your Audience to Break the Silence

[^1125]:

[^1126]:

[^1125]
The longer I was silent, especially among my own people, that is, professors of color around the country, the more embarrassed I became at what had happened to me; the more I began to believe that perhaps I could change myself and the hostility would go away; the more I began to believe that somehow I had caused this racist and sexist treatment; the more I continued to speak solely to hostile and nonresponsive institutional actors. Thus, the more I became oppressed, the more I continued to speak solely to the institution. A host of e-mails and memoranda are a testament to the fact that over a four-year time period, I continued to communicate exclusively with the BCLS administration and deans. They rarely, if ever, responded to my requests for institutional support, for substantive committees, and for recognition that I was facing hostility from students because I am a Black woman, among many other things. If the BCLS administration responded to my requests, they denied that race and gender were relevant to the hostility I was experiencing. They argued that there had to be some nonracial and nongendered explanation for the hostility.

Yet, to speak only to people who require an unsanitized, nonracial, and nongendered explanation for negative evaluations and student hostility is debilitating. Not only does it leave you exposed to further denigration, but eventually your voice, that is, your very ability to speak, is co-opted by those who do not want to listen and do not want to hear that race and gender infect how students, colleagues, and administrators perceive, evaluate, treat, and promote people of color. Thus, your only audience becomes those that are perpetuating the harm from which you seek redress. I did not realize at the time that: [*1127]

Appropriation of the marginal voice threatens the very core of self-determination and free self-expression for exploited and oppressed peoples. If the identified audience, those spoken to, is determined solely by ruling groups who control production and distribution, then it is easy for the marginal voice striving for a hearing to allow what is said to be over determined by the needs [and comforts] of that of that majority group who appears to be listening, to be tuned in. It becomes easy to speak about what that group wants to hear, to describe and define experience in a language compatible with existing images and ways of knowing, constructed within social frameworks that reinforce domination. n37

The very fact that I continued to speak exclusively to institutional actors was part of my oppression, fear, and silencing.

Slowly, I realized that for my message to be heard, I had to change the audience. To not change the audience would require me to be increasingly silenced because those that were doing or allowing the harm did not appear to be open to the facts of my institutional life. They did not seem to want to hear about the hostile encounters with students (the hate mail, the racial flyer, or the racial meetings). If I had a hostile racial encounter with an administrator, others did not want to hear about that. Other administrators and colleagues did not want to hear that BCLS administrators denied and delayed my funding, that my committees were inactive, that I was denied valuable research assistant assistance, that a visitor was allowed to compete with my core seminar, and that my correspondence was met with silence. Consequently, within my institution, my experience of being aggressively tenure-and-success blocked was ignored. Administrators and colleagues were not interested in the racial realities of my everyday academic life.

I was silenced not because I was not speaking, but because administrators were not willing to listen.

Certainly, self-imposed silence is an enemy. It is as debilitating as being silenced. But, as I learned, limiting your speech to an audience that is not willing or inclined to hear is much more powerful than silence because you are vulnerable to continued and escalating denigration. Indeed, the institutional nonresponsiveness to my numerous memoranda and e-mails tells a tale of institutional indifference and hostility to the message and the messenger. The administration ignored most of my internal cries and requests for help. Yet, my individual attempts to help myself, especially to rebut negative evaluations, were criticized and rejected. Given the nonresponsiveness of my institutional audience, I remained a silent and silenced outsider. So, one strategy for those that are being negatively perceived and negatively treated is to change your audience. Perhaps, then, the message and the messenger will receive respect, responsiveness, and action.

To speak effectively, those of us that are silenced must move beyond the confines of our internal law school audience. We must also create a record of our trials, tribulations, and successes. Indeed, since "the story of black women law professors in legal academy has yet to be told, [our scholarly articles will help in] creating a record of our experiences as teachers, scholars, administrators, and participants in the law school culture." n38 Black women law professors need to tell more stories for no other reason than that we need to hear each other's voices in an environment that is hostile to our credentials, our appearance, our existence, our accents, our beliefs, our values, and our exercise of professorial and evaluative authority. Latinas and Latinos also need to add their rich voices
to the growing body of scholarship that tells the story of the discriminatory treatment that many of us are facing in academia. The Latina/o voices must be joined by Asian men and women, Native American men and women, non-native professors of color, more African American voices, and many, many others. Together, we can create a symphony of voices that show that negative experiences are occurring, and that we object that these racialistic things are occurring to us as individuals and to us as a group.

But to break the silence and the fear of silence, we must speak and affirm the value of resisting the tyrannies of silence. We must ask ourselves: "What are the words we do not yet have? What do we need to say? What are the tyrannies we swallow day by day and attempt to make our own, until we will sicken and die of them, still in silence?" n39 Many of us are dying inside because of [*1129] the silence. Each day, we swallow racial and gendered micro-aggressions but are afraid to speak out because of our tenure vulnerability. Sometimes we are so afraid and have been so silenced that we need the help of others to remember that we are entitled to speak. Some times we need a little help from our friends in legal academia to overcome the fear. Part IV below discusses how senior colleagues of color can assist junior colleagues of color shatter the tyrannies of silence.

IV. Needing a Little Help from our Friends

It is unfortunate that many other untenured professors of color did not join us at this meeting of untenured professors of color at LatCrit IV. I found it helpful and affirming. Perhaps in the future we will be able to carve out space at each LatCrit conference, Critical Race Feminism conference, regional conference of the professors of color and Critical Race conference to speak about the volumes of silence among the untenured. Certainly, professors of color have many agendas and many things we must speak and write about. The rich program offered at LatCrit IV is a testament to the areas outside of legal academia where there is oppression. Yet in critiquing society, we cannot forget that legal academia, the place where many of us spend our formative years, is fraught with racial and gendered hostility. And, it will not change unless we continue to turn a critical and vocal eye to legal academia whenever we can.

At the end of our LatCrit IV meeting, we who are untenured tried to find a way we could communicate our needs, desires, and fears to senior professors of color. How could we move beyond prestigism, colorism, and other "isms" that separate professors of color to ask for aggressive assistance from our senior colleagues of color? To that we did not have a definitive answer. But I would like to suggest a

strategy. Each senior professor of color must aggressively reach out. You may not know that a junior professor of color is in fear or has been silenced by fear. You may not know that person at all, but each senior professor of color must be willing to reach out in order for all of us to build a lasting legacy within legal academia. We must, at a minimum, be willing to ensure that as we age we replace ourselves with two or three junior professors of color, who can survive and withstand the rigorous hostilities of legal academia. [*1130]

I have been fortunate in that regard. When I met Isabelle Gunning (Southwestern University School of Law) at the Critical Race Feminism Conference held by the University of Iowa's Journal of Gender, Race & Justice in November, 1998, she was not aware that I was in fear and had been silenced. n40 In fact, she did not know me at all. She did not know that I had experienced consistent hostility within my institution almost from the moment I arrived. But she took time to listen and hear me. As we all sat around the evening after the conference, several novice professors turned to Professor Gunning and asked her "how do you, a senior Black woman, survive." She was taken aback. Perhaps it was not until that moment that she realized that she was indeed senior and that she had lessons of survival that she could communicate to us.

I do not remember what she said about survival. I do remember that she took the time to connect with me. And she listened. It was the first time in three years in legal academia that I risked telling anyone how horrible my experience had been. The horrors of my experience just spilled out of my mouth. I could not stop the flow once I began. My anger, fear and denial spilled forth, perhaps in incoherent words. I guess I was tired of carrying around the burdens of the secrets of my negative experience. I was able to speak of the hate mail, the racial flyer, the racial meeting, and the institutional nonresponsiveness without fearing that somehow it was my fault and that I deserved this negative treatment. She was also the first person who told me that it was okay to be afraid, to be stressed and to be angry. She encouraged me to write about the experience. She also encouraged me to meditate and develop other stress management techniques.

Perhaps Professor Gunning did enough by simply being there for a novice professor in fear and pain. She did more. When she returned home, she sent me a wonderful CD from Sweet Honey in the Rock and a note wishing me well, telling me that she was thinking about me and my experiences, and imploring me to stay in touch. The music had helped her heal as she had faced ten [*1131]uture trials and tribulations at
Writing about the experience was difficult to do. I did not want to remember or revisit the ugly incidents. I had repressed many of them in order to survive and do my job. I simply would have been unable to teach my students while also worrying that one of them was sending me hate mail every month, that some of them were responsible for the racial flyer, and that some had called a meeting to question my competence and existence in academia (while failing to expressly invite or inform the Black students in this same class). I would not have been able to overcome the fear that perhaps one of my students had gotten into my office, thrown personal things around and stolen valuables. In order to do my job, I had to repress these incidents and the fear and anger that resulted.

Nonetheless, over that Christmas holiday in 1998, I decided to write about my experiences. I wrote the primary Sapphire article about my experiences at BCLS n41 by going to a safe place, a friend's home, where who I am and who I want to be is recognized, respected and affirmed. Being in a safe place, I could review the racial hate-mail, n42 the hateful flyer, and the notes I took as I went through my first years of teaching. I could remember and review the quotes of White colleagues who called me "arrogant," a "bitch," and the like. I could revisit statements that I deserved poor evaluations because I was too different or because I was a poor teacher made worse by race and gender. I could review the slow or nonexistent instances of institutional support and the failure to protect me in the face of racial hate-mail and a racial meeting. I could review the slow and nonexistent responses [n1132] to requests for substantive committees, for funding, and for research assistance. I could remember each of these individual acts of hostility that I had repressed in order to survive and continue to do my job. Indeed, by going to a safe place, I could begin to recover from my selfimposed amnesia without succumbing to my righteous anger and hate. n43

When I finished writing what has been and will be one of the most personal articles of my entire career, I sent all 300 pages to her and asked her for comments. In an e-mail she told me that it took itome to several people I could trust. One of them was Isabelle Gunning. I sent all 300 pages to her and asked her for comments. In an e-mail she told me that it took great courage to remember these events and to write about them.

Shortly thereafter, I saw her at LatCrit IV. Before dinner the first evening, she indicated that she wanted to talk with me about the article. Through the course of the evening, I forgot about her request as I talked and mingled with people at the conference. But she followed through, catching me before I slipped away for the evening. Instead of going to bed early, we spent most of that first evening talking not only about the article, but also about fear and the silencing that fear causes. I know I will forever owe a great debt to Isabelle Gunning for just listening. Her effort to hear me, to validate my experiences, and to affirm my pain is a model for other senior professors of color to mirror. Reach out to someone you don't know. You may be just what that person needs to defeat the tyrannies of silence that keeps us all in fear. n44

Conclusion

Individual effort alone cannot shatter the tyrannies of silence that the untenured suffer. It will take the collective efforts of all of us to make legal academia a place where people can speak freely, especially those who are race vulnerable, gender vulnerable, and tenure vulnerable. Until then, each individual must weigh the risks of speaking with the risks of remaining silent.


n2 Lorde, supra note 1, at 40.

n3 One white women also attended this evening meeting. She too faced trials, tribulations and fear regarding her path to tenure. The trials and tribulations of white women on the tenure track are beyond the scope of this Essay because some white women receive some protection due to the fact that they share the same race as those in power.

n4 See infra Part IV and V (reviewing discussion with Isabelle Gunning regarding legitimacy of anger and fear as well as
need to share negative experiences through writing).

n5 See supra note 1.

n6 I have revised the Bell/Delgado survey from the mid-1980s and have sent it to all professors of color listed as such in the AALS directory. See Derrick Bell & Richard Delgado, Minority Law Professors' Lives: The Bell-Delgado Survey, 24 Harv. C.R.-C.L. L. Rev. 349 (1989). I hope to take the data that results to report in the experiences of professors of color since the mid-1980s.

n7 See, e.g., Derrick Bell, Confronting Authority: Reflections of an Ardent Protestor (1994) (discussing how Derrick Bell was fired from Harvard Law School after waging one-man war against Harvard Law School for not hiring women of color on law faculty). There are two types of silence that are relevant to this article. One is the silence that is self-imposed, which is based on fear and retribution, i.e., what will people do or say if I write this article? What will happen to my career? In addition to self-imposed silence, there is the silence surrounding professors of color because few colleagues talk directly to you. Whoever has a problem with you gossips about it, tainting the opinions of those around you. They never communicate directly with you. As a result, an individual instance of justified situational anger, annoyance and irritation by a professor of color becomes a reputation, i.e., one strike and you are out. Thus, no one talks to you, but many talk about you.

When there is this type of silence surrounding professors of color and given the stereotypes and the presumption of incompetence, professors of color, especially women of color, rarely have the opportunity to be mentored to explain, expound or clarify any misunderstandings or misperceptions. Intentions (good or bad) are not explored. Relationships are not built. Instead, stereotypes are solidified and perpetuated. Then, institutional reputations are created and used to justify the failure to provide the necessary support for the survival and retention of a woman of color.

These types of activities have generally been considered to be "other forms of chilly behaviors and practices" that make women feel uncomfortable in academia. See generally Association of American Colleges, The Campus Climate Revisited: Chilly for Women Faculty, Administrators, and Graduate Students 10 (1986). They are also considered some of the common barriers that Black women face to academic success and survival. See Sheila T. Gregory, Black Women in the Academy: The Secrets to Success and Achievements 82-83 (1995).

n8 Unfortunately, though there are two Black women at BCLS, including myself, we remain tokens. As tokens we are powerless to affect our environments. This token status is also a cause of student hostility. See generally Linda S. Greene, Tokens, Role Models, and Pedagogical Politics: Lamentations of an African American Female Law Professor, 6 Berkeley Women's L. J. 81 (1990-91).

n9 Fear can be absolutely debilitating, preventing one from moving forward, sideways or backward. For an excellent, though dated discussion of fear, see generally Charles R. Lawrence, III, A Dream: On Discovering the Significance of Fear, 10 Nova L.J. 627 (1986). In addition to fear, many African American women suffer from the consequences of repressing warranted anger at racism and sexism. See generally Julia A. Boyd, In the Company of My Sisters: Black Women and Self-Esteem (1993); bell hooks, Sisters of the Yam: Black Women and Self-Recovery (1993) [hereinafter hooks, Sisters of the Yam]. As result of this repression, some have opined that Black people in the middle class are enraged, despite all the outward indicia of having made it in the white world. See, e.g., Ellis Cose, Rage of a Privileged Class (1995); see also William H. Grier & Price M. Cobbs, Black Rage (1968) (discussing effects of racism on Black adults and children); bell hooks, Killing Rage (1995) [hereinafter hooks, Killing Rage].

n11 If I was not tenure vulnerable because of my race and gender when I began at BCLS, it would have been inconceivable that an administrator would have risked calling me a bitch (or referring to me as a "bitch" as the story is now told within the institution -- as if there is a difference). When one is new, Black, female and tenure vulnerable, being cursed at and insulted in this way is part and parcel of the risks of existing.

n12 Boston College purports to have a "no tolerance" policy for hate mail. See Letter from David R. Burgess of Boston College, Oct. 5, 1995 (on file with author) (stating that: "Boston College will not tolerate the abuse of students, staff or faculty based on race, gender or sexual orientation."). Yet, when I received racial hate-mail, the institution did not respond at all to identify or apprehend the perpetrator(s). I was told instead that it was not racial hate-mail and was probably a student venting. One administrator showed me letters he had received complaining of his poor teaching. My letters did not merely complain about poor teaching. They stated that as a Black woman I was not entitled to teach. I was called a Black mammy, among other race/gender names. See Smith, supra note 2, at Parts IV and V. Students who were supportive of me were referred to as "nigger lovers" and "Black mammies." Id. at 136. This was racial hate-mail. That reality, however, was ignored.

n13 Given the damage that has already occurred to my psyche, self-esteem and self-confidence based on these types of actions, tenure at some point in the future may not be enough to compensate for this damage or to counteract the damage. Further, the longer one remains vulnerable on the tenure track, fighting and being silent about racial macro and microaggressions, the more damaged one can become.


n15 See generally Christine Haight Farley, Confronting Expectations: Women in the Legal Academy, 8 Yale J.L. & Feminism 333, 358 n.23 (1996) (noting that evaluations can be ignored, discounted, or used by faculty to award or deny tenure).

n16 Lorde, supra note 1, at 42.


n18 See generally Smith, supra note 2, at Part IV (discussing synergism of negativity that results from racial educational isolation, retrenchment, presumption of incompetence and negative stereotypes, which causes reversal in expected power dynamic between Black female professors and white students).

n19 For a recitation of my experience as a Black woman in law school experiencing, intra-race sexism, racism, colorism, and successism, among other "isms," see generally Pamela J. Smith, Leave your Identity at the Door: When Your Enemy Looks Like You, Presentation at the Columbia University Law School Women of Color and the Law: Confronting the Myth of Neutrality and Seeking Visibility (March 29-30, 1996) (transcript on file with author) (discussing unique Black female burden where Black women have to be flag bearers for whites; never being good enough to be shielded from racism; never being Black enough to be shielded from intrarace hatred and burdens; and
never being woman enough to be shielded from intrarace sexism). There are other accounts of Black women who attempt to straddle the Black world and the white world while having grown up in the projects and having attained success as an adult. See e.g., Jill Nelson, Leanita McClain: Agonies Drawn in Black and White, Wash. Post, Feb. 24, 1987, at C12 (discussing book entitled A Foot in Each World, which contains collection of essays by Leanita McClain); see also Lois Benjamin, The Black Elite: Facing the Color Line in the Twilight of the Twentieth Century (1991) (detailing how 100 successful Black professionals feel isolation of being successful and Black).

n20 Prestigism as used here refers to a preference among professors of color based upon whether one attended an Ivy League undergraduate or law school.

n21 Socio-economic class preferences as used here refer to biases based upon whether one grew up middle or upper-middle class, as well as whether one operates within upper-middle class circles now.


n23 I received the racist flyer in early October or late September, 1996. Someone went into my office and stole personal things, for example my watch, on October 31, 1996. I received hate mail from October, 1996 until May, 1997.


n26 Other professors of color have discussed their difficulties in teaching Property Law. See, e.g., Jenny Rivera, The Diversity Among Us, 19 W. New Eng. L. Rev. 31 (1997) (discussing how it is difficult to make students comfortable with fact that Latina is teaching them Property); Reginald Leamon Robinson, Teaching from the Margins: Race as a Pedagogical Sub-Text: A Critical Essay, 19 W. New Eng. L. Rev. 151 (1997) [hereinafter Robinson, Teaching from the Margins] (describing in detail his experience as new Black male law professor, teaching Property law from Black intellectual point of view); see also Reginald Leamon Robinson, Split Personalities: Teaching and Scholarship in Nonstereotypical Areas of the Law, 19 W. New Eng. L. Rev. 73 (1997) [hereinafter Robinson, Split Personalities] (same).


n28 As bell hooks espouses, "It is important that black people talk to one another, that we talk with friends and
allies, for the telling of our stories enables us to name our pain, our suffering, and to seek healing." hooks, Sisters of the Yam, supra note 9, at 16-17.

n29 Mentoring is a very personal and time-consuming activity. See Smith, Failing to Mentor Sapphire, supra note *. Ideally it will take place naturally between senior professors of color and junior professors of color. But mentoring junior professors of color must be an institutional activity. The entire burden cannot and should not fall on senior professors of color that may be experiencing the same or worse obstacles, despite tenure.


n31 hooks, Sister of the Yam, supra note 9, at 25.

n32 Lorde, supra note 1, at 42.

n33 The lack of continuous diversity at Boston College is perhaps indicative of institutions' failure to retain the African Americans that they hire. For recent counts on the number of law professors, see ABA Comm'n on Women in the Profession, Unfinished Business: Overcoming the Sisyphus Factor: Report on the Status of Women in the Legal Profession 6-7 (1995); Richard A. White, The Gender and Minority Composition of Law School Faculty, Newsletter, February 1995, at 7; Association of American Law Schools, All Faculty in 1998-99 Directory of Law Teachers by ethnic group & gender (1999) (visited Apr. 9, 2000) <http://aals.org/statistics/T1B.htm> (on file with author); American Bar Association, Miles to Go: Progress of Minorities in the Legal Profession, A Report from the ABA, at 12 tbl.13 (1998) (visited Apr. 9, 2000) <http://www.Abanet.org/minorities/milestogo.pdf> (on file with author). As a result of this failure, Black faculty who are at Boston College, despite being at different department or schools, remain concerned about retention and have communicated this to key administrators. See Leon F. Williams, Ph.D., Talking Points for a Meeting [of the Boston College Black Faculty] with the AVP, Dec. 10, 1998 (on file with author) (noting as first priority of group as being "Retention of Black or African American faculty who are successfully recruited to arrest the revolving door syndrome"); Boston College Council of Black Faculty, To Build a City on a Hill, July 1997 (on file with author) (concluding that at Boston College, Black faculty complain of "disparate work loads; overt, covert, and subtle racism; the politics of omission, hostility, presumptions of racial/professional incompetence; tainted evaluations by some majority students and colleagues; undervaluations of the research focus and interests of black professors; isolation and marginalization, culminating in attrition").

At the Boston College Law School, when a white female was denied promotion from Associate Professor with Tenure to Full Professor with Tenure, students also expressed strident concerns about the equality of the law school's promotion and tenure of white women and professor of Color. As a result of the students' effort, BCLS held a forum that specifically addressed equality in promotion and tenure. While the posters, flyers, questions, and other formal material the students' prepared are on file with the author, several documents summarize the students' concerns and issues at that time. See Coalition for Community Diversity Letter to the 1996-97 Promotion and Tenure Committee, Apr. 14, 1997 (on file with author) (stating that: "We hope that you will continue to take these concerns seriously and work with us on improving the tenure and promotion process to ensure that the qualified people of color and women at BCLS are promoted to both Associate and Full professor rank."); Robert Kim, Students, Faculty and Alumni Meet to Discuss Goldfarb, Diversity, Alledger, May 2, 1997, at 4, 8, 10; Students Looking for Tenure Answers: Tenure Committee on the Spot, Alledger, May 2, 1997, at 2, 9.

n34 Bell & Delgado, supra note 6, at 349.

n35 Lorde, supra note 1, at 44.

n36 See id. at 44.
When I was engulfed in fear again, I was fortunate to have Derrick Bell reach out to me -- and affirm my right to speak and my right to be treated fairly.


Lorde, supra note 1, at 41.

At the Critical Race Feminism Conference, I met and became reacquainted with many fantastic women and men of color. Since then, as I have talked and written about my experience, I have met and became acquainted with many other professors who have affirmed my experience. I am grateful to each of them.

See generally Smith, Teaching the Retrenchment Generation, supra note * (discussing student hostility and sociological phenomena that allow it to exist); Smith, Failing to Mentor Sapphire, supra note * (discussing institutions' failure to mentor Black women and opining that this failure is actionable under Title VII).

A student sending racial hate-mail is not unique to the law school. In 1998, minority students received an e-mail message that stated "Hey Monkeys and Apes . . . BC is for white men, not chinks, spicks, niggers or fags." Race Relations on Campus, J. Blacks Higher Educ., Winter 1998/1999, at 142 [hereinafter Race Relations on Campus]; see also Lauren Adams DeLeon, Stamp of Ignorance, Emerge, February 1999, at 18 (reporting on same incident at Boston College). Nor is racist hate mail unique to Boston or Boston College. See generally Race Relations Rep. (fairly new journal that has chronicled over 300 incidents of racial harassment in primary schools, high schools, and institutes of higher learning); Race Relations on Campus, supra, at 142-43 (reporting on racial incidents around country on college campus).

For a discussion of this type of memory repression, see generally, Emma C. Jordan, Nepenthe, 6 Berkeley Women's L.J. 113, 113 (1990-9191) (opining that "submerging . . . hostile encounters in the murky waters of psuedoforgetfulness must be a common reaction to working in a complex racial environment").
INTRODUCTION

The growing discord over the continuing use of race-conscious social justice programs in the United States has given rise to the consideration of replacing them with color-blind class-based affirmative action programs. Although there are a number of theoretical investigations into the proposal for class-based affirmative action, the discourse is short on practical assessments. This Article amplifies the class-based affirmative action debate by drawing lessons from Socialist Cuba's socioeconomic redistribution measures. Inasmuch as Socialist Cuba attempts to diminish racial disparities with the use of colorblind socioeconomic redistribution programs one can classify their strategy as a class-focused rather than a race-focused attack on racism. I use the term "class-based approaches" to racial justice broadly to encompass all color-blind social reforms that are designed in part to ameliorate the economic aspects of racial inequality. The existence of the Cuban redistribution programs has allowed me to explore the general question of whether racial justice is effectively addressed when the strategy for overcoming race problems discourages a focus on race as divisive.

Although facially distinct in their contexts, comparing the Cuban and U.S. programs is particularly useful for several reasons. Like the United States, Cuba has a long history of racial subordination that continues to exercise its influence today. The present-day United States also shares Cuba's disdain for race-conscious measures because they are similarly interpreted as promoting racial divisions. Furthermore, there is a growing recognition in the United States that has long existed in Socialist Cuba, that equal
opportunity platforms alone do not operationalize a mechanism for impoverished Blacks to improve their life circumstances. n6 To the extent that the Cuban socioeconomic redistribution programs are more extensive than any class-based affirmative action plan [*1137] proposed in the United States, that substantive difference enriches the comparative analysis. For instance, if the comparison illustrates that the Cuban class-based approach has not successfully eradicated all vestiges of racial inequality, it is reasonable to cast doubt upon the efficacy of the U.S.'s much more modest proposal of class-based affirmative action. In the alternative, if the comparison illustrates that the Cuban class-based approach has been successful in diminishing racial disparities, then it can serve as an example of the kind of commitment of resources it takes to overcome racism. This Article's examination of the continuing racial disparities in Cuba demonstrates that race-blind class-based approaches to racial justice are not the complete answer to the seduction of racial hierarchy.

I begin in Part I by setting forth the details of the Cuban class-based approach to racial inequality. I examine the ways in which AfroCubans n7 have benefited from the socioeconomic redistribution programs but conclude that racial disparities continue to exist because of the attraction individuals have to maintaining group status. Part II then delineates a brief account of the Cuban history of racial subordination that continues to influence Cuba's political economy. Part III analyzes the interconnections between race and class that cannot be appreciated by a race-blind class-based approach to racial inequality like class-based affirmative action. In Part IV, I draw upon the Cuban context to conclude that the Cuban and Latin American propensity for suppressing Afro-Latino/a [*1138] identity may impede LatCrit theory's n8 antisu bordination goal for Latinos/as and other communities of color in the United States.

I. The Contemporary Cuban Context

Soon after Fidel Castro came to power he publicly denounced racial discrimination in the most direct and sweeping terms ever heard from a Cuban political leader in office. n9

People's mentality is not yet revolutionary enough. People's mentality is still conditioned by many prejudices and beliefs from the past. . . . One of the battles which we must prioritize more and more everyday . . . is the battle to end racial discrimination at the work place . . . . There are two types of racial discrimination: One is the discrimination in recreation centres or cultural centres; the other, which is the worst and the first one which we must fight, is racial discrimination in jobs . . . . n10

Castro declared that racial discrimination would disappear when class privilege was eradicated. n11 With this speech just three months after he came to power, Fidel Castro abolished by edict whites-only beaches and clubs. n12 He also purported to terminate racism by abolishing the official use of racial classifications or any reference to race because "a Cuban is simply someone who belongs to no race in particular!" n13 In other words, "there are no white Cubans or black Cubans, just Cubans." n14 [*1139]

This was followed with legal reforms which:

I. eliminated private schools in order to expand and improve the educational system for all residents regardless of status, n15

II. converted private rental housing into a public service to fulfill the goal of shelter for all, n16

III. codified a legal right to be employed without regard to race, n17 and

IV. developed a massive public health system and universal health care coverage. n18

These legal reforms were translated into the following substantive equality measures. Basic foodstuffs and other necessities were evenly distributed to all citizens pursuant to a government rationing system allocating to every person booklets for food and clothing. Rationing was introduced in March 1962, as an attempt to provide equal distribution of scarce goods. n19 The rationing system that exists today offers a limited number of foods and goods at greatly discounted costs. n20 The prices of basic goods are determined by the salaries of the lowest-paid workers and housing prices are set at a maximum of twenty percent of one's income. n21 The commitment to providing a guarantee to employment was fulfilled with the expansion of public works, the nationalization of industries, and agrarian reform that created many government positions. n22 In addition, the government funded child care centers in [*1140] order to facilitate the employment opportunities of women. n23 Prior to the decline of the Soviet economy in 1985 and its cessation of subsidies to Cuba, lunches and nutritious snacks were provided free or at a very low cost at all work sites and schools. n24 In the 1959-1990 period the rate of malnutrition among children declined to 0.1 percent as compared to the U.S. rate of five percent. n25

Before the onset of the economic austerity programs of the 1990s ("the special period") the overall Cuban population was wellnourished and had a life expectancy at birth of seventy-six years. Furthermore, the infant mortality rate was reduced from the 1958 rate of 33.4 deaths per 1000 live births n26 to 10.4 per
1000 live births by 1992 -- one of the lowest infant mortality rates in the world. n27 Which compares positively with the overall U.S. rate for the same period of ten deaths per 1000 live births (while the U.S. African American infant mortality rate was 108.14% of the white infant mortality). n28 These early redistributive measures improved the status of Afro-Cubans in particular because they were over-represented in the lowest sectors of the population. n29 In fact, the universal health care system's eradication of many lethal Third World diseases such as malaria was a significant boost to the health status of Afro-Cubans, who historically had been disproportionately affected. n30

The education data is also impressive. Just prior to the revolution, only about one half of primary-school age children were enrolled in school. n31 In poor and rural communities where the majority of the Afro-Cuban population was then located, the enrollment was even lower because of the paucity of school buildings and teachers. n32 The Revolution's abolition of private schools was accompanied by the expansion of a free public educational system [*1141] whereby more schools were constructed and more people were trained as teachers, n33 and books were loaned at no cost to students at every educational level. n34 In addition, a massive literacy campaign raised the national educational level of the country. n35 Education through junior high school (or age sixteen) was made mandatory and many more post-junior high school educational options including vocational schools, specialized art or sports schools, and pre-university high schools were created. n36 From 1959 to 1990, the number of high school graduates increased threefold. n37

The desire to provide shelter to all citizens informed Socialist Cuba's reform of the housing laws. Within the first month of the revolution, the government prohibited evictions and ordered the reduction of rents by thirty to fifty percent, depending on the tenant's income level. n38 Presently, citizens may own a primary residence and a vacation home but may not seek to profit personally from renting out other residential properties because it can lead to homelessness for those persons unable to pay the requested rental sums. n39 The housing law reforms have transformed the majority of Cubans into "homeowners." n40 Initially housing was a public service where the state was the primary landlord and after a period of paying a reduced rent the tenant would be converted into an owner of the property. n41

As of 1984, the remaining public service tenants [*1142] stopped paying rent and instead were extended government mortgages priced at twenty percent of the family income. n42 All of these housing reforms ameliorated the condition of Afro-Cubans, who prior to 1959 primarily resided in uninhabitable structures. n43 In fact, because of the Urban Reform Law changes in tenancy, by 1979 more Blacks owned their homes in Cuba than in any other country in the world, albeit with a socialist form of ownership. n44

Furthermore, housing construction was directed to easing the housing shortage in rural areas where many Afro-Cubans lived in poorly constructed thatched roof shelters.

Notwithstanding the benefits that redounded to Afro-Cubans from the socialist reforms, racial disparities persist today. For instance, despite universal health care coverage, health and medical gaps continue to exist between white Cubans and Afro-Cubans in Cuba, as indicated by the higher vulnerability of Afro-Cubans to the parasitic diseases of the poor. n45 Even though much of the housing stock was desegregated when private rental housing was abolished and the state became the primary landlord, n46 "barrios marginales" (marginal communities) of poor Afro-Cuban residents still exist and are stigmatized for the residents' inability to improve their standard of living. n47 Despite the fact that educational opportunities have been available on an equal basis since the closing of private schools in 1961 and the significant investment in public education, Afro-Cubans are not proportionately represented in university programs. n48 A color hierarchy in education is apparent in the greater representation of whites in the better schools of higher education, while mixed-race Mulattos/Mestizos predominate in technical vocational schools, and Black Cubans dominate [*1143] in the junior high schools. n49 Education experts note that the quality of teaching and equipment are superior in the elite high schools where white Cubans predominate. n50

More telling, perhaps, is that despite the large demographic proportion of Blacks in Cuba, they are not represented in the ranks of government leadership. n51 In fact, the proportion of Afro-Cubans in high positions has diminished from the already-low levels of the 1960s and 1970s. n52 The decrease in Afro-Cuban leaders is particularly noteworthy given the growth of the Afro-Cuban population since the universal health care coverage decline in Black infant mortality rates, and the mass exodus of tens of thousands of white Cubans immediately after the Revolution. n53 After the 1991 Meeting of the Fourth Congress of the Cuban Communist Party, Afro-Cubans continued to make up less than fifteen percent of the party members elevated to the Political Bureau. n54

The underrepresentation of Afro-Cubans in leadership roles similarly extends to the military, the Ministry of the Interior, and university appointments. n55
The underrepresentation of Afro-Cubans in positions of authority may at first appear puzzling when one considers that the Cuban Constitution explicitly outlaws racial discrimination and specifies the right to ascend in the hierarchy of the armed forces and other public employment sectors without regard to race. But an examination of the mechanisms for selecting leaders reveals opportunities for the exercise of conscious and unconscious racial bias. For example, in the government context the highest leadership roles are filled by a selective appointment process internally within the Communist Party of Cuba ("PCC" -- Partido Comunista de Cuba). It is only in the lowest ranking governing entity of the Poder Popular (People's Power mass organizations) for each municipality that delegates are popularly elected and thus provide access for Afro-Cubans' participation. But the Poder Popular's elected leadership is constrained in its role to merely execute the orders and policies of the select membership of the PCC. Furthermore it was not until 1992 that the electoral law was reformed to permit direct elections for National Assembly representatives.

The longstanding pattern of racially biased exclusion from the ranks of socialist government leadership positions carries far-reaching implications, given the connection between the distribution of economic privileges and services and one's status in the government. Soon after the installation of the socialist government, high-ranking government officials were allocated residences in the abandoned homes of wealthy Cuban emigres. Today, government leaders have their requests for larger housing units and housing relocation more quickly granted than other members of the society. Mona Rosendahl, a Swedish Social Anthropologist who recently conducted field work in Cuba, has noted that "whereas political leaders at the municipal level [who are popularly elected] have few privileges, those at the national level [who are specially appointed] live rather privileged and secluded lives."

Racial bias can also be easily exercised in the controlled system for the distribution of consumer goods entitled Los Estimulos de La Emulacion Socialista (economic incentive award program), whereby government supervisors award consumer goods at much reduced costs to "model" workers. Conflicts often arise over who is a model worker in the disbursement of merit points. Although the model worker is presumably selected based on workplace performance, commentators equate the selection process with a political favoritism, which is itself imbued with racial bias. Items that are distributed under the economic incentives program include goods like electric fans, refrigerators, television sets, and privileges like housing relocation permits and foreign travel permits.

The current economic crisis has only exacerbated the prevalence of racial disparities. The most dynamic sector of the economy is the tourist industry, in which well-paying jobs with access to valued foreign currency, are reserved for persons "de buena apariencia" (good looking but commonly understood as white Cubans). The impact of being employed within the tourist industry is profound because it also provides access to scarce foods and consumer goods (like soap) that are extremely difficult to locate within the strained government rationing system. The ability to earn extra income with foreign currency tips from tourists enables these lucky Cubans to shop for scarce foods and consumer goods within the U.S. dollar-only shops and restaurants. Therefore, being excluded from employment in the tourist sector restricts Afro-Cubans to job positions in which they are paid in the undervalued domestic currency of the peso.

Furthermore, it is white Cubans that overwhelmingly benefit from the ability to receive monthly foreign currency remittances from relatives outside of Cuba, because it was white Cubans that primarily fled Socialist Cuba in the 1960s and were economically positioned to succeed in the United States. In contrast, the relatives of Afro-Cubans who primarily left with the Mariel boatlift in the 1980s or on handmade rafts in the 1990s did not enter the United States with the same economic ability to accumulate enough wealth to send significant sums of cash back to their Cuban relatives. In fact, the 1993 depenalization of hard currency which enabled Cuban exiles abroad to send U.S. dollars to their relatives in Cuba generated considerable racial hostility.

Clearly, the economic austerity of 1990s Cuba has worsened the position of Afro-Cubans, who can no longer rely upon the government guarantee of employment, shelter, or food to subsist from day to day. As in the context of African Americans "history not only teaches, but warns that in periods of severe economic distress, the rights of Black people are eroded and their lives endangered." But it is important to remember that although the current economic crisis has worsened the condition of Afro-Cubans, they were already disproportionately situated to experience the worse effects of the crisis. In other words, the low status of Afro-Cubans preceded the economic crisis and should be assessed in its own...
right. Despite the redistribution programs' progress before the economic crisis, Socialist Cuba maintained a racial hierarchy that harmed Afro-Cubans.

There are two principal reasons why the opportunities to assert racial bias are consistently exercised in a nation like Cuba that is committed to a racial equality agenda: the attraction individuals have to maintaining group status, and the legacy of a long history of white supremacy. The attraction to maintaining racial hierarchy was well explained by Law and Economics scholar Richard McAdams, who theorized that "race discrimination best reveals the degree to which group status production is a powerful and pervasive fact of social life." n84 McAdams's status-production theory of race discrimination asserts that individuals are driven in part by their competition for esteem and that racist behavior is a process by which one racial group seeks to produce esteem for itself by lowering the status of another group. n76 "Through allocation of intra-group status, whites induce other whites to produce inter-group status through acts of subordination." n77 The acts of subordination can turn particularly violent when individuals want to recapture a sense of social position in the midst of social instability. n78 The status-production of race discrimination creates prestige solely because one is white. This is akin to W.E.B. Du Bois's early articulation of a "psychological wage" that supplements the wages of low-income white workers in the United States, who receive public deference because they are white. n79

The psychological wage is such a powerful inducement that it often overrides some of the economic disadvantages of racism. For example, it has been repeatedly observed that low-income white workers frequently fail to cooperate in labor movements with other low-income workers that are nonwhite because they prefer to maintain the intangible status of whiteness even though it diserves their economic interests. n80 Cheryl Harris terms this a property interest in whiteness. n81 Thus, even though racism accords tangible benefits to whites it is not purely an economic enterprise. n82 Accordingly, McAdams's explanation of the status-production theory notes that "people have a loyalty to groups that goes beyond what serves their narrow pecuniary self-interest." n83

An application of the status-production theory to the Cuban context elucidates part of the power of racial privilege in a society that has seemingly abolished class-based hierarchy. n84 With Socialism Cuba's official eradication of the ability to garner esteem through the group-based status of socioeconomic class, racial privilege is one of the most accessible mechanisms for garnering esteem. Racial privilege is accessible because no talent or merit is needed before becoming a member of the favored group. It is as Sartre said of anti-Semitism, "a poor man's snobbery." n85

Race-based status production also perfectly suits the longstanding Cuban and Latin American ideology of "adelantando la raza a través de blanqueamiento" (improving the race through whitening). In this ideology nonwhites can aspire to racial privilege by seeking partners that are lighter than they are and producing children that might also be light enough to move up the race and color hierarchy from Black to Mulatto, and then to white. n86 Whereas the Horatio Alger ideology informs Blacks in the U.S. that they can achieve economic and social parity with whites by working hard and being thrifty, Cuban racial ideology informs Afro-Cubans to patiently await the moment that they can be "blanco o casi blanco" (white or almost white) themselves. n87 Thus, despite the fact that many are purposely excluded by a system of racial privilege the possibility of ascending the color hierarchy ensnares Afro-Cubans to endorse white privilege. n88

Exacerbating the appeal of using a race-based method of status production is the Cuban legacy of racial bias which is a dynamic part of contemporary Cuban socialization. For example, in a 1994 ethnographic study, seventy-five percent of white Cubans and seventy-five percent of Mulattos surveyed embraced the importance of status enhancement through ascendency in a color hierarchy. n89 As a result, these same persons surveyed indicated that they would disapprove of their children participating in intimate relationships with persons that were darker than themselves. n90 The study also revealed that seventy percent of whites and Mulattos interviewed felt that Black Cubans engaged in delinquent behavior and rarely worked. n91 A cultural anthropologist conducting research in Cuba in the early 1980s also noted that whites view "Black culture" as the causation of Black Cuban poverty. n92 The white Cubans questioned described the problematic aspects of Black culture as lack of importance placed on education, propensity for violence and crime, and lack of discipline. n93 Of course such dispersions of Black culture are belied by the extraordinary numbers of Afro-Cubans that pursued higher education when the socialist government abolished private schooling and committed its resources to expanding access to quality public education. n94 Furthermore, those that seek to rely upon Black culture as an explanation of Afro-Cuban social status, often fail to consider the documented relevance of racially selective criminal prosecution and enforcement. n95 Yet Cubans persist...
in relying upon racially biased explanations of poverty to such a large extent, that even after AfroCuban slum dwellers are relocated to markedly improved low-cost housing, they continue to be stigmatized as slum dwellers. n96

It should be noted, though, that the ideology of "blanqueamiento" which denigrates connections to African ancestry is not a philosophy that the socialist government in Cuba constructed, but has been a part of much of Latin America's historical approach to race relations. n97 In fact, a brief review of Cuba's historical construction of racial ideology is also useful in demonstrating how racial disparities continue to exist in a nation that has actively pursued substantive economic equality. History shows that the Cuban nation-state like many Latin American countries pursuing a nation-building project, has consistently framed considerations of race to be socially divisive, while simultaneously subordinating persons of African ancestry through the use of the "blanqueamiento" ideology and otherwise. n98 Indeed, the "blanqueamiento" -- whitening ideology has been an implicit and sometimes explicit part of Latin American nationalism that has perceived race-consciousness as a threat to nationalist sovereignty. n99 Examining Cuba's historical context dispels the notion that the socialist government chose a class-based approach to remedy exist [*1151] ing racial disparities solely because of its socialist ideology. n100 In actuality the de-emphasis of race has long been a part of Cuba's national ideology. n101

II.Cuba's History of Race Subordination and Colorblind Nationalism

Cuban legal scholar Alejandro de la Fuente has observed that the view of race-based analysis as inherently divisive dates at least as far back to nineteenth century Cuba's struggle for independence from Spain, and continued into the Republican government initiated after Cuba obtained its independence from Spain in 1898. n102 For instance, in the nineteenth century Cuban campaign for independence from Spain, race was viewed as a divisive issue that had to be discouraged at all costs. n103 None other than Independence hero Jose Marti wrote in 1893:

To insist on the divisions into race, on the difference of race . . . is to make difficult both public and individual enterprises . . . . The Negro who proclaims his racial character . . . authorizes and brings forth the white racist . . . Two racists would be equally guilty, the white racist and the Negro . . . . n104

In other words, the independence movement viewed national unity as incompatible with racial identity. In fact, any desire for Afro-Cubans to voice race-based grievances was rejected outright as un-Cuban and thus unpatriotic. n105 Yet, white Cubans were overtly racially prejudiced against Afro-Cuban troops, n106 who made up almost half of the enlisted ranks of the Liberation Army and an estimated forty percent of the senior commissioned ranks. n107 Furthermore, a [*1152] number of separatist leaders planned to maintain a white hierarchy of privilege after independence was achieved because their interest was to end Spanish rule, not to destroy the colonial order. n108 For instance, after war hero Jose Maceo rose to the rank of brigadier general, he seriously considered retiring because of his white subordinates' negative focus upon his African ancestry. In a letter to the provisional president, Maceo stated that he understood "that a small circle exists who . . . did not wish to serve under the orders of the speaker Maceo . . . because they are opposed to, and have their sights on men of color above white men." n109 Even though Afro-Cubans were instrumental in the Cuban independence movement against Spain, the Cuban elite continued to view them as inferior and subordinate to whites. One Cuban scholar notes that the "main reason for the political immobility of a class that shouldered years of accumulated grievances against colonial rule was its fear of blacks." n110

Once Cuba formally achieved independence in 1898, not only did race continue to be silenced to construct a national unity, but whiteness was explicitly promoted as a method for advancing the country and sabotaging the economic mobility of Afro-Cubans. n111 Influential intellectuals advocated for the physical elimination of the Black population as a mechanism for advancing the status of the new republic. n112 Census figures were distorted to report a decreasing population of Afro-Cubans, n113 and new legislation appropriated one million dollars for the sole purpose of promoting European immigration, n114 The Republican government facilitated the massive immigration of white workers and their families as an [*1153] other facet of the blanqueamiento ideology. n115 Land and resources were specifically offered to white immigrants to encourage their permanence. n116 Indeed, between 1902 and 1931, forty percent of all immigrants were white Spaniards, n117 and between 1902 and 1912 an estimated 250,000 Spaniards emigrated to Cuba despite Spain's former position as colonial oppressor. n118 Immigrants from Haiti and Jamaica, in contrast, were viewed as guest workers, who should return to their countries of origin after each sugar harvest, n119 and accordingly many of the Black contract workers that remained in the country were forcibly expelled during the Great Depression in the 1930s. n120
Census data from the periods 1899-1943 reflects the overrepresentation of Blacks in the lowest and worst paid sectors of the economy, such as agriculture and personal services. n121 During this time, Afro-Cubans were also systematically excluded from the academic and electoral processes. n122 When displaced Afro-Cubans attempted to form their own political party, entitled "el Partido Independiente de Color," its leaders were arrested and prosecuted for allegedly conspiring to impose a "Black dictatorship." n123 The Cuban senate then passed legislation known as the Morua law, prohibiting the formation of political parties along racial lines. n124 When the Black party organized a political protest to repeal the Morua law, the government suppression, in what came to be called the "Race War of 1912," was violent and massive. n125 Afro-Cuban protesters demonstrated their frustration with their poor economic status by damaging property, including sugar mills and company stores. Although the protest focused on damaging property and not harming individuals, the Cuban armed forces retaliated by killing Afro-Cubans and Haitian contract workers indiscriminately. n126 One Afro-Cuban scholar recalled:

I still remember how I listened, wide-eyed and nauseated, to the stories -- always whispered, always told as when one is revealing unspeakable secrets -- about the horrors committed against my family and other blacks during the racial war of 1912... Chills went down my spine when I heard stories about blacks being hunted day and night; and black men being hung by their genitals from the lamp posts in the central plazas of small Cuban towns. n127

A direct observer has also noted that the army "was cutting off heads, pretty much without discrimination, of all Negroes found outside the town limits." n128 The government repression was violent and extensive because the creation of an all-Black political party threatened the raceless paradigm on which Cuban nationalism was constructed. n129 This may also account for the onslaught of white civilian volunteers, who formed militias and offered their services "to defend the government" against Afro-Cuban political protesters. n130 Thus, a decade after independence found Afro-Cubans in worsened economic conditions and with no improvements in political participation for which they had fought the Spaniards.

The remainder of this century has witnessed a further entrenchment of white supremacy within Cuban society along with the continued promotion of a raceless nationalism. By the 1930s AfroCubans were prevented from joining the navy or air force officer corps, and were formally excluded from such trades as baking and pastry making. n131 Public beaches, parks, restaurants, cabarets and yacht clubs remained racially segregated by custom. n132 The Cuban media praised lynchings of Afro-Cubans as "progressive manifestation of Cubans' North Americanization," in what was interpreted as an imitative tribute to United States Jim Crow tactics designed to garner favor with the United States, rather than being an example of Cuba's native white supremacy. n133 Meanwhile, Cuban leaders began to characterize the country as a mulatto and mestizo nation in order to provide an explanation abroad for the presence of Cuba's many dark-skinned residents and obviate the classification of a "Black nation." The mulatto nation characterization necessitated the continued rejection of Afro-Cuban identity movements because the construction of the mulattoculture characterization of Cuba makes Afro-Cubanness a socially contested site of identification. A self-proclaimed Afro-Cuban is a menace to the national paradigm of all Cubans being the same because they all share the same mixed-race cultural heritage. So while simultaneously taking public pride in the mixed-race cultural heritage of the country, Cuba discouraged Black identity in order to promote one homogeneous national identity. But the nationalism movement left unaddressed the existing racially determined social, economic and political hierarchies. n134 The race-deflection dynamic continued through Batista's rule of Cuba in the 1950s.

Afro-Cuban scholar Lourdes Casal noted:

One of the most pervasive features which I found in the dominant prerevolutionary racial ideology was the unwillingness to discuss racial issues. This taboo was linked to a tendency -- among whites -- to minimize Cuban racism and among blacks to accept racism as a fact of life which you simply tried to circumvent or avoid [by marrying the right/white person pursuant to the ideology of blanqueamiento.] n135

The race discourse taboo which persisted through Batista's rule coexisted with extreme racial stratification and de facto racial segregation. n136 In short, a Black racial identity has been historically subverted in Cuba to promote a uniform national identity that has masked racial privilege while simultaneously thwarting the mobilization of racial justice movements that could improve the status of AfroCubans. When the Cuban Revolutionary Party ascended to government in 1959, it inherited the race-deflection ideology along with the legacy of racial prejudice.

Even though Fidel Castro often stated that racial discrimination would disappear with egalitarian class reforms because racial inequality was merely a byproduct of class divisions, he has begun to slowly move away from that position. In the 1997 Meeting of
the Fifth Congress of the Cuban Communist Party, Castro acknowledged that Blacks and women (of all races one presumes) were underrepresented in the leadership of the government and the state. n137 Similarly, Afro-Cubans believe that employment discrimination is pervasive and that they are not welcome in all social spaces. n138

There is increasing recognition that historic economic factors have left black Cubans among the poorest sectors, even today when opportunities are opened to all regardless of race. Because of these factors, blacks have had less chance of gaining the privileges of the professional class or of the higher-level bureaucrats (who have access to travel and other perks, even if minimal by U.S. standards). n139

The growing recognition of the continued existence of racial disparity prompted government discussion during the 1997 Meeting of the Fifth Congress of the Cuban Communist Party of an affirmative action program in which Blacks and women across race could be more directly involved in leadership positions. n140 The proposal for a method of numerical participation for Blacks and women dates back to the 1986 Meeting of the Third Congress of the Cuban Communist Party. n141

But these discussions have not resulted in any direct action. The resistance to a proposal for numerical participation can be explained in part by the wariness with which some Cubans approach policies created in the United States n142 given the U.S.'s longstanding antagonism to the socialist government and its economy as commenced with the embargo under the Foreign Assistance Act of 1961. n143 But more importantly, there is a concern that such measures are contrary to the egalitarian goals of the Revolution insofar as they make race an issue. n144 In fact, one commentator has noted that Fidel Castro may be the lone voice promoting racial advancement amidst a more conservative party leadership n145 and that Castro's concern with a possible backlash and exodus by disgruntled white Cuban residents has slowed down his implementation of a more forceful racial justice program. n146 The public denials of racism in Cuba by government officials certainly indicate that there is no official consensus regarding Cuban race issues. n147 Rather, there continues to be a reluctance to address the racial disparities as a racial bias problem because of the perception that the discussion of race is divisive and destructive to the Cuban national identity. In other words, overt considerations of race are still viewed as divisive, and thus taboo. Gisela Arandia Covarrubia, a highly regarded Afro-Cuban scholar, promoted the strengthening of "nationality" as a solution to the continuing racial disparities because a method of numerical participation could produce adverse reactions in the population. n148 No adverse reactions, however, have been evident in the Cuban use of affirmative action for women in employment. n149 Cuban legal specialist Debra Evenson noted that despite the existence of parallel systems for redressing complaints of discrimination of gender and race, it is only gender bias claims which are publicly brought. n150 The contrast between the existence of gender-bias claims and the absence of race-bias claims is especially stark when one considers that the socialist government's abolition of the private practice of law for the creation of a system of law collectives for lawyers has made public access to legal counsel relatively easy and inexpensive. n151 Furthermore, a large number of the law collective attorneys are white women and a large percentage of law students are white women. n152 Thus, despite the hardships that white women have encountered in making the socialist revolution responsive to gender issues, as a group they have fared better than Afro-Cuban women and men alike. n153 In short, despite the pervasive use of redistribution programs designed to ameliorate the poor socioeconomic status of Afro-Cubans in particular, racial disparities continue to exist in part because the class-based approach chosen continues the colorblind historical subordination and makes Afro-Cuban identity and identity movements socially contested.

III. The Interconnections Between Race and Class

This Article's exploration of the Cuban context demonstrates that addressing race problems solely as class problems does not entirely confront the complexities of racial subordination. n154 This is because a class-based approach to racial disparities cannot appreciate the investment that favored individuals have in the norm of race-based privilege. If racial disparities continue to exist in a nation like Cuba that has committed extensive resources to ensuring substantive economic equality for its residents, it is unlikely that a more modest program of class-based affirmative action could alleviate racial disparity in the United States. Like Cuba, the United States has a long legacy of racial bias and discrimination, and is no less subject to the lure of race-based esteem acquisition. In both contexts, race and class are linked, and one aspect cannot be addressed without acknowledging the other.

Indeed, some scholars assert that the public discourse which pits race against class as a mode of analysis presents a false debate. n155 For instance, those that do focus on class as the culprit of racial disparity often refer to the existence of a U.S. Black middle class as a justification for their colorblind perspective. n156 The analysis connects the ability of a Black middle class to
exist with the power of [*1160] class status to be more determinative of one's life chances than is race. But the very growth of a Black middle class is due in no small part to the race-conscious affirmative action programs institutionalized in the 1970s.

Furthermore, the Black middle class's continued exposure to racial discrimination despite their economic success illustrates the way in which economic status alone does not transcend the problems of race. For example, racially comparative studies of the middle class demonstrate that the Black middle class is less financially secure than the white middle class. n157 At the same time it is accurate to state that the Black middle class is better off than low-income Blacks just as the white middle class is better off than low-income whites. n158 More pertinent, though, is the fact that the race-conscious social programs that facilitated the expansion of a Black middle class from its historically small proportions, n159 also improved the status of low-income Blacks. Many blue-collar industries were not racially integrated until race-based affirmative action programs were implemented. n160 For example, the representation of Blacks more than doubled from 1960 through 1990 in the blue-collar occupations of telephone operators, aircraft mechanics, firefighters, and electricians. n161 It is a misapprehension to view raceconscious affirmative action programs as misplaced because they only benefit middle class Blacks when in point of fact they also have benefited low-income Blacks. Furthermore, it is inappropriate to fault race-based affirmative action programs for not achieving what they were [*1161] never designed to do -- in effect, obliterate socioeconomic distinctions. n162 Rather, race-based affirmative action programs have only sought to diminish the racial disparity within each socioeconomic class.

Some scholars have critiqued the existing race-based affirmative action programs for being too narrowly drawn to actually change the unequal class and power dynamics that exist across race. n163 But the inquiry I have pursued in my examination of the Cuban context is more modest, although no less complex -- that is, what are the race and class connections that disproportionately place Blacks in poverty, and secondarily what accounts for the perpetual subordination of Blacks within each economic class. n164 Socialist Cuba sought to obviate the need for such questions by obliterating all economic class differentials and still racial disparity persists. Indeed, Marxist theory has been criticized for discounting the significance of race as a factor in subordination and for alternatively viewing racial oppressors as a classless monolith of whites. n165 Derrick Bell offers a more racially centered explanation of capitalist economic exploitation. He posits that the capitalistic class structure has maintained itself by placating low-wage whites with the subordination of Blacks. n166 Similarly, Herbert Hill notes that "through the rationalization of labor costs, the greater rate of exploitation of the black worker subsidizes the higher wages of the [*1162] white worker. Employers also gain from such practices through the benefits of a labor policy that results in lower average costs." n167

But these are descriptions of how racism intersects with a capitalistic structure; they are not explanations of the cause of racism. Racism predates capitalism, n168 and as stated earlier is not always economically motivated. n169 Accordingly, economic reductionist explanations of racial subordination that posit a resolution to racism with the implementation of class-based reform are overly simplistic. In other words, any concerted effort to address racial subordination should examine racism's connection to class but simultaneously appreciate the way in which racial ideology adapts itself to changing economic contexts. n170 The Cuba-U.S. comparison illustrates this premise.

U.S. class-based reforms of the past have also demonstrated the fallacy of presuming that colorblind economic reforms overwhelmingly assist impoverished people of color. For instance, Roosevelt's New Deal legislation, which sought to stabilize the U.S. economy after the Great Depression, did succeed in reducing unemployment from 13 million to 9 million. n171 Most Blacks, however, were purposefully ignored by New Deal programs in that they predominated in work sectors that were omitted from the government mandates for unemployment insurance, the minimum wage, social security and farm subsidies. n172 In contrast, Black inclusion in Lyndon B. Johnson's war on poverty and New Society programs was used to racialize the concept of poverty. n173 Sociologist Jill Quadagno traces the demise of the War on Poverty to its links to [*1163] Black civil rights with programs that used federal funds to: empower community action groups run by local Black activists; provide affirmative action and job-training programs to break longstanding racial barriers to union jobs; and to provide housing subsidies to those otherwise locked into substandard housing. n174 The connection to Black civil rights rebounded with a backlash against the poverty programs because "whites opposed them as an infringement of their economic right to discriminate against Blacks and a threat to white political power." n175 In short, the War on Poverty sought to remedy the complexities of poverty with colorblind social welfare programs that included Blacks but failed to
consider the racially stratified operation and justification of poverty. n176

One of the primary difficulties with relying upon universal raceneutral economic strategies for achieving racial justice is that such strategies fail to appreciate the way in which the very inclusion of Blacks marginalizes Blacks as "the poor" and thereby estranges whites from prioritizing the elimination of poverty. In turn, the identification of poverty with Blacks undermines public concern with poverty because Black "culture" is deemed the cause of their low economic status. n177 Indeed, today's circumscribed assessments of poverty relief efforts in the U.S. have encoded Blackness as synonymous with undeserving welfare recipients. n178 Similarly, AfroCuban [*1164] "low-culture" is blamed for Afro-Cubans disproportionate experience of poverty. n179 The increasing stratification between rich and poor in both the United States and Cuba will only further isolate Blacks as both the image and reality of poverty. n180 Simply put, the racialization of poverty justifies the demonization of poverty. n181 The ideological power in racializing poverty in order to deflect attention from its systemic causes is demonstrated by the widespread usage of the tactic. n182

The concept of a pathological under-class has become the rationale for continued racism and economic injustice; in attempting to separate racial from economic inequality and in blaming family pathology for Black people's condition, current ideology obscures the system's inability to provide jobs, decent wages, and adequate public services for the black poor. n183

The racialization of poverty also breeds complacency about its existence because poor whites are encouraged to view their poverty as a temporary set-back compared to what is constructed as the permanent underclass of poor Blacks. n184 In addition, Blacks themselves can internalize the vision of Blackness as a culture of poverty so that they dissociate from mobilizing around the concerns of the poor.

Like the Latin American racial ideology of blanqueamiento, the racialization of poverty can become so ingrained that it just seems [*1165] like common sense to blame Blacks as a group for their economically subordinated status and to esteem whites as individuals for their "ability" to be successful. n185 The theories are also similar in their hegemonic power to value whiteness while veiling the privilege that is accorded to whiteness. That is the failing of class-based approaches to racial justice. Class-based approaches to racial justice are misplaced because they do not pierce the veil of white invisibility that shields whites from appreciating their institutionalized skin-privilege. n186 Hiding from whites the way in which they are complicit in the operation of racial hierarchy disinclines them from becoming agents of change.

The lack of engagement with white privilege is a fatal omission because it permits racial stratification to continue unabated, and worse still obscures white privilege in such a way that it could very well sabotage the ability to eradicate racial discrimination. n187 When classbased remedies are not complete correctives of racial problems, their cloak over racial hierarchy relegates Blacks to explaining their continued subjugation as a consequence of their "culture of poverty," and thereby interferes with the ability to mobilize protest against continuing racial hierarchy. n188 A race-blind class-based approach to racial inequality is unable to effectively address racial bias or economic stratification because it is ill equipped to unpack the interconnection between race and class that rhetorically defines poverty as Black. [*1166]

My exploration of the socialist Cuban context leads me to conclude that even though race-conscious affirmative action has not eradicated racism in the United States, class-based affirmative action would be a poor replacement. Racial justice reformers should instead confront racism directly as race-based while addressing its interconnections with class. n189 Using a race lens in conjunction with a class lens could be more fruitful in devising solutions to racism. n190 For instance, maintaining a race-conscious approach to racial equality in the U.S. while simultaneously adopting a version of the Cuban redistribution initiative could provide a broad-based mechanism for communities of color to realize substantive equality rather than mere formal equality. n191 The Cuban reduction in Black illiteracy, infant and maternal mortality, and the increase in Black educational attainment and average life span are all indicators which suggest that actual redistribution of wealth is material in ensuring the substantive equality of people of color. In contrast, the U.S. formal equality focus has maintained racial disparities in mortality rates and in educational attainment. Furthermore, current debates in the United States regarding under-funded public schools and the need for health care reform would be well served by considerations of the Cuban successes after abolishing private schools and instituting a system of universal health care. LatCrit theory, a jurisprudence dedicated to highlighting Latino/a concerns and voices in legal discourse and social policy for the attainment [*1167] ment of social justice, supports such multilayered intersectional approaches to subordination. n192

IV. Conclusion: Lessons for LatCrit Theory
In addition to serving as an assessment of class-based approaches to racial justice, this cross-cultural analysis of the interconnections implicates the continued development of LatCrit theory. Specifically, this Article implicitly questions whether its antisubordination goal can be achieved if its scholars inadvertently neglect to challenge the Latin American model of discounting racial diversity in assessments of Latin American identity and group needs in the United States. For inasmuch as LatCrit jurisprudence has focused upon critiquing what it terms the Black-white binary of civil rights discourse, n193 it has done so while, for the most part, sidestepping the particularities of Afro-Latinos. n194 LatCrit inclusion of the Afro-Latino/a perspective would reveal the Black-white binary aspects of the Latin American racial constructs that can manifest themselves in Latino/a identities in the United States. n195 To the extent that many Latin American countries have promoted themselves as "mestizo" nations for the very purpose of downplaying their connections to Blackness, the presumed absence of a Black-white binary within the Latin American racial construct is often false, and indeed more indicative of Latin American binary preoccupation n[*1168] with fleeing Blackness and valuing whiteness. n196 The Latin American concern with whiteness is only exacerbated when transplanted in the United States by Latino/a immigrants and migrants, who struggle against being racialized themselves and lumped together with poorly treated African Americans. Many Latinos/as quickly learn that part of the price of the promise of assimilation is denigration of Blacks. n197 Indeed, the poverty rates of those Latinos/as identified as Black are worse than of other Latinos/as. n198 The Cuban dissociation from Blackness resonates with the frustrations of Afro-Latinos/as in the United States that feel pressure to disclaim a Black identity. For instance, in a recent issue of Hispanic magazine a reader wrote in to say:

My Latino friends see my race as a liability. "You're not black, like the African Americans in the US" one told me recently. It bothers me that to accept me, they want to distance me from being black, which carries negative connotations in the Americas. n199

In addition to problematizing the LatCrit critique of the Blackwhite binary, an acknowledgement of Afro-Latinas/os would also bring added complexity to the LatCrit assessment of whether Latinas/os are best understood as a race or as an ethnicity. n200 Ian Haney Lopez astutely addresses the way in which Latinas/os as a group are often racialized in the United States in ways that do not comport with national understandings of ethnicity. n201 But if Latinas/os are a race, what are Afro-Latinas/os? This is not a question of mere semantics within the confines of theoretical analysis. The disposition that Latina/o communities choose to take with respect to the race/ethnicity divide will be indicative of their stance towards coalition building. Eric Yamamoto appropriately cautioned race-crits to be attuned to the ways in which communities of color [*1169] can deploy hierarchies of oppression in their efforts to survive the challenges of racism. n202

An Afro-Latina/o attention to praxis is especially sensitive to how the group label of race or ethnicity can be used to further subordinate communities of color. n203 For instance, if the ethnicity label is chosen to distance Latinos/as from the dispersions of being a race, then the ethnicity choice undermines the potential for solidarity with African-Americans, who are always viewed as a race. In contrast, choosing the race label in order to negate Latina/o connections to African ancestry derails the potential for coalition building with African-Americans. In order for the LatCrit antisubordination agenda to be effective we must remain alert to how individual expressions of Latina/o identity practically situate Latinas/os's communications with other communities of color. n204 An unquestioning reliance upon Latin American racial ideology that suppresses racial difference within Latina/o communities while simultaneously esteeming connections to whiteness through marriage and racial miscegenation will thwart longterm antisubordination coalition building. The white supremacy embedded in the Latin American promotion of racial harmony by encouraging persons of African descent to "marry up" to whiteness, is not conducive to working with other racial and ethnic minorities to dismantle racial hierarchy.

The growing numbers of Latinas/os in the U.S. population will make the race politics of Latinas/os central to the viability for any [*1170] future efforts to develop effective coalitions across communities of color. The popular press has repeatedly alerted the public to the changing racial demographics of the United States, including predictions that Anglowhites will be a numerical minority, just as it has expounded upon the consequent importance of the Latina/o population for purposes of election campaigns and economic development. n205 The extraordinary public focus upon the growth of the Latina/o community and its influence in the United States is equivalent to the flattering attention of an obsessed suitor. But Latinas/os should stop to consider what the courtship is leading up to. There are numerous historical examples of demographic changes motivating elite whites to allocate middle-tier privileges for certain groups that have elevated the status of those group members, but maintained a hierarchy that privileges whiteness all the same. n206
The public focus upon Latinas/os as a "hot new minority that will outnumber African Americans" implicitly encourages Latinas/os to dissociate themselves from the plight of other oppressed people of color. Accordingly, Latinas/os will be ideally positioned to either be complicit in the maintenance of a race-based hierarchy, or empowered to challenge the status quo together with other subordinated communities. Given the growing demographic importance of Latinas/os, the path they take may be central to the development of opportunities for permanently eradicating racism. [*1171]

The Cuban example of the Latin American "blanqueamiento" approach to race relations has demonstrated the harm of denying that race and racism exist while simultaneously maintaining a racially stratified society that esteems whiteness. Just as Cuba's nationalism project subverts recognition of race to unite all Cubans in a common struggle for economic survival, Latinas/os in the U.S. may succumb to the temptation to discount racial difference in the effort to unify Latinas/os across class as Latinas/os only, distinct from other members of the African Diaspora.

In order for LatCrit to be true to its antisubordination goal it will need to engage the particularities of all Latinas/os rather than viewing those with intersectional identities as a distraction from some essentialized view of how Latinas/os are subordinated. This is a struggle that any group-focused movement will confront as its members assert perspectives that do not conform with a pre-defined notion of the group's identity or mission. The Cuban context indicates that such a dynamic would be an ineffectual response to ameliorating economic and social subjugation of Latinas/os and other communities of color. In conclusion, glossing over the racial particularities of Latinas/os would undermine the antisubordination goal of LatCrit theory, and thus should be resisted at all costs. Similarly, class-based affirmative action should be rejected because of its inability to appreciate and address the personal investment whites have in race-based privilege or the way poverty is racialized.

FOOTNOTE-1:

n1 Harold Cruse, Rebellion or Revolution? 93 (1968).


n3 See generally Frances Lee Ansley, Classifying Race, Racializing Class, 68 U. Colo. L. Rev. 1001 (1997); Deborah C. Malamud, Class-Based Affirmative Action: Lessons and Caveats, 74 Tex. L. Rev. 1847 (1996); Frederick A. Morton, Jr., Class-based Affirmative Action: Another Illustration of America Denying the Impact of Race, 45 Rutgers L. Rev. 1089 (1993).

n4 The UCLA School of Law's published account of their use of class-based admissions preferences is one of the few empirical studies which exists and is justifiably limited in its scope given its recent implementation and focus on law school admissions. See Richard H. Sander, Experimenting with Class-Based Affirmative Action, 47 J. Legal Educ. 472 (1997); see also Deborah C. Malamud, A Response to Professor Sander, 47 J. Legal Educ. 504 (1997); Linda F. Wightman, The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions, 72 N.Y.U. L. Rev. 1 (1997) (examining theoretical implications of using socioeconomic status as proxy for race based on data from students that applied to law schools in 1990-1991, and concluding that it would not achieve diverse student body); Tung Yin, A Carbolic Smoke Ball for the Nineties: Class-Based Affirmative Action, 31 Loy. L.A. L. Rev. 213, 234 (1997) (reviewing Richard D. Kahlenberg, The Remedy: Class, Race, and Affirmative Action (1996)) (examining income distributions and test scores by race indicating that primary beneficiaries of race-blind, class-based affirmative action program are likely to be overwhelmingly white).

n5 See infra Part II.

n7 The term "Afro-Cubans" is used here to collectively describe all persons of African descent whether labeled Mulatto or Black to focus upon the centrality of bias against African ancestry and phenotype in Cuba. See Nadine Therese Fernandez, Race, Romance, and Revolution: The Cultural Politics of Interracial Encounters in Cuba 27 (1996) (unpublished Ph.D. dissertation, University of California (Berkeley)) (on file with author) (describing academic's use of term Afro-Cuban to refer to Blacks and Mulattos together when discussing race issues). The Cuban discussion on racism focuses upon Blacks and whites because the demographic numbers of other racial and ethnic groups is relatively small. For instance, Chinese Cubans who are descended from Chinese brought to Cuba in the 1800s as contract labor, now number fewer than 500 in a total population of approximately ten million. See Evelyn Hu Dehart, Chinese Coolie Labour in Cuba in the Nineteenth Century: Free Labour or Neo-Slavery?, in The Wages of Slavery 67, 68-70 (Michael Twaddle ed., 1993). In addition, the religious diversity of the country was diminished when the vast majority of the Jewish population left after the Revolution. See Robert Levine, Jews Under the Cuban Revolution: 1959-1995, in The Jewish Diaspora in Latin America, 265, 269, 278 (David Sheinin & Lois Baier Barr eds., 1996) ("In 1990, the number [of Jews in Cuba] had dwindled to roughly 305 families, most with non-Jewish spouses, in a total population of about ten million.").


n10 See id.


n12 See Casal, supra note 9, at 19.


n14 John Clytus, Black Man in Red Cuba 76 (1970). Castro's articulation of a color blind platform is very reminiscent of Justice Scalia's denunciation of race-conscious remedies in Adarand Constructors v. Pena, wherein he states "In the eyes of government, we are just one race here. It is American." 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in judgment). Yet there is a meaningful difference in their purpose. Justice Scalia supports a purely mechanical approach to racial equality that would merely prohibit formal barriers to civil rights. In contrast, Castro has instituted a substantive commitment to racial equality by coupling his call for color-blindness with law reforms that have sought to go to the heart of race-based socio-economic disparities.


n17 See Cuban Const. art. 43 (amended 1992) (providing right to be employed by government without regard to race); id. art. 45 (amended 1992) (providing employment as right of citizenship).


n21 See Zatz, supra note 15, at 10.
n22 See id. at 9.
n27 See id. at 7.
n29 See Casal, supra note 9, at 21.
n31 See Leiner, supra note 23, at 446.
n32 See id.
n33 See id. at 450.
n36 See Fernandez, supra note 7, at 184.
n37 See Kovach, supra note 25, at 35.
n38 See Evenson, supra note 35, at 179; see also Jill Hamberg, Cuban Housing Policy, in Transformation and Struggle: Cuba Faces the 1990s, at 235 (Sandor Halebsky & John M. Kirk eds., 1990).
n39 See Evenson, supra note 35, at 178-79.
n40 See id. at 184. The legal meaning of Cuban homeownership must be understood within the socialist context that only permits personal property over "items intended for consumption to satisfy an individual's basic needs, which includes a household's dwelling unit." Stuart Grider, A Proposal for the Marketization of Housing in Cuba: The Limited Equity Housing Corporation -- A New Form of Property, 27 U. Miami Inter-Am. L. Rev. 453, 470 (1996). In contrast, the land under a dwelling unit is considered state property because it is a natural resource and the sale of a home is subject to state restrictions, which give the government the option to repurchase any property at a price previously established by the government's Urban Reform Committee. See id. at 470, 472. Initially, testamentary disposition rights over homes was limited to persons living with the deceased for at least a full year before death, but has since been extended to allow non-cohabiting heirs to inherit dwelling units. See id. at 475.
n41 See Evenson, supra note 35, at 179.
n42 See Zatz, supra note 15, at 21.
n44 See Evenson, supra note 35, at 179-80; supra note 40.
n46 See Evenson, supra note 35, at 179 (Urban Reform Law of October 14, 1960, converted private rental housing into a public service). In 1984, the property laws were reformed to transform occupants of public housing into the owners of the units in which they resided. See Zatz, supra note 15, at 21 (explaining that the 1984 Ley de Viviendas and its 1988 modification made Cubans the owners of their homes).
n48 See Evenson, supra note 35, at 110.
n49 See Fernandez, supra note 7, at 176.
n50 See Leiner, supra note 23, at 453.
n51 See Gayle McGarrity & Osvaldo Cardenas, Cuba, in No Longer Invisible:

n52 See id.


n54 See Evenson, supra note 35, at 112-13.

n55 See Moore, supra note 13, at 225; Jorge I. Dominguez, Racial and Ethnic Relations in the Cuban Armed Forces: A Non-Topic, 2 Armed Forces & Soc'y 273, 284-85 (1976) (noting that blacks are underrepresented in top military elite and officer ranks and overrepresented in lowest ranking troop level).

n56 See Cuban Const. arts. 42-43.

n57 See Rosendahl, supra note 20, at 165.

n58 Id. at 15 n.5 ("There are 15 provinces in Cuba and between eight and twenty municipalities in each province.").

n59 See id. at 6-7, 82-83, 91.

n60 See Antoni Kapcia, Cuba After the Crisis: Revolutionising the Revolution 16 (1996).

n61 See Fernandez, supra note 7, at 80.

n62 See Rosendahl, supra note 20, at 165.

n63 Id.


n65 See Rosendahl, supra note 20, at 37-38.

n66 The recent scarcity of resources has seriously hampered the ability of the Cuban government to consistently maintain the redistribution programs. For instance: 1) medical institutions often run out of medicine; 2) the ration system does not have enough food to supply a healthy diet; 3) the state guarantee of employment is provided with salaries paid in the undervalued national currency which cannot compete with the prices of non-rationed foods and consumer goods; and 4) the state guarantee to shelter is hindered by the cost of scarce housing construction materials. Despite the universality of the hardships, Afro-Cubans are not as structurally well-positioned as white Cubans to survive the economic crisis. See Fernandez, supra note 7, at 78.

n67 See McGarrity & Cardenas, supra note 51, at 77, 98, 100.


n69 The contemporary dynamic of a racially restrictive dual currency economy replicates the multiple currency economy of nineteenth-century Cuba that harmed Afro-Cubans after the War of Independence in 1898. See Aline Helg, Our Rightful Share: The Afro-Cuban Struggle for Equality, 1886-1912, at 101 (1995) (noting that Afro-Cuban laborers were paid prewar wages in depreciated Spanish silver that could not match cost of goods gradated to value of U.S. dollar in postwar Cuba).


n74 Derrick Bell, Revocable Rights and a Peoples' Faith: Plessy's Past in Our Future, 1 Rutgers Race L. Rev. 347, 348 (1999) (observing that during times of economic crisis Black needs become vulnerable to compromise and sacrifice).

n76 See McAdams, supra note 75, at 1044.

n77 Id. at 1050.

n78 See id. at 1052.


n80 See David R. Roediger, Towards the Abolition of Whiteness: Essays on Race, Politics, and Working Class History 29, 63, 191-92 (1994); David R. Roediger, The Wages of Whiteness 13 (1991) (discussing how racial privileges conferred by whiteness can motivate subordinated and exploited whites to overlook their exploitation by other whites).


Whiteness has a cash value: it accounts for advantages that come to individuals through profits made from housing secured in discriminatory markets, through the unequal educations allocated to children of different races, through insider networks that channel employment opportunities to the relatives and friends of those who have profited most from present and past discrimination, and especially through intergenerational transfers of inherited wealth that pass on the spoils of discrimination to succeeding generations.

n83 See McAdams, supra note 75, at 1084.

n84 The Cuban context also undermines Richard Epstein's critique of the status-production of race theory for under-appreciating the ability of a free market to overcome racial bias. See generally Richard A. Epstein, The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake, 108 Harv. L. Rev. 1085 (1995). After Cuba's totalitarian control of the economy relaxed to permit foreign investment, privately owned restaurants, and the promotion of the tourism industry, the introduction of these free-market reforms were accompanied by "white-only" hiring preferences that were not imposed by the government. See Kapcia, supra note 60, at 6-8 (describing Cuba's recent economic reforms). In short, racism has a force of its own that asserts itself in both controlled markets and free markets.

n85 Jean-Paul Sartre, Anti-Semite and Jew 26 (1960).

n86 See Sabrina Gledhill, The Latin Model of Race Relations, in Moore, supra note 13, at 355. Skin color-based hierarchies have also existed in regions besides Latin America such as British, French, and Dutch Guyana, Curacao, Guadeloupe, Haiti, Jamaica, Martinique, and Trinidad among others. See Harmannus Hoetink, Slavery and Race Relations in the Americas 41-47 (1973).

n87 See Gledhill, supra note 86, at 355.

n88 See McGarrity, supra note 47, at 75 (providing anecdotal evidence of racist attitude of light-skinned mulatto Cubans); see also Abby L. Ferber, White Man Falling: Race, Gender, and White Supremacy 7 (1998) ("The power of ideology comes from its power to define what it does and does not make sense to say, the power to define knowledge and reality.").

n89 See McGarrity, supra note 47, at 64-65.

n90 See id.; see also Fernandez, supra note 7, at 190-227 (detailing parental and peer pressure targeted against interracial couples in Cuba); Kevin R. Johnson, Racial Mixture, Identity Choice, and Civil Rights, Civil Rights J. 44, 45 (1998)
(observing sociopolitical aspects of choosing intimate partner).

n91 See McGarrity, supra note 47, at 64-65.

n92 See id. at 67.

n93 See id.

n94 See Evenson, supra note 35, at 110 ("The closing of private schools in 1961 and the public investment in public education were extremely important to the process of rectifying racial inequality.").

n95 See McGarrity & Cardenas, supra note 51, at 101 (concluding that greater level of police repression targeted against Afro-Cubans accounts for estimated 70% of Cuban prison population that is Black); Jody Benjamin, Police Racism Flourishes in Castro's 'Workers Paradise,' L.A. Daily J., May 21, 1992, at 6 (describing consistent harassment by Cuban police experienced by African American journalist and other Afro-Cuban residents he interviewed).

n96 See Butterworth, supra note 19, at 29, 67.


n99 See Blackness in Latin America and the Caribbean: Social Dynamics and Cultural Transformations, supra note 97, at 7-8.

n100 At the same time it is important to note that Marxist theory has long been criticized for its de-emphasis of race in its analysis of class oppression. See Cruse, supra note 1, at 151.


n103 See id. at 44-45.

n104 Id. at 44 (quoting Marti). Marti thought that Afro-Cubans would "rise" to the level of whites through intermarriage with whites and by rejecting their African heritage in favor of Western culture. See Helg, supra note 69, at 45.

n105 See de la Fuente, supra note 102, at 45.


n108 See Helg, supra note 69, at 71-72.


n110 Id. at 39.


n113 See Rout, supra note 106, at 306. It is interesting to note that Cuba employed an
overt white immigrant preference in its immigration system long before the United States did the same with the National Origins Quota Act of 1924. See Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (restricting immigration based on national origin and quotas to favor white European immigrants).

n114 See Rout, supra note 106, at 303.

n115 See de la Fuente, supra note 111, at 44-112.

n116 See Moore, supra note 13, at 30.


n118 See Perez, supra note 107, at 527.

n119 See id. at 524.

n120 See de la Fuente, supra note 117, at 144.

n121 See id. at 155.

n122 See Helg, supra note 112, at 53.


n124 See Luis E. Aguilar, Cuba, c. 1860 - c. 1930, in Cuba: A Short History, supra note 45, at 21, 44.

n125 See Helg, supra note 69, at 193.

n126 See Perez, supra note 107, at 537.

n127 Casal, supra note 9, at 12.

n128 Perez, supra note 107, at 537.

n129 See de la Fuente, supra note 102, at 55.

n130 See Helg, supra note 69, at 203.

n131 See Rout, supra note 106, at 305.

n132 See id. at 305.

n133 Helg, supra note 112, at 56. Although some commentators attribute Cuban segregation policies to the work of the United States occupation forces and the continuing influence of the United States, Cuba had a long history of racism that complemented the race-based intervention of the United States. See Nancy Leys Stepan, "The Hour of Eugenics:" Race, Gender, and Nation in Latin America 174 (1991). Post-slavery 19th-century Spanish-ruled Cuba had an entrenched de facto system of segregation that did not require legal enforcement. See Helg, supra note 69, at 25. Prisons and hospitals, for example, had one section for whites that included Chinese and another for Blacks and Mulattos, and all theater seats except for that of the gallery were whites only. See id. Further, exclusive hotels were whites only, and many other places of public accommodation often refused to serve Blacks and Mulattos. See id. In fact, when U.S. planters and the U.S. Chamber of Commerce in Havana wanted to increase the numbers of immigrants from Haiti, Jamaica, Barbados, and other Caribbean islands to work the sugar plantations of Cuba in the 1910s, the native Cuban government was in opposition and accused the United States of being more concerned with the cost of sugar than with the racial and cultural future of Cuba. See de la Fuente, supra note 102, at 51-52.

n134 The failings of Cuba's nationalism project to overcome the problem of racism contravenes U.S. proposals to solve racism by submerging racial identities to a more forceful "American" vision. See generally Jim Sleeper, Liberal Racism (1997) (discussing inclusion of Blacks by imploding notions of "Blackness" and of "whiteness").

n135 See Casal, supra note 9, at 13.

n136 See Louis A. Perez, Jr., CUBA Between Reform and Revolution 307 (2d ed. 1995). Perez noted that:

In the main Afro-Cubans occupied the lower end of the socio-economic order. Almost 30 percent of the population of color over twenty years of age was illiterate. Blacks tended to constitute a majority in the crowded tenement dwellings of Havana. They suffered greater job insecurity, more unemployment/underemployment, poorer health care, and constituted a proportionally larger part of the prison population. They generally earned lower wages than whites, even in the same industries. Afro-Cubans were subjected to
systematic discrimination, barred from hotels, resorts, clubs, and restaurants.

Id.

n137 See de la Fuente, supra note 102, at 63.

n138 See McGarrity, supra note 47, at 64-65 (noting that 84% of Black Cubans surveyed in 1994 ethnographic study indicated that discrimination in employment was endemic and increasing).

n139 Evenson, supra note 35, at 113.

n140 See de la Fuente, supra note 102, at 63.

n141 See id. at 62.

n142 See Gisela Arandia Covarrubias, Strengthening Nationality: Blacks in Cuba, 12 Contributions in Black Stud. 62, 68 (1994) ("I believe that the problems of the Blacks in Cuba can be resolved only within the space of their own nation, and not outside.").


n144 See Casal, supra note 9, at 21; de la Fuente, supra note 102, at 62-63.


n146 See Moore, supra note 30, at 19.


n149 See Evenson, supra note 35, at 99.

n150 See id. at 98, 112.


n152 See id. at 81.


n154 See Frances Lee Ansley, Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship, 74 Cornell L. Rev. 993, 1073 (1989) (urging civil rights scholars to commit themselves to dealing interrelatively with race and class in order to fully understand white supremacy); Richard Delgado, The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?, 22 Harv. C.R.-C.L. L. Rev. 301, 320 (1987) ("It is not enough to subsume racism under some other category, such as class struggle, that fails to understand racism's subtlety and complexity.").

n155 See Marable, supra note 82, at 89.

n156 See William Julius Wilson, The Declining Significance of Race: Blacks and Changing American Institutions 150 (1978) ("Class has become more important than race in determining black life chances in the modern industrial period" because middle class Blacks with skills are better able to be successful than low-income non-
skilled Black workers). But see Stephen Steinberg, Turning Back: The Retreat from Racial Justice in American Thought and Policy 148 (1995) ("Wilson falls into the familiar trap of assuming that the postindustrial economy is based primarily on an educated and skilled work force. While this holds true for some jobs in a few fast-growing areas of technology, most jobs in the service sector are notable for not requiring much education and skills.").

n157 See Deborah C. Malamud, Affirmative Action, Diversity, and the Black Middle Class, 68 U. Colo. L. Rev. 939, 967-87 (1997) (noting that Black middle class is less secure than white middle class when these social factors are considered: housing segregation, prestige of job classification, income security, educational bias, wealth accumulation, and intergenerational status transmission).

n158 See Alex M. Johnson, Jr., How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods, 143 U. Pa. L. Rev. 1595, 1602 (1995). Johnson further posited that there are circumstances under which an elevated socioeconomic class assists Blacks circumvent some of the harsh effects of racism, as when real estate agents distinguish wealthy Blacks from the stereotypes of Blacks when facilitating their ability to integrate a white neighborhood. See id. at 1616.


n160 See Steinberg, supra note 156, at 147-48.

n161 See Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 113 (1992); Steinberg, supra note 156, at 166.

n162 See Marable, supra note 82, at 88 ("Affirmative action has always had a distinct and separate function from antipoverty programs.").

n163 See id.

n164 See Bell, supra note 159, at 807 (stating that Blacks in United States are over three times as likely than whites to live in poverty); Thomas F. Pettigrew, The Changing, but Not Declining, Significance of Race, 77 Mich. L. Rev. 917, 920 (1979) (book review) ("The black poor are far worse than the white poor, and the black middle class still has a long way to catch up with the white middle class in wealth and economic security."). But Frances Ansley observes that ultimately a vision of racially equal economic stratification should give way to a more expansive notion of economic justice that seeks to diminish all economic disparities. See Ansley, supra note 154, at 104850. Unfortunately, the more expansive notion of economic parity that Frances Ansley advocates is particularly utopian given the entrenched nature of capitalism and this nation's historical resistance to radical economic reforms for the poor. See Howard Zinn, A People's History of the United States: 1492-Present 383, 433 (rev. ed. 1995).


n166 See Bell, supra note 159, at 895-96, 901-906.

n167 Herbert Hill, Comments on Race and Class, Nation, Apr. 11, 1981, at 436; see also Marable, supra note 159, at 2 (elaborating on connection between capitalism and economic exploitation of Blacks).


n169 See supra notes 49-57 and accompanying text (discussing under-representation of Afro-Cubans in positions of governmental authority); see also Fredrickson, supra note 168, at 209-212 (discussing consistent U.S. pattern of Black exclusion from industrialized jobs to placate low-wage white workers along with exclusion from unions); Marable,
supra note 159, at 35-39 (documenting virulent racism of United States unions).

n170 See Ansley, supra note 154, at 1036 ("White supremacist regimes are, in fact, not confined to any particular political economy. They can be shown to exist in non-capitalist economies as well as in socialist ones.").

n171 See Zinn, supra note 164, at 393.

n172 During the New Deal reforms of the 1930s most Blacks worked as farmers, farm laborers, migrants and domestic workers. See id. at 394.

n173 See Jill Quadagno, The Color of Welfare: How Racism Undermined the War on Poverty 197 (1994) (interpreting war on poverty as effort to eliminate racial barriers of New Deal programs and to integrate Blacks into national political economy).

n174 See id. at 28-31.

n175 Dorothy E. Roberts, Welfare and the Problem of Black Citizenship, 105 Yale L.J. 1563, 1572-73 (1996) (book review) ("Privileged racial identity gives whites a powerful incentive to leave the existing social order intact. White Americans therefore have been unwilling to create social programs that will facilitate Blacks' full citizenship, even when those programs would benefit whites.").

n176 Similarly, contemporary color-blind educational programs in Florida and Texas which select the top performers in every high school for enrollment in a state university, are superimposed upon a system of racially segregated high schools that ignores the difference in college preparation resulting from under-funded high schools. See Peter T. Kilborn, Jeb Bush Roils Florida on Affirmative Action, N.Y. Times, Feb. 4, 2000, at A1. I have N.Y.U. Law Professor Paulette Caldwell to thank for this observation.

n177 See Steinberg, supra note 156, at 119-26 (detailing U.S. legacy of 1965 Moynihan Report which associated Blacks and more specifically the Black family with pathological and self-inflicted "culture of poverty"); McGarrity & Cardenas, supra note 51, at 66-67 (describing anthropological studies of white Cuban views of "low Black culture").


n179 See de la Fuente, supra note 111, at 13-14, 24.

n180 See David Gergen, To Have and Have Less, U.S. News & World Rep., July 26, 1999, at 64 (stating that gap between rich and poor is widening in United States, and poverty rates have dropped very little despite current economic boom).

n181 See John A. Powell, Welfare Reform for Real People: Engaging the Moral and Economic Debate, 17 Law & Ineq. J. 211, 211-12 (1999) ("We have changed the focus on welfare from addressing the needs of the recipient and structural impediments to focusing on the apparent defects of the recipients.").


n183 Margaret B. Wilkerson & Jewell Handy Gresham, Sexual Politics of Welfare: The Racialization of Poverty, Nation, July 24, 1989, at 126 (quoting
Barbara Ommolade, single-mother college counselor).

n184 See Patricia J. Williams, The Rooster's Egg: On the Persistence of Prejudice 3 (1995) (noting that typical woman on welfare is young white woman with children, who is convinced she is not typical but just temporarily down on her luck).

n185 See Michael Omi & Howard Winant, Racial Formation in the United States: From the 1960's to the 1990's, at 66-67 (1986) (stating that in order to consolidate hegemony, ruling groups produce ideology to pervade popular thought that comes to be considered common sense).


n187 See Rachel F. Moran, Neither Black nor White, 2 Harv. Latino L. Rev. 61, 89 (1997) ("In substituting class for race, officials could obscure the ongoing significance of race in the everyday lives of Americans and the ways in which it interacts with class to exacerbate the condition of the underclass.").

n188 Black comedian Chris Rock unintentionally illustrates the perversity of the "culture of poverty" ideology with his stand-up routine on the subject of "why Black people hate niggers" in which he juxtaposes Black middle class values as being in opposition to low-class "nigger" culture. See Chris Rock, Rock This (1997); see also Leslie Espinoza & Angela P. Harris, Afterword: Embracing the Tar-Baby LatCrit Theory and the Sticky Mess of Race, 85 Cal. L. Rev. 1585, 1603 (1997), 10 La Raza L.J. 499, 517 (1998) ("Many of us who grew up in middle class, 'respectable' African-American homes can recall being told by parents or other relatives to stop 'acting colored.' The image we were all fleeing was the image of the nigger, the lower-class black person who talked too loudly in 'Black English,' laughed too heartily, and was vulgar in appearance, word, and deed.").

n189 The closest parallel to the race and class perspective favored in this Article is the anti-caste principle used in the distinct context of India's reservation program for disadvantaged groups because it connects economic and political disadvantage to social structure. See Clark D. Cunningham & N.R. Madhava Menon, Race, Class, Caste . . . ? Rethinking Affirmative Action, 97 Mich. L. Rev. 1296, 1302 (1999); see also Cass R. Sunstein, Affirmative Action, Caste, and Cultural Comparisons, 97 Mich. L. Rev. 1311-12, 1316-18 (1999).

n190 For instance a race-class mode of analysis can more completely explain why white women as a group benefit the most from current affirmative action programs rather than the racial minority groups they were originally designed for, and similarly why white Cuban women have fared better that Afro-Cuban women and men under the socialist redistribution programs. See Evelyn Hu-DeHart, Affirmative Action--Some Concluding Thoughts, 68 U. Colo. L. Rev. 1209, 1212 (1997) (explaining that white women are best positioned to take advantage of affirmative action programs because their social, economic and educational backgrounds more closely parallels that of white men).


n192 See Valdes, supra note 8, at 12.


n194 It has been noted that one of the challenges of LatCrit is that the search for a Latino/a perspective on the law can result in essentializing Latino/a identity. See Stephanie M. Wildman, Reflections on Whiteness and Latino/a Critical Theory, in Critical White Studies (Richard Delgado & Jean Stefancic eds., 1997) ("I will say first that there is a downside to this lens, to naming Latinas/os as a group, because this act of naming essentializes a very diverse group, making it appear to be a homogeneous whole."). But see Elizabeth
n195 See Raquel Z. Rivera, Boricuas From the Hip Hop Zone: Notes on Race and Ethnic Relations in New York City, 8 Centro J. of Center for Puerto Rican Stud. 202, 209 (1996) (concluding that reason many Puerto Ricans in United States refuse to identify as Black is because of anti-Black sentiment "brought on the trip from Puerto Rico").

n196 The Latin American preoccupation with whiteness and denigration of Blackness is also prevalent in Latin American countries with small numbers of self-identified Afro-Latinos like Mexico, Argentina, and Peru just to name a few. See Rout, supra note 106, at 185-312.


n198 See Marta Tienda & Ding-Tzann Lii, Minority Concentration and Earnings Inequality: Blacks, Hispanics and Asians Compared, 93 Am. J. Soc. 141, 163-64 (1987); see also Moran, supra note 187, at 175 ("Indeed, Latinos who disproportionately self-identify as Black bear this racial tax as well.").

n199 Delina D. Pryce, Black Latina, Hispanic, Mar. 1999, at 56.


n201 See id. at 282-83.

n202 See Eric K. Yamamoto, Conflict and Complicity: Justice Among Communities of Color, 2 Harv. Latino L. Rev. 495, 495 (1997) ("A racial group can be simultaneously oppressed in one relationship and complicit in oppression in another.").


n204 One powerful example of the political significance of individual expressions of Latino/a identity is illustrated by the interaction that a Latina acquaintance of mine had with her white male partner. After dating one another in college for approximately two years, the young woman asked her partner when he meant to introduce her to his parents. The time for their college graduation had arrived and she wished to coordinate a convenient time to meet them. He responded that he could not possibly introduce her to his parents. When she inquired why that was the case he replied, "Because you have Black blood." Her outcry was immediate: "I don't have Black blood! My dark skin comes from my Puerto Rican Taino indian ancestry." Despite the fact that the Spaniards decimated the Taino indian population of Puerto Rico in the 1500s, this Latina deployed a common Latino/a defense to U.S. racism -- she condoned bias against Blacks by asserting a Mestizo ethnic identity. See Taino Revival: Critical Perspectives on Puerto Rican Identity and Cultural Politics 49 (Gabriel Haslip-Viera ed., 1999) (explicating Puerto Rican phenomenon of asserting false Taino identity to deny African ancestry).


n207 See Espinoza & Harris, supra note 188, 85 Cal. L. Rev. at 1624, 10 La Raza L. J. at 538 ("Latinos/as are offered a lure by mainstream society: the choice of not identifying with African Americans and not identifying as racial minorities.").

n208 See Moran, supra note 187, at 169-170. Moran wrote:

As the Latino population continues to grow, officials are likely to pay increased attention to it unique needs and characteristics. With its heightened visibility will come weighty responsibilities . . . . Latinos must be sensitive to the ways in which their reform agenda will affect those Americans least able to escape the strictures of race labels.

Id.


Larry Cata Backer *

BIO:

* Executive Director, Tulsa Comparative & International Law Center, Professor of Law, University of Tulsa, Tulsa, Oklahoma. My thanks to Pedro Malavet and Linda Lacey for reading the text and to Rob Leneau for his excellent research assistance.

SUMMARY: ... Yet outsider scholarship does seem to serve an important purpose for traditionalists. ... We might assume that courts, like dominant group academics, give short shrift to emerging scholars of color and to "outsider" scholarship. ... However, mere quantity does not suggest either the impact or usefulness of outsider scholarship. ... The courts appear to have actively engaged outsider scholarship in very few cases. ... Two courts very recently have begun to engage some outsider scholarship. ... Occasionally other courts, state and federal, have engaged outsider scholarship from time to time. ... The dominant discourse looks on emerging schools of outsider scholarship as uncompromisingly subversive. Traditionalists within the dominant discourse view critical narrative or outsider scholarship as evidence of the significant threat to dominant norms posed by the groups these outsiders represent. ... To the extent that outsider scholarship can be painlessly co-opted, controlled or radicalized, it can play a useful role in defense of the disciplining of dominant discourse. ... Thus, a dominant group will hear the stridency of outsider scholarship as the attempt by one group to impose its norms on all others -- norms which will still subordinate and exclude but in ways different from that of the current norms. ...

[*1173]

Many people have complained lately about the increasing irrelevance of legal scholarship. n1 More often than not, emerging schools of legal scholarship are the specific targets of these complaints. "Postmodern jurisprudence is characterized by an enormous disjunction between theory and practice, between the legal academy and the judiciary." n2 But others, in turn, complain that these emerging schools of legal scholarship, especially the scholarship of "outsiders" is not taken seriously enough by the academic, legal and political communities in the United States. n3 These complaints, in turn, have given rise to another area of legal scholarship, schol [*1174] arship about scholarship. n4 As a result, there seems to be much truth to the observation made recently by a student of legal scholarship that "an ongoing Kulturkampf presently exists within the legal academy regarding both the direction and meaning of legal scholarship." n5

Not only have some proclaimed that legal scholarship has been losing its power to help officers of the court and the laity understand law, but they have also announced that, in the hands of some, scholarship has become dangerously nihilistic or subversive. n6 [*1175] So labeled, such scholarship is condemned en masse. "Labeling is a big part of the criticism of all critical race scholars. The label anarchist has a political undercurrent, a not so subtle reference to the consequences of anarchy, to the fate of the political dissidents in the time before the Cold War and communism." n7

Recent scholarship by traditional outsiders to the legal academy, and principally people of color n8 and women, n9 appears especially threatening. These writers reject cultural conformity. They reject the notion that there is such a thing as a dominant normative ideal to which people can or ought to subscribe. n10 They understand that [*1176] the notion of conformity within the dominant group is elusive and ultimately unattainable. They grasp all too well that even (and perhaps especially) liberal or progressive members of the dominant group essentialize them, decharacterize them and then judge them as unworthy. As Gwendolyn Mink has accurately observed in connection with recent changes in American welfare law: "Pegging equality to cultural conformity while withholding the tools and choice of conformity from African Americans, liberal racism marked the Black mother, worker and child as unassimilable." n11
Within the academic legal community in the United States, the result has been to either shun or demonize such writing. Richard Delgado, for example, has demonstrated how a small closed community of white male scholars monopolized elite civil rights scholarship. This closed group of scholars all resembled each other in writing, but did not appear to acknowledge scholarship other than their own or that of their circle. Especially ignored was the work of people of color within the academy. n12 In revisiting his original work ten years later, Professor Delgado noted that:

With a few notable exceptions both the original group and the newcomers rely on a panoply of devices, ranging from the dismissive Afterthought to the wishful Translation, to muffle and tame the new voices. . . . Some of the resistance may be intentional, but I believe most of it results from quite ordinary forces: preference for the familiar, discomfort with impending change, and a nearuniversal disdain for an account or "story" that deviates too much from one upon which we have been relying to construct and order our social world. Cultural momentum tends to be preserved. All discourse marginalizes. We resist [*1177] transformative thought until it has lost the power to transform us. n13

The institutional practice norms that Professor Delgado describes serve primarily to magnify the force of assimilation within the legal academy. Legal scholarship, like other spheres of public expressions of norms, is subject to the operative command of our social ordering -- conform or be punished. n14 The most utilized punishment, or mechanism for the enforcement of conformity, is shunning. n15 The most effective means of formal shunning requires little more than that a work or author not be cited. Shunning a work or author, or citing such work or author dismissively, is itself a formal acknowledgement that this scholarship is neither an important source of information nor authority for the court. Thus, ignoring scholarship has serious repercussions in the citation obsessed American intellectual environment of the late twentieth and [*1178] early twenty-first centuries. n16 These notions have not just been borne out within the American legal academy as Richard Delgado has sought to show. Citation madness affects the judiciary as well, where we have begun to measure the influence of particular judges through studies of citation patterns. n17 [*1179]

Yet outsider scholarship does seem to serve an important purpose for traditionalists. To the practitioners of the dominant form of academic legal scholarship, this sort of scholarship serves as a warning, the exemplar, of the types of work which are deemed "bad." n18 Richard Delgado's point, then, might be well taken, if with a bit of irony: "If I am right, imperial scholarship will continue to be with us a long time." n19

We might assume that courts, like dominant group academics, give short shrift to emerging scholars of color and to "outsider" scholarship. This Article tests the theory that current legal scholarship, and especially the "outsider" scholarship of people of color, is either shunned or demonized in the courts. This Article examines the reception of outsider scholarship in the courts, which along with the legislatures, constitute the formal institutional vehicles for "altering the existing legal landscape" in the United States. n20 For [*1180] this purpose, the Article reviews the opinions of state high courts and federal appeals courts for citations to "outsider" scholarship. n21 To focus the examination, the article limits the survey to judicial citation of what has been chosen as a fairly representative sample of well-known scholars who epitomize major strands of critical, minority, and feminist scholarship in the legal academy. n22 These scholars include: Harlon Dalton, Stanley Fish, Richard Delgado, Catherine McKinnon, Patricia Williams, Lani Guinier, Derrick Bell, [*1181] Charles Lawrence III, Duncan Kennedy, Mari Matsuda, Gerald Lopez, Kimberle Crenshaw, Janet Halley, Ruthann Robesom, Jerome Culp, Gary Peller, and Neil Gotanda. To further focus the examination, the Article limits the survey to the ten-year period, from June 1989 through June 1999. This ten-year period marks the time when these scholars achieved academic success, as conventionally measured, and their scholarship achieved a fair measure of circulation in the highest organs of the dominant culture set aside for that purpose. n23

Part I of this Article examines the way in which courts have cited these representatives between 1989 and 1999. The initial focus is on rates of citation. Citation rates indicate the scope of the "normalization" of outsider scholarship within the process of the production of law, that is, the extent to which it has been accepted as a part of what passes as normal or conforming academic scholarship. n24 The second focus is on the nature of the citations. The way outsider scholarship is used provides a better indication of the seriousness with which it is taken by the courts than does mere number counting. The manner of use is also a good indication of the utility of the scholarship for purposes other than for the ideas presented in the works cited. Thus, outsider scholarship is valued quite differently, depending on whether the courts engage the ideas developed in the cited pieces or whether the pieces cited [*1182] were used as a boundary marker between the "normal" and everything else.
Part II then draws generalizations from the data examined in Part I. First, the Article considers the citation patterns in cultural context from the outside in, examining the reasons courts may respond to outsider scholarship as either threat or as irrelevant. Second, the Article considers the patterns from the inside out, suggesting reasons for, and the consequences of, the tense relationship between traditional and "outsider" scholarship as reflected in the courts. Finally, the Article examines the patterns in terms of the general debate over the utility and effect of federalism.

The results of the examination of the citation patterns were a bit surprising and somewhat counterintuitive. One would have expected that federal courts would be the more likely place where the sophisticated and norm challenging work of these authors would get the greatest airing as well as the most sympathetic reading. However, this study shows that more state courts, rather than federal courts, are listening, and learning.

What stands out most, however, at both the state and federal level, is the silence. Courts, even hostile courts, rarely take the time to cite, much less ridicule, demean or demonize the work of these scholars. To that extent, the ideas propounded by those scholars, for the most part, have not yet failed to become a well-established part of the dialog of formal law making in America.

The pattern of judicial indifference would appear to paint a rather bleak picture of the possibilities of outsider scholarship in the courts. Yet this is not entirely the case. Thus, this study ends with an irony. The great hope for the normalization of outsider scholarship within formal lawmaking institutions lies with those very concepts of strong federalism that were championed by southern intellectuals and anti-Federalists before the American Civil War. Among the most important lessons of this study is the continued utility of the American federal system in which semisovereign states share power, including judicial power, with the central government. Strong states sometimes serve best the interests of outsiders. Federalism works, and has created those few places where the voices of "outsiders" can be considered, can change the legal landscape, and by so doing, provide a beacon and example for those others who would follow.

I. Citation Patterns

A. Methodology

The principal object of the search was to identify the cases in which federal or state courts cited one of the people making up my representative sample of well known outsider scholars, principally women and people of color. First, this study limited the pool of cases to those cases in which the court published a written opinion. Second, for reasons of time and economy, this study further limited the pool of cases to those published cases available on Westlaw, the electronic database maintained by West, Company.

To obtain the citation database, I simply broadly searched for the occurrence of each author's name in the Westlaw files for court cases. I eliminated the cases in which the author appeared as counsel in the case, or where the reference was to an individual other than the author. On the other hand, cases in which a representative author was cited by name were retained even if the court made no reference to a particular work of the individual cited.

In addition I conducted searches for the use of the terms "critical race," and other terms typically associated with what has sometimes been described as the more "extreme" elements of those movements. In addition, these general references might provide valuable information about judicial attributes towards schools of outsider scholarship absent a specific reference to an author or a work. Moreover, these general references could provide more information about the quality of the citation patterns in the courts and help signal aberrational citations to a particular named author.

Some caveats are in order at this point. First, a general caution on the approach underlying this study. The primary purpose of this study is qualitative, not quantitative. This study did not set out to determine an actual definite rate of citation. Instead, this study places more importance on qualitative analysis. The roughly accurate citation rates themselves suggest the quantum of the effect discussed, but the specific and particular numbers themselves are not the object of the study.

Second, following other studies, this survey notes five additional cautions that must be kept in mind as one reviews the results of the survey. First, one should be wary of drawing statistical significance from small samples. Second, the study does not measure how scholarly work, not cited in opinions, influences the thinking of judges. Third, judges are not the only group involved in the process of law. As such, citation counting exercises do not expose the utility or impact of such scholarship on lawyers, the press, legislators, or the general public. Indeed, it was only relatively recently that the work of one of the scholars in the sample, Lani Guinier, was instrumental
in blocking her confirmation to a highly visible position in the U.S. Department of Justice. n40 Fourth, courts cite scholarly work as less useful or authoritative than case law or legislation -- such work is less authoritative for courts. n41 And fifth, scholarly work has utility outside the courtroom. n42 As such, the failure to cite should not necessarily form the basis of an opinion that the work lacks merit or use.

[*1186]

B. Citation Quantity

1. General Terms: Critical Race Theory, Critical Legal Theory, Radical Feminism, Multiculturalism

The terms "critical race theory," "critical legal theory," "radical feminism" and "multiculturalism" have become household fetishes within legal academia. In the minds of traditionalists these terms are vested with near magical power, the power to corrupt society. Each term is blindly regarded as representing forms of extreme non-traditional legal scholarship movements. Each had been roundly condemned by major spokespersons who claim to speak for, or who may be influential with, traditionalists or political conservatives in America. n43 Each of these terms have received sufficient circulation through established institutional vehicles for the transmission of cultural information so that most judges would be generally aware of and have some sense of the ideas to which these terms referred, whether or not such understanding is distorted. The references in reported decisions to these terms are summarized below.

a. Critical Race Theory

Perhaps the most surprising result was that there was no mention of critical race theory by name. n44 Given the large number of race and ethnicity based cases percolating through the courts between 1989 and 1999, this is indeed unexpected. To check the result, I also ran searches using the terms "minority /2 scholar!" and "black african /2 american /2 scholar!". n45 The former search turned up twenty-four cases, most involving the validity of minority based scholarships for students. The latter search turned up four cases, most identifying particular people as fitting within this "category." [*1187] To the extent that the ideas of critical race theory have made their way into the courts, it seems to have entered the courts by another name -- multiculturalism, which is discussed later. n46

b. Critical Legal Theory

The search turned up four federal cases n47 and four state cases. n48 All of the citations related to issues of ambiguity in the interpretation of writings. One case quoted an article from a symposium on critical legal studies as support for a "but see" cite to the court's statement that, "In fact, most words, sentences and documents have a plain meaning." n49 Here critical legal theory is used to support the statement that not everybody believes in a plain meaning for words -- though the court, in the case reported, does.

Three of the four federal cases originated in the Sixth Circuit. One of those cases uses critical legal theory for essentially aesthetic purposes; its use is meant to serve principally as a literary ornament wafting the very noticeable aroma of contempt and disdainful irony. Yet, even serving as mere literary device, it seems an awkward if not altogether inapt reference to quantum theory. n50

In the other two cases from the Sixth Circuit, the opinions with references to critical legal theory sprung from the pen (or word processor) of Judge Boggs, both times writing in dissent. In the first, Judge Boggs dissented from a decision of the panel holding an arbitrator's decision immune from judicial review. Judge Boggs suggested greater latitude for review if the judge is convinced that the arbitrator's result does not rationally derive from the agreement, arguing that "One does not have to be a complete devotee of the Critical Legal Studies School to believe that there are degrees of ambiguity and clarity in most language." n51 In the second, an equally divided court of appeals affirmed a decision of the district court in a water rights case involving the construction of an ambiguous phrase. n52 The case is particularly interesting because it is one of the relatively rare instances in which judges indulged in a "weight of secondary authorities" game. n53 Here again, Judge Boggs' opinion of critical legal studies is not positive: "Thankfully, we have [*1189] not reached the stage where a law review article rather than Article III judges determine when ambiguity is present in a provision of law. Law review commentators, especially those of the "critical legal studies" school, are notorious for thinking every bit of text is ambiguous. See, e.g., Anthony D'Amato, Aspects of Deconstruction: The 'Easy Case' of the Under-Aged President, 84 Nw. U. L. Rev. 250 (1989)." n54

The four state cases refer to critical legal studies in passing. One case cited Duncan Kennedy and Roberto Unger for articles the court states advocate the principle in contract law that if the gain realized by the party in breach exceeds the injured party's loss, the measure of damages should strip the party in breach of all gain. n55 In another case, the Supreme Court of Mississippi used a citation to an article about critical legal studies as authority for its decision to ignore authority in other jurisdictions. The court argued such authority was of limited value because each authority merely cross-referenced each other for authoritative
support. As such, each employed "loopified" or circular reasoning, amounting to "nothing more than unacceptable ipse dixitism or dogmatism." n56 In yet another case, a dissenting justice of the Pennsylvania Supreme Court used a reference to both legal realism and critical legal studies in an attempt to shame the majority.

It is wrong to pick a winner for extraneous reasons and then adopt a rule to reach the prechosen result. To do so, as I believe the Majority has done in this case, lends credence to the theories of "realists" like the late Judge Jerome Frank, and the modern "critical legal studies" radicals that ours is not a system of law at all, but merely one of individual preference. n57

In the last case, a products liabilities case, a passing reference is made to a study, conducted by Professor Wright comparing the [*1190] causation theories of traditional scholars, libertarians, legal economists, realists and critical legal studies scholars. n58 Thus, to some extent the term "critical legal studies" has entered the vocabulary of the courts. Yet, it has been used primarily to mock critical legal studies scholars, or as an example of an unquestionably unreasonable point of view. Critical legal studies thus serves the courts as the equivalent of a clown or the academic village idiot.

c. Radical Feminism

The search yielded one federal case n59 and one state case. n60 In the federal case, the Seventh Circuit, through Judge Easterbrook, rejected plaintiff's section 1983 claims based on female guards' monitoring of the plaintiff while he was naked. Judge Posner, concurring and dissenting, makes a reference to radical feminists as progressive social engineers of a disdainful type.

There are radical feminists who regard "sex" as a social construction and the very concept of "the opposite sex" as implying as it does the dichotomization of the "sexes" (the "genders," as we are being taught to say), as a sign of patriarchy. For these feminists the surveillance of naked male prisoners by female guards and naked female prisoners by male guards are way stations on the road to sexual equality. If prisoners have no rights, the reconceptualization of the prison as a site of progressive social engineering should give us no qualms. Animals have no right to wear clothing. Why prisoners? n61

In Indiana, the state court of appeals reviewed a probation requirement for defendants convicted for criminal trespass that required them to attend a reproductive health lecture sponsored by a clinic. In rejecting the defendants' federal First Amendment argument, the court, in a footnote, noted that "defendants analogize the lecture requirement to having convicted domestic batterers [*1191] undergo psychological reprogramming at the hands of radical feminists. We reject the implied notion that only radical feminists oppose spousal abuse." n62 Like critical legal studies, and perhaps to a greater degree, the label "radical feminist" appears useful only as a pejorative. The phrase, for some courts at least, conjures up the worst sort of social demons. Radical feminists thus portrayed, are essentially un-American and antidemocratic.

d. Multiculturalism

The search yielded just one state case n63 and one federal case. n64 The state case involved consideration of a cultural defense in a criminal case. In a footnote following the mention that the defense "obtained the assistance of two experts, Dr. Marina S. Tulao and Dr. Quan Cao, to present the appellant's insanity and cross cultural defenses" the court cited two law review articles that mentioned the very case being reviewed. n65

The federal case provides a wonderful extended discussion on "multiculturalism" and the academy. We are reminded that, "Multiculturalism is the latest shibboleth in the Academy." n66 The court then quotes from the testimony of an expert with respect to the meaning of the multiculturalism debate in the context of the history of the American South.

The Knight Plaintiffs have invited this court to join the foray of the national debate on multiculturalism and uses the arguments of the debate to find that the predominantly white schools of the [*1192] state are illegal bastions of Eurocentrism perpetuating segregation. The Court will decline the invitation. n67

The federal case suggests that some courts conflate multiculturalism and critical race theory. Each, however, represents the same thing to many courts -- an attempt at cultural redefinition through the mechanics of law and litigation. Some courts find this project distasteful.

2. Harlon Dalton; Ruthann Robeson; Jerome Culp; Gerald Lopez

The search yielded no references to these authors in the cases.

3. Stanley Fish

Stanley Fish is cited in two federal cases between 1989 and 1999, though only one of the two citations is directly related to Fish's work. In the first case, n68 the court used Professor Fish to construct an analogy. The court reasoned that lectures by Stanley Fish, whatever their quality, cannot constitute personal knowledge of disputed evidentiary facts in a First
Amendment case before a judge. Likewise knowledge acquired at a conference on developments in DNA technology cannot constitute the acquiring of personal knowledge of contested evidentiary facts. n69 Here Professor Fish is reduced to literary device within a judicial opinion. In the [*1193] second case, n70 Professor Fish is identified as an example of "keen legal minds (especially those informed by modern literary theory) that will always be able to 'conjure up hypothetical cases in which the meaning of disputed terms' will be thrown into doubt." n71 Here Professor Fish is used to provide a specific example of what other courts have suggested was "wrong" about critical legal theory. n72

4. Richard Delgado

Richard Delgado is cited once by the federal courts, and five times in the state courts. In the federal case, n73 the court granted plaintiff's motion for summary judgment where the plaintiff challenged the University of Wisconsin rule that prohibited students from directing discriminatory epithets at particular individuals with intent to demean them and create a hostile educational environment. The reference to Professor Delgado merely identified him as one of the faculty members who helped develop the rule. n74

In contrast to the federal courts, the state court cases tended to more significantly engage Professor Delgado's scholarship. In a case from Oregon, n75 an appellate court cited Professor Delgado as weighty authority on the effect of racial epithets, giving him citation precedent to a sister state supreme court opinion. n76 In a case [*1194] from California, Professor Delgado's work was cited in support of the position that racist speech is not constitutionally protected. n77

In a case from New Jersey, n78 the supreme court expressly relied on the hate speech ideas articulated by Professor Delgado and Laura Lederer in reinstating the suspension of an off-duty firefighter for directing a racial epithet at the on-duty police officer that stopped him for drunk driving. n79 In a second New Jersey case, n80 the court relied heavily on Professor Delgado for asserting the qualitative difference of racial insults "because they conjure up the entire history of racial discrimination in this country." n81 As such, "a rational factfinder may conclude that defendant's sole remark would have caused substantial emotional distress in the average African-American." n82 Finally, in a case from Alabama, n83 the court recognized and engaged the earlier scholarship of Professor Delgado, though it failed to adopt Professor Delgado's view. The court noted, citing among several other works of various authors, the work of Joan Vogel and Richard Delgado, n84 that such critical [*1195] commentary has recognized the medical "conspiracy of silence" as fact. The Alabama court, however, refused to adopt this position on the grounds that other state courts, while considering this notion, had declined to recognize this "conspiracy of silence" in malpractice cases. n85

5. Catherine MacKinnon

As should come as no surprise with regard to the person who propounded the idea of hostile environment sex discrimination, n86 Professor MacKinnon enjoys more citations between 1989 and 1999 than many others. Professor MacKinnon's understanding of the existence of unequal power in the context of sex harassment appears to be well known and officially acknowledged by the courts.

Professor MacKinnon is cited in eleven federal cases during this period, n87 though she is cited in only one state case. In the state case, n88 Professor MacKinnon's work was cited as pioneering work that "demonstrated and emphasized the role of male power and domination in sexual harassment. Ms. MacKinnon's subsequent works have elaborated, in a variety of contexts, on the interrelationship between male domination and both physical and civil rights abuses of women." n89 This state court conceded that gender related abuses of power can exist even when females occupy posi [*1196] tions of official authority and males occupy subordinate positions. n90 However, the court shrank from applying her work in discrimination cases because it believed that the ideas are substantially impossible to apply by the courts.

The bottom line, however, is that it does not really matter for the purposes of the Human Rights Act whether the plaintiff was a victim of a power play. We do not perceive "discrimination" as necessarily synonymous with an abuse of power. More importantly, we do not find an inquiry into power to be a useful part of our fair employment doctrine. As a practical matter, any doctrinal standard that includes a requirement that a plaintiff must establish some abuse of power is simply unworkable. The concept is far too subtle and formless for judges and juries to apply in a consistent manner, especially in hostile employment cases. n91

The courts giveth, and the courts taketh away!

In many of the federal cases in which Professor MacKinnon is cited, the citation is used to establish the historical or theoretical basis of the sex discrimination cause of action. n92 In some cases, Professor MacKinnon is cited for the purpose of questioning that basis or its later elaboration in the courts. n93 Some courts have am [*1197] plified the ideas in Professor MacKinnon's work to develop the basis for liability in
sex discrimination cases, n94 or to help define the forms which hostile work environment can be manifested in the workplace. n95 Federal courts have cited Professor MacKinnon to limit the reach of hostile discrimination cases, when, for example, asserted by males against females. n96 Other federal courts have used [*1198] Professor MacKinnon's work in support of the opposite result in the same factual context. n97 Sometimes a court merely quoted another court quoting Professor MacKinnon's work, suggesting that the only part of the work read was the portion appearing in the opinion quoted. n98 Courts have also drawn on Professor MacKinnon's work to incorporate a power analysis in their evaluation of sex harassment claims, n99 though not necessarily as Professor MacKinnon might have applied it. n100 [*1199]

6. Patricia Williams

Professor Patricia Williams is cited twice during this period, despite the intense interest in her work exhibited by many traditionalists. n101 In one case, n102 Professor Williams is cited merely as one among a number of scholars who praised the book at the heart of the litigation as evidence of the validity of the author's case history method of developing the themes of the book. In the other case, n103 Professor Williams work describing racism as "spirit murder" n104 is cited along with the work of Professors Delgado and Matsuda in support of the court's statement that racial slurs inflict psychological harm on the victim. n105

7. Lani Guinier

Federal court cases cited Professor Guinier eight times, n106 but no state court cases cited her. In line with her most well-known work, many of the cases in which Professor Guinier is cited relate to voting rights issues. Professor Guinier is used as authority to support the proposition that authentic representatives of the African American community need not be African American. n107

Much more often, courts cited Professor Guinier in connection with her advocacy of cumulative voting to correct inequities from the current one person one vote voting rights structure. For seven [*1200] early courts, Professor Guinier is a "radical black," n108 or someone that advocates the overturning of the Voting Rights Act as currently constituted. n109 For other courts, Professor Guinier is someone mentioned in passing, a curiosity whose ideas about cumulative voting as a means of electoral fairness to American minority groups may be lightly engaged. n110 Sometimes, the reference to Professor Guinier's work is even wistful. n111 Other courts mined Professor Guinier's work for something useful, even if the court applies the [*1201] result in a manner antithetical to the spirit as well as her desired outcome in the work. n112

8. Derrick Bell

A federal court cited Professor Bell once and state courts do not at all. In the federal case, n113 the court cited Professor Bell positively, but not for a central point of the case. n114

9. Charles Lawrence, III

A federal court cited Charles Lawrence only once during 1989-1999, but the cite is quite positive. The court, in explaining the basis of the Griggs v. Duke Power n115 disparate impact method, used the language and ideas of Professor Lawrence. "Not all discrimination is apparent and overt. It is sometimes subtle and hidden. It is at times hidden even from the decisionmaker herself, reflecting perhaps subconscious predilections and stereotypes. See Charles Lawrence." n116 A California court also cited Lawrence, along with Mari Matsuda and Richard Delgado, to suggest that racial and ethnic [*1202] slurs cause injury by their very utterance and, thus, ought not to fall within the protection of the First Amendment. n117

10. Duncan Kennedy

Professor Kennedy, one of the earliest scholars writing in the area of critical legal studies, is cited in one state case n118 and one federal case. n119 In the state case, discussed above, Professor Kennedy is listed as one of many scholars from different scholarly camps favoring the disgorgement principle of remedy that was not adopted by the court. n120 In the federal case, the court cited Professor Kennedy in a contract case, if only to take a dismissive swipe at Professor Kennedy's notion of the nature of contractual good faith. n121

11. Mari Matsuda

Professor Matsuda is best known in the courts for her scholarship on racist speech. Much of the citation to her work reflects this "common knowledge" in the courts. Professor Matsuda is cited five times in state court cases n122 and four times in federal courts n123 during this period. [*1203]

In two of the state court cases from New Jersey, Professor Matsuda is cited for similar propositions, and as favorably, as Richard Delgado. n124 In a third New Jersey case, the court, though holding that the hate crime statute at issue violated the First Amendment's protection of speech, cited Professor Matsuda with deference. n125 Indeed, in the New Jersey cases, it seems clear that some courts have begun to lend significant weight to the work of critical scholars with respect to hate speech and discrimination. In this
Professor Matsuda is also cited by a California court, in a case in which the court reversed the denial of an injunction against the manager of a car rental agency to refrain from making racial epithets against Latinas/os, and intentional and unwanted touching of his employees. n127 Here, the majority relied in part on the work of Professor Matsuda in reaching its decision. n128 The dissenting opinion rebuked the majority for this "radical restructuring of existing First Amendment and California free speech jurisprudence." n129 The dissent laid the blame for this squarely on the influence of Professor Matsuda. n130 "The case may raise important questions ultimately meriting [U.S. and California Supreme Court] review . . . , but we are bound to follow existing precedents, rather than implement schemes posited in law review articles." n131 Now an odd thing happens. Rather than embrace the reliance on Professor Matsuda's ideas, the majority, very like the apostles did long ago, disavowed any such reliance. The majority dropped a footnote in their opinion in which they categorically stated that, "We do not rely on Matsuda's thought provoking ideas, however, but simply note the existence of a vigorous debate on this subject." n132

The federal cases all deal with issues of discrimination. In all of the cases, Professor Matsuda is quoted positively, with courts relying on her work, if only for limited purposes. In two cases, Professor Matsuda's work on accent and language discrimination has been used by the courts. In one case, Professor Matsuda's work proved helpful in discrimination case involving accent. n133 In the [*1205] other case, n134 Professor Matsuda is cited as influential in the emerging case law suggesting that distinctions based on language ability may be an indication of or a proxy for race and ethnicity. n135

In another federal court case, Professor Matsuda's work is cited for authority that it "is well established that the victims of racial discrimination suffer physically and emotionally as a consequence of multiple incidents of harassment in a hostile work environment." n136 But not all federal cases suggest agreement with the thrust of Professor Matsuda's racist speech scholarship. n137

12. Kimberle Crenshaw

Professor Crenshaw is cited twice in federal courts. She is not cited in state courts during 1989-1999. In one case, n138 Professor Crenshaw's work is cited for an understanding of classic forms of racism. n139 In a related case, n140 the court cited the earlier decision with the reference to Professor Crenshaw's work. [*1206]

13. Gary Peller

Professor Peller is cited twice in federal court. In one case, discussed before, n141 Professor Peller is lumped together with a number of other members of the critical legal studies movement "notorious for thinking every bit of text is ambiguous." n142 In the other case, n143 Professor Peller's work is listed among those supporting the court's assertion that considerable debate exists on a topic potentially relevant to the case, but which the court will not address. n144


Professor Gotanda has been cited once in a state court case. n145 In that case, the court cited in passing Professor Gotanda, along with others, with respect to a dispute in the interpretive community over the meaning of the words "preferential treatment" and "discrimination" in the California Constitution as amended by Proposition 209. n146 However, the court concluded that "the comparative merit of these positions is not relevant here." n147

15. Janet Halley

My search revealed no state court citations for Janet Halley, a noted scholar of the law affecting sexual minorities. Professor Halley is cited in one federal case, n148 along with Richard Posner, for the proposition that there is some evidence that sexual preference is [*1207] for some immutable. n149 Professor Halley's analysis of the law in this area, of central relevance to the case, was not discussed.

C. Citation Quality

The review of citation quantity appears somewhat disappointing at first. The study found a mere handful of citations to outside scholars writing in the areas that have been at the forefront of controversy and litigation throughout the 1990s. However, mere quantity does not suggest either the impact or usefulness of outsider scholarship. Focusing on citation quality more clearly reveals the nature of the important place of outsider scholarship in mainstream institutions.

Citation rates for law review articles or other scholarly work in court opinions is generally quite low. n150 In 1989, eighteen percent of federal circuit courts of appeal opinions cited law review articles, n151 a rate that was lower than the citation rate in the 1970s. n152 Of the law review articles cited, judges are more
willing to cite those found in "elite" journals. n153 Examining citation rates by subject, studies have shown that courts were least inclined to cite to [*1208] law journals or other scholarly work in the areas of sex and race discrimination, n154 the primary areas of much outsider scholarship.

Given the generally low rate of judicial citation and the even lower rates of judicial citation in areas in which outsider scholars are most active, it is not unreasonable to expect low citation rates. Yet, the citation history of the sampled outsider scholars in the courts yields some interesting, and somewhat disheartening patterns of use: positive engagement, hostility, and indifference.

1. Positive Engagement

Positive engagement implies that courts are listening and considering the ideas with which outsider scholars struggle. Positive engagement does not necessarily require that courts agree with the ideas and conclusions in the works considered. Rather, positive engagement requires that courts consider the ideas and arguments as important or as worthy of attention in deciding a case.

The courts appear to have actively engaged outsider scholarship in very few cases. In the federal courts, the clearest example of positive engagement involves ideas which are no longer essentially "outside" because they have been adopted by the United States Supreme Court and made, to some extent at least, binding on the lower federal courts. The earlier work of Catherine MacKinnon is an example of this positive engagement. n155 Yet even here, the engagement by the federal courts can be grudging. It follows a "this far because we must but no farther" attitude. n156

State cases are another matter. Two courts very recently have begun to engage some outsider scholarship. In some instances, this work has become an integral part of the developing jurisprudence of the courts, even where the courts did not adopt the outsider ideas. n157 Although not the only state courts to do so, New Jer [*1209] sey and Oregon courts have been the most open to such engagement.

Occasionally other courts, state and federal, have engaged outsider scholarship from time to time. Sometimes, the engagement is surreptitious so that the engagement can be plausibly denied. n158 Even so, courts attempt to engage a work of outsider scholarship, even if only to reject its premises. That type of engagement can also be seen as a positive development, a sign of outsider scholarship influence. Still other courts appear to have absorbed the work of outsiders without much comment. n159

2. Hostility

Overt hostility is refreshing and even positive for at least two reasons. First, such hostility indicates that the outsider's work is being read and provoking significant (even if negative) reaction. Second, hostile engagement clarifies the position of institutions with significant coercive and cultural power in this society by lifting the veil of ambiguity from courts. For activist litigators especially, elimination of judicial ambiguity and the exposure of those basic norms, which courts use to decide cases, can serve important strategic objectives. n160 While hostility to outsider scholarship exists in the courts, as evidenced by the citation patterns discussed above, its intensity and breadth is smaller than expected.

The citation patterns suggest that courts direct the greatest hostility not at individuals, but at group designations. Thus, with some exceptions, courts find it easier to be hostile to "movements" than to individuals. Critical race theory (perhaps masquerading as multiculturalism), n161 critical legal theory, n162 radical feminism, n163 and [*1210] multiculturalism (as a general catch all for outsider scholarship) merit undisguised hostility or contempt in the cases. These labels appear to serve as convenient proxies for judgments that such scholarship constitutes unacceptable or absurd deviance.

Individuals, too, suffer little bursts of hostility from the courts. For example, Lani Guinier has been labeled a "radical Black," n164 and Mari Matsuda has been characterized as the proponent of radical restructuring of our constitutional guarantee of "free" speech. n165 Hostility can be manifested using scholarship for a purpose contrary to the spirit of the scholarship itself, such as using the work of Lani Guinier to support resisting minorities' vote discrimination remedies, n166 although, engagement suggests that courts will treat the scholarship as worthy of debate. Hostility generally signifies that the debate is over. Hostile citation, much like signs in the desert next to certain watering holes, serves as a warning to other courts that the identified "pool" of scholarly ideas is "poisoned." Yet, in contrast to indifference, either reaction engagement or hostility is positive. In either case, the work of outsider scholars is recognized within a high organ of institutional norm making.

3. Indifference

Indifference is the most damaging form of disengagement with the work of outsider scholars because of the way it silences them. Indifference is an effective gatekeeper, preventing ideas raised in outsider scholarly work from appearing in those institutional arenas in which policy is debated and
norms are institutionalized. Indifference suggests a banal hostility, where the ignored work fails to rise to a level worth acknowledging. Silence is a potent weapon to keep newly emerging ideas within the ghetto of the academy.

The most striking general pattern that emerges from this study of citations is the lack of any significant engagement with the work of outsider scholars. Indifference sometimes took an active form. Examples include disdainful dismissal, such as the cases mentioning critical legal studies, Duncan Kennedy, n167 and Gary Peller. n168 [*1211] Other forms of active indifference included condescension, n169 afterthought or filler. Indifference, at other times, took the form of pedantry, where such references noted academic disagreement on a point usually not important to the resolution of the case, n170 or for a minor point of fact or history. n171

The most significant form of indifference, though, is a total shunning. The Sixth, Seventh, and Ninth Circuits have the lion's share of citations to outsiders. In contrast, some circuits have not cited the work of any of the outsiders represented in this study. In this later group are the First, Fourth, Eighth, and Tenth Circuits. The lack of citation in the context of these circuits' caseloads, which involves review of cases in areas in which the representative authors have achieved a certain renown, is hard to explain benignly. Perhaps it is possible to explain this lack of formal citation by reference to the studies that observed courts generally tend to cite outside authority less in discrimination cases. Yet, such an explanation may also suggest that courts that have cited outsider scholars are then aberrational because these courts cite outsider scholars when "normal" courts would not. But this explanation is unsatisfactory as well. One may suspect that the shunning in the circuits in which outsider scholars remain formally absent suggests a specifically targeted indifference, conscious or unconscious, of a greater magnitude than generalized indifference. n172 Even though some state courts engaged the work of outsiders to some degree, the majority of state courts have yet to acknowledge outsider scholarship in any manner. This is disturbing indeed.

One can argue that the "fault" for this absence of outsider scholarship from federal and state courts falls squarely on the shoulders of the outsider scholars themselves. Perhaps they have failed to produce something the courts can "use." This, after all, is the charge commonly made. n173 But giving weight to such an explanation [*1212] might lead to the conclusion that the price for citation is the willingness to pander, that is, to produce only what the courts want to hear or face the prospect of being deemed judicially "useless" and therefore disposable. n174 Scholarship that does not serve to reproduce, sharpen, explain or perpetuate the current normative cultural order will tend to be consigned to oblivion. These notions are most starkly illustrated by the Seventh Circuit's dismissal of "radical feminism." n175 This conclusion should be as disturbing to mainstream scholars as it is to outsider academics. Any scholarly deviance can turn a mainstream scholar into an outsider. However, as applied to traditional outsiders, the reasons that courts respond only to scholarship that they want or are willing to hear, are not as simple as they might at first appear.

II. Generalizing from Citation Patterns
A. Citation Patterns in Cultural Context
1. From the Outside In

The pattern of judicial citations between 1989 and 1999 demonstrates that dominant society does not react well to rebellion. Society accepts assimilated "others" into the fold in some loose manner, far easier than it recognizes the "others" possibly conflicting normative points of view. n176 Indeed, the voices of "others" that acknowledge the value and place of dominant social norms are the only ones that appear intelligible to the dominant social order. As for those that do not accept the necessity of assimilation and conformity, dominant society rejects them. It is no wonder, then, that outsider scholars appear rarely, and rarely appear in a positive light, in the writings of the courts. [*1213]

The dominant discourse looks on emerging schools of outsider scholarship as uncompromisingly subversive. Traditionalists within the dominant discourse view critical narrative or outsider scholarship as evidence of the significant threat to dominant norms posed by the groups these outsiders represent. Such dissent will either be co-opted or destroyed. n177 For the dominant group to engage in dialogue with these subversive newcomers would be tantamount to accepting the notion that the sociocultural norms on which dominant society is built must be destroyed or swept aside. Traditionalists reject the obligation to engage those who seek to destroy the dominant norm structure, and certainly will not concede that such a structure is rotten to the core. The invitation to "join the conversation" extended to the previously excluded comes with a condition: those invited must accept and respect the core parameters of the extant normative conversation. n178

Progressives within the dominant discourse share the traditionalist's unease, but express unease more furtively. For the traditional Left, the threat of outsider scholarship is to the historic relationship, often
paternalistic, between the Left and communities of color. n179 Critical scholarship rejects the "helping (white) hand" of the traditional Left as merely another form of colonization -- this time helping communities of color become darker skinned Europeans. To accept this challenge adversely affects the power relationships between the traditional Left and its former clients -- that is the subordinated groups it had represented within dominant discourse. But it also adversely affects the balance of power between progressives and traditionalists within the dominant elite. Suppression by the Left of this sort of rebellion is also necessary and involves public abandonment of outsider scholars. n180

The courts, as an important site of institutional norm making, reflect both traditionalist and progressive unease with their new social partners of color. For traditionalists, outsider voices are sometimes worth suppressing, and for this purpose may be acknowledged. Suppression occurs by those time honored methods of social and cultural control --- shunning and demonization. To the extent that outsider scholarship can be painlessly co-opted, controlled or radicalized, it can play a useful role in defense of the disciplining of dominant discourse. n181 The courts appear to engage in a healthy dose of demonization - radical feminists, multiculturalists, and particular writers suffer most publicly in this regard. n182 Rejectionist and separatist discourse, served up in a highly demonized form, can be used to scare and intimidate dominant group elites seeking dialogue. n183 Thus, progressive voices within the courts can be bullied, and made to confess to the progressive's un [*1215] ease with outsider work. n184 When not suppressed or demonized, tradition-rejecting voices can be recast into something more benign; for example sexual harassment can be reduced from an attack on the patriarchal basis of social organization to patriarchal rules for civility and decorum in the workplace. n185 In other cases, these outsider voices are largely treated as noise -- uncomfortable, irritating, and persistent -- not worth a credible listen. n186 The absence of these voices from the official written pronouncements of the courts reduces the likelihood that people outside the academic community will be exposed to these outsider works. Only in a few of the states in which communities of color flourish do we see a break in this pattern. n187

Ironically, the dominant normative narrative of the Left and the Right is increasingly irrelevant in the discourse of peoples of color. In this sense, and perversely, communities of color have begun to assimilate patterns of behavior from the dominant communities. For those communities, dominant norms have little relevance in the context in which these communities must exist. Indeed, for communities of color, the dominant discourse is primarily a vehicle for assimilation, essentially erasing communities of color with the whitewash of dominant normativity. n188 This might be acceptable but for the fact that, from the perspective of communities of color, this whitewashing discourse occurs without any real hope of substantive integration within the dominant community. But there is only the slimmest hope that communities of color can really attain the status of "whiteness," whatever the hope that dominant discourse offers. n189 There is no need to bother assimilating in the absence of sociocultural reward.

The consequence is that people of color, and particularly scholars of color, wind up having little more than interior dialogues. n190 Their voices, though more widely circulated, even in some mainstream organs of communication, remain truly visible only to other people of color. n191 Dominant groups remain outside this outsider discourse and substantially unaffected by it. The paucity of citation, even for the purpose of engagement and rejection of the ideas being developed by outsider scholars, is strong evidence of the separation between outsider discourse in the academy and dominant discourse in the courts. n192 In much the same way that dominant discourse, of which the courts form a part, rejects an essentialized "them," these writers of color reject the animating notions of dominant discourse. The circle is thus closed.

The effect, of course, is mutual incomprehensibility. n193 What follows is what always follows: people continue to do what they have always done -- they shut their ears except to listen for what they want to hear. n194 And in a world in which the dominant still domineer [*1217] nate, the consequence is that social and legal norm making will be defined largely by reference to unchanged dominant group norms. The work of scholars of color remains a mere curiosity. The citation patterns outlined above make this conclusion visible indeed.

2. From the Inside Out

Mutual incomprehensibility, irrelevance, and suppression run counter to the American twentieth-century mythology of the integrative enterprise of liberal pluralism n195 and of the open access to the marketplace of ideas. n196 This review of citations of outsider scholars in the courts has perhaps revealed a pattern at odds with this American mythology. There is only a limited access to the judicial marketplace of ideas for outsider scholars. But to what extent do outsider scholarly communities share responsibility for this result?
Outside scholars present powerful arguments for change based on the long suppressed perspectives of dominant culture in its various legal guises. These outsider scholars have helped expose the coercive power of dominant culture and social norms on people, practices, and particularly the law. n197 That scholarship rightly [*1218] gives voice to the "other," and to the fairness of extending to all "others" the group dignity that the dominant group extends to its own. For these scholars, outsider norms are powerful because they are deemed fundamentally value-laden in a way truer to the authentic basic values of our society. Dominant norms are corrupt. It follows that the current dominant system of values must collapse as a result of its self-conscious moral bankruptcy. To this end, critical scholars tend to "deal" with dominant culture and its norms as a series of logical propositions dependant wholly on the internal logic of their ordering for their viability. Ironically, critical scholars in this way perform (again) the role last played by Enlightenment rationalists who, through reason, sought to overturn the illogical dark old world in which they lived. n198

Perversely, this rationalist exercise is based on the faith of outsider scholars in two conditions. The first is the power of their vision to alter the normative sociopolitical structure of the United States. The second is the inevitability of the disintegration of the [*1219] current structure of social hegemony as its inherent unfairness is exposed. n199 As such, outsider scholars can approach dominant norms, and the institutions that maintain those norms, the way people who have found a new religion approach the theology of the religion they have rejected. Their faith n200 in the verities of the new covenant, however, necessarily blinds them to the strength of the faith of those "left behind" within the corruption of the dominant discourse.

But faith in the truth of a normative structure is not the exclusive province of outsider scholars. Core social norms are not the stuff of rationalist exercises. Rather, these norms are the expression of an internalized conviction, absolute, confident, immutable and flowing from a source beyond human corruption. n201 White, patriarchal, European --- dominant -culture is not a logical exercise. Dominant culture is both powerful and thinks itself good. For those whose faith in dominant norms is strong, cultural choices expressed in law, as the Alabama courts remind us, must be treated as political issues to be decided in the area of culture and politics. n202 By concentrating on the exposure of unfairness and of exclusion of [*1220] the "other," outsider scholars ignore or at least misperceive the basis, nature and real underlying strength and vitality of the dominant normative substructure in the United States. On both a political and socio-cultural level, "our political system is a change-resistant system, designed by the founders not to move quickly and strongly in new directions." n203 The quality of court citations to outsider work provides a glimpse of the strength and resilience of the dominant normative system. This, then, is the problem for the rationalism of critical scholarship. Neither rationalism nor an appeal to faith will convince that who believe, with equal faith, in the value of the system outsider scholars curse as hopelessly corrupt. What appears as arrogance to a dissenter, n204 may be an expression of faith by dominant culture. n205

Recast as a mere oppositional force, transformative critical theory can be easily dismissed by dominant culture as the noble gesture. n206 The citation patterns described in Part I are testament to that effect in the courts. n207 In a more extreme form of dismissal, those that challenge this hegemony are cut off from the community, from the avenues in which discourse is transmitted. Falling outside the community of discourse, such outsiders become outlaw, a pattern of social and cultural interaction well analyzed by outsider scholars. n208 Perversely, then, to place oneself outside dominant group norms both strengthens the conscious identity of [*1221] the "other" and weakens the ability of this "other" to communicate with the dominant group. This compounds the incentive to marginalize and subordinate nondominant groups within the metaphysical space occupied by the dominant group. Those are the necessary consequences of falling outside.

Outsider theorists will continue to babble, at least as far as the dominant group is concerned, as long as that dominant culture continues to hear these scholars speak a language which it finds unintelligible. Babbling is inevitable when outsider scholars use what Professor Balkin calls "cultural software" unknown to the dominant group, n209 when they build on the basis of a normative foundation incompatible with that of the dominant society in which they live. Moreover, these scholars will find it impossible to persuasively argue to the dominant culture in favor of polyculturalism using the very language of chauvinism and dominance that serves critical theory well as an indictment against the dominant culture. n210 A dominant culture will tolerate, and to that extent recognize, the voices of self-conscious outsiders, but no farther. n211 [*1222]

The dominant majority will tend to ignore writings that marginalize its views and seek to sweep away it core normative values. Such writings do not
communicate with the dominant group. "When it comes to legal scholarship addressing race, by contrast, it is striking that despite the existence of critical race theory for nearly a decade, the response to it has generally been a conversation among those who identify themselves as critical race theorists." n212 They cannot. The dominant group will not engage in dialogue on the basis of its acceptance of the notion that it must be destroyed or swept aside. Hermeneutics as suicide is rare, as cultures, and especially, as dominant cultures, go.

In a sense, then, critical theorists can fall into the old Marxist-Leninist trap: n213 it is well enough to identify racism and patriarchy (just as it was to identify capitalism) as an evil; it is quite another to assume that naming the evil will result in its destruction or transmogrification. n214 Judicial citation patterns suggest that naming a core norm evil can create a mirror effect -- those who identify a thing or practice as evil or bad can in turn be characterized as the "true" face of evil in turn. n215

The kind of dialogue between "mainstream" and "outsider" that is reflected in the citation patterns of the courts, based on mutual nonrecognition, breeds subordination. n216 The only question of interest in this sort of dialogue is: which set of norms will subordinate the others? Social cohesion, the discipline of the group in the face of mutual incompatibility, requires choice. From the perspective of the dominant group, subordination means silencing contrary cultural norms in the public (though not the private) space. Polyculturalism can exist in theory; yet in reality it more accurately describes only that transitional period between the dominance of one set of sociocultural norms and another. One set of norms must govern, the norms of others, now necessarily outsiders, may exist subordinate to the governing norms. In a pluralistic society such a set of norms acts as primus inter pares. In other societies, particularly traditional and religiously based societies, all other norms are suppressed. Thus, a dominant group will hear the stridency of outsider scholarship n217 as the attempt by one group to impose its norms on all others -- norms which will still subordinate and exclude but in ways different from that of the current norms. The perceived hypocrisy and hidden agenda of outsiders vying for the role of dominant can only serve to reduce their discourse to noise to the ears of the dominant. There may well be no solution to this problem when the dialogue between insider and outsider is cast as an either-or contest.

B. Citation Patterns and the Federalism Effect

The most interesting generalization that can be made from the patterns of citations of outsiders is that the American federal system has substantially contributed, at least indirectly, to the penetration of outsider scholarship in the courts. What the citation patterns suggests is that the availability of multiple sovereigns, and sovereign courts, has increased the size and quality of this penetration in the courts.

For a long period of American history, the protection of the sovereign power of states -- states rights -- has been the province of geographical minorities, mostly members of the elites of the old southern slave-owning landed aristocracy. n218 Certainly, for poor people and people of color, states traditionally have appeared to be the enemy, and a unitary federal policy the preferred means of attaining equal status within the American polity. n219 Yet the notion of the protection of discrete minorities, developed by southern antebellum theorists like John C. Calhoun, n220 may well provide the preferred base for the protection of minority rights in the coming century. n221

As populations shift in the United States, and traditionally marginalized groups become a majority in certain states, the notion that the general government ought to make room for effective political expression at the state level is gaining appeal. The greater the number of formal venues for the construction of law, the greater the opportunity for the normalization of outsider voices. n222

The process of legal transformation abhors the monolith. The power of this notion is demonstrated by the process of citation of outsider scholars within the judicial organs of the United States. The existence of multiple organs of lawmaking, each representing different admixtures of the people of that jurisdiction provide the most congenial environment for the full participation of what John C. Calhoun described as "each interest or combination of interests, orders classes or portions into which the community may be divided." n223 Demographic power and group self-consciousness, as the aristocrats of the old South well understood, precedes political power. Outsiders should take this lesson to heart as new interests, groups and factions come into their own in the coming century. The road to normalization of previously excluded communities may well lie through the states. Citations of outsider scholars provides a window into the normalization progress.

Conclusion

Citations in the opinions of courts provide an important measure of the acceptance and acceptability of the work of outsider scholars, primarily women and people of color within the formal institutional establishment for the crafting of law. A study of the
rates of citation in federal and state courts among a representative sample of outsider scholars reveals that though some progress has been made, some scholars are being cited only some times, the progress is at least erratic. Engagement by courts is far less common than hostility or, more pervasively, indifference. Yet there are bright spots that point the way to the future. The most significant of these is the growing importance of states, especially states where traditional outsiders may be becoming more integrated into the political and cultural life of the states, in the inclusion of works of traditional outsider scholars in their jurisprudence. It may well be that federalism will become an important element in the struggle by traditional outsiders for a place at the political table.

FOOTNOTE-1:


n4 Mary Beth Beazley and Linda Edwards defend this emerging area of scholarship on two grounds, stating that "it renders the scholarly life more accessible to newcomers to the academy, and it sustains a conversation that can identify and question assumptions that might otherwise hold the academy captive." Mary Beth Beazley & Linda H. Edwards, The Process and the Product: A Bibliography of Scholarship About Legal Scholarship, 49 Mercer L. Rev. 741 (1998); see also Jean Stefancic, Latino and Latina Critical Theory: an Annotated Bibliography, 85 Cal. L. Rev. 1509 (1997), 10 La Raza L.J. 423 (1998).

n5 Ronald J. Krotoszynski, Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption, 77 Tex. L. Rev. 321, 322 (1998) (commenting on satiric article by Professor Dennis Arrow published in Michigan Law Review). This so-called culture war has become fashionable indeed. Recently Harvard Magazine ran a cover story in which one faculty member after another told stories of the hard time each had, and the amount of social disapprobation they endured, at the hands of the liberal establishment at Harvard University. One person at the Divinity School was quoted as complaining that the Divinity "School requires that one subscribe to radical feminism, to inclusive language, to their views on homosexuality and affirmative action -- there are probably more things that one has to subscribe to now than there were 50 years ago." Janet Tassel, The Thirty Years' War: Cultural Conservatives Struggle with the Harvard They Love, Harvard Magazine, Sept.-Oct. 1999, at 61.
This difference of opinion within the legal academic community has produced a wave of heavily emotional argument, some of which has been quite cantankerous and rude. See, e.g., Richard Delgado, Rodrigo's Book of Manners: How to Conduct a Conversation on Race -- Standing, Imperial Scholarship and Beyond, 86 Geo. L.J. 1051 (1998); Nancy Levitt, Critical of Race Theory: Race, Reason, Merit, and Civility, 87 Geo. L.J. 795 (1999).

The level to which debate sometimes sinks may be due to the fact that more than mere ideas are at stake among the combatants. Careers in academia have been advanced propelled or destroyed on the basis of judgments based on the merits of the scholarship pursued. In this sense, perhaps, one can think of traditionalists as a body holding a monopoly on a product (scholarship) and erecting barriers to entry (through the hiring process) and technical specifications designed to produce a predetermined result (defining scholarship to include only what they produce) in an effort to maintain a dominant position in the market for faculty positions and the production of scholarship worthy of the name. A comprehensive law and economics study of this phenomenon is probably long overdue.

n6 See, e.g., Paul D. Carrington, Of Law and the River, 34 J. Legal Educ. 222, 227 (1984) (stating that Critical Legal Studies writers are preaching antilaw and, to be consistent with their own premises, they should leave academy). Influential academics have attempted to discredit the more "radical" or "transformative" of the new scholarship. See, e.g., Daniel A. Farber & Suzanna Sherry, Beyond All Reason: The Radical Assault on Truth in American Law (1997).


n9 For now near classic statements of the feminist project, see Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 58-60 (1988). Professor West explained that:

By the claim that modern jurisprudence is "masculine," I mean two things. First, I mean that the values, the dangers, and what I have called the "fundamental contradiction" that characterize women's lives are not reflected at any level whatsoever in contracts, torts, constitutional law, or any other field of legal doctrine. The values that flow from women's material potential for physical connection are not recognized as values by the Rule of Law, and the dangers attendant to that state are not recognized as dangers by the Rule of Law.

Id. at 58; see also Martha Minow, The Supreme Court, 1986 Term -- Foreword: Justice Engendered, 101 Harv. L. Rev. 10, 61-62 (1987). Professor Minow has noted that:

If, at times, feminists appear contradictory in this sense -- if feminists argue that women have both the right to be regarded and treated as men and the right to have special treatment or valorization of women's differences -- we have an explanation. The inconsistency lies in a world and set of symbolic constructions that have simultaneously used men as the norm and denigrated any departure from the norm. Thus, feminism demands a dual strategy. First, feminism must challenge
the assumptions of female inferiority -- the belief that women fall too short of the unstated male norm to enjoy male privileges and that women's own traits make male privileges or benefits inappropriate for them. Second, feminism must challenge the assumption of separate but equal spheres.

Id. at 62; Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 831 (1990) (stating that "method matters also because without an understanding of feminist methods, feminist claims in the law will not be perceived as legitimate or 'correct.' I suspect that many who dismiss feminism as trivial or inconsequential misunderstand it").


The important work is published in eight or ten law reviews and is written by a small group of professors, who teach in the major law schools. . . . . It is fascinating. Paul Brest cites Laurence Tribe. Laurence Tribe cites Paul Brest and Owen Fiss. Owen Fiss cites Bruce Ackerman, who cites Paul Brest and Frank Michelman, who cites Owen Fiss and Laurence Tribe and Kenneth Karst . . . .

Id. at 562-63; see also Patricia J. Williams, The Alchemy of Race and Rights 48 (1991); Patricia A. Cain, Feminist Legal Scholarship, 77 Iowa L. Rev. 19, 30 (1991).


But for what it's worth, I notice that Richard Delgado, Derrick Bell, Patricia Williams, and Mari Matsuda, all of whom now teach in the major law schools, seem to cite each other a lot (along with Cornel West, now at Harvard), and that Erin Edmonds likes citing all of them except West (give her time), along with bell hooks, also a favorite of the others, but cf. bell hooks & Cornel West, Breaking Bread 36-37 (1991) (quoting hooks complaining that white scholars sometimes steal her ideas without enough "acknowledgment," and that black scholars don't get cited enough).


n14 I have argued that assimilation is among the basic positive defense mechanisms of culture. "Change in social practice is internalized within dominant norm setting institutions through its assimilation of cultural minorities." Larry Cata Backer, Queering Theory: An Essay on the Conceit of Revolution in Law, in Legal Queeries 185 (Leslie J. Moran et al. eds., 1998). The most extensive studies of this effect has been in connection with the interaction of marginal people, the poor, and sexual, racial and ethnic minorities, with the rest of "us." On the importance of the assimilation imperative in welfare law, see Larry Cata Backer, Poor Relief, Welfare Paralysis, and Assimilation, 1996 Utah L. Rev. 1, 39 [hereinafter Backer, Poor Relief], stating that: "overt cultural assimilation acts positively, imposing unpleasant effects on deviant social classes and racial and ethnic groups. Trivialization is an important tool of assimilation."
n15 See Arthur Austin, Evaluating Storytelling as a Type of Nontraditional Scholarship, 74 Neb. L. Rev. 479, 481 (1995) (“Many traditionalists do not know about the new writings, or ignore them. To some professors, nontraditional work is the practice of politics rather than legal scholarship.”).


Citations are strings of names and numbers incorporating the language and power of one source in another source. . . . Links between documents . . . are more important in law than in any other discipline. . . . In judges' opinions in the common-law system, citation links, which carry the weight of precedent and legislative mandate, are more significant than the words that surround the citations.

Id. In this sense, courts act like autopoietic systems. Autopoiesis refers to systems, in particular legal and social systems, which produce and reproduce their own elements by the interaction of their elements. See Gunther Tuebner, Introduction to Autopoietic Law, in Autopoietic Law: A New Approach to Law and Society 1, 3 (Gunther Tuebner ed., 1987). Citations are the means of self-referencing communication within the courts, when courts cite to other opinions. Citation to legal scholarship provides this closed system with a means of indirect communication with other, and especially related, systems. See Gunther Tuebner, Law as an Autopoietic System 87 (Anne Bankowska & Ruth Adler trans., Zenon Bankowski ed., 1993). Tuebner stated:

Social subsystems use the flow of social communication, and extract from it special communications as new elements. They use social structures (expectations) for the construction of legal norms and social constructions of reality for the construction of "legal reality." They do not need to create these from scratch, merely to imbue them with new meaning.

Id. Thus, the simultaneous independence and dependence of law. See Niklas Luhmann, Law as a Social System, 83 Nw. U. L. Rev. 136, 139-40 (1989). The autonomy of these systems, however, permits indirect communication with other systems of society and culture. See Heinz von Foerster, On Constructing a Reality, in Observing Systems 288, 306 (1981); Luhmann, supra.

Inputs from outside the system must be digested and translated into a form that the system can utilize. The manner in which these communications are digested determines the degree of power of such scholarship to participate in the production of legal culture. To use the language traditionally used by the courts to express these notions: "While we are aware of no Texas case dealing with the interests of a participant in the collateral securing of a participated loan, we find guidance in legal scholarship and in the opinions of courts in other jurisdictions." Asset Restructuring Fund, L.P. v. Liberty Nat'l Bank and Resolution Trust Corp., 886 S.W.2d 548, 549 (Tex. App. 1994).

n17 See, e.g., William M. Landes et al., Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges, 27 J. Legal Stud. 271 (1998). The abstract to this article states that:

This article uses citations to the published opinions of judges on the federal courts of appeals who had 6 or more years tenure at the end of 1995 to estimate empirically the influence of individual judges. We rank judges on the basis of both total influence (citations adjusted for judicial tenure and other variables) and average influence (citations per published opinion).


n18 See, e.g., Carrington, supra note 6, at 222. The scholarship of narrative has come under significant attack in this respect, especially as practiced by people of color. See, e.g., Richard A. Posner, Overcoming Law 372-98 (1994) (attacking objective and subjective truths of famous story in Patricia J. Williams, The Alchemy of Race and Rights 44-45 (1991)); Daniel A.
Farber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 Stan. L. Rev. 807, 832-35 (1993) (arguing that storytelling cannot be judged like traditional scholarship even when stories are presented as fact); Mark Tushnet, The Degradation of Constitutional Discourse, 81 Geo. L.J. 251, 277 (1992) (suggesting that storytelling should be viewed as inherently fictional and treated as such).

n19 Delgado, supra note 13, at 1372 (stating that, "here, as in other areas of academic life, the absence of full public discussion of innovation tends to favor those forms of scholarship that are already established, with palpable consequences for the professional lives of innovators"); see also Kathryn Abrams, Hearing the Call of Stories, 79 Cal. L. Rev. 971, 977 (1991); cf. Stephen L. Carter, Academic Tenure and "White-Male" Standards: Some Lessons from the Patent Law, 100 Yale L.J. 2065 (1991).

n20 Krotoszynski, supra note 5, at 327. Professor Krotoszynski was at least partially right when he asserted that "at the risk of appearing terminally naive, I have always assumed that legal scholarship, in whatever form, had as its object influencing the direction of law -- ideally by moving judges, lawyers, legislators and bureaucrats to rethink or reconsider a particular problem." Id. Yet it has seemed to me that this very visible and formal manifestation of institutional change is both the tip of the iceberg and the last event in the process of norm or behavior "making." Certainly in the case of sexual minorities, cultural judgments of what is normal and what is not have helped create visions of the characteristics of sexual minorities that create the normative archetypes on which courts base their legal judgments. See Larry Cata Backer, Chroniclers in the Field of Cultural Production: Interpretive Conversations Between Courts and Culture, 20 B.C. Third World L.J. (forthcoming 2000) [hereinafter Backer, Chroniclers in the Field of Cultural Production]. The author stated:

In this culturally prophetic sense alone do courts exist as the place for the struggles and contestations which may produce cultural movement. It is the site where "losing" arguments are articulated and memorialized. Thus produced, the prophetic find their way back into non-judicial social discourse. In this function, and in this function only, might courts indirectly serve as a means of cultural movement. A good American example is Justice Harlan's voice of dissent in Plessey v. Ferguson. Once articulated, this argument became a part of the cultural dialogue suggesting an alternative vision of "what is." When that vision changed, the problem of the articulation of accepted social norms of race relations returned to the court. But now, invoking its oracular voice in Brown v. Board of Education the Court identified as norm the cultural construct rejected in Plessey. It did so not because the Plessey dissent now won the day as a matter of logic or jurisprudence, but because the popular culture had embraced the notions articulated in the opinion as their own. Thus, the Plessey dissent produced culture which produced law.

Id.

n21 There has been growing attention to citation rates of academics in the courts. See Richard G. Kopf, Do Judges Read the Review? A Citation-Counting Study of the Nebraska Law Review and the Nebraska Supreme Court, 1972-1996, 76 Neb. L. Rev. 708 (1997); Michael D. McClintock, The Declining Use of Legal Scholarship by Courts: An Empirical Study, 51 Okla. L. Rev. 659 (1998) (arguing that citation rates are generally decreasing, on basis of review of citation patterns by federal courts and state supreme courts of law journal rated as "leading" by Chicago-Kent

According to McClintock, "the idea to study the use of law review articles as judicial precedent appeared as early as 1930." McClintock, supra, at 660; see also D.B. Maggs, Concerning the Extent to Which the Law Review Contributes to the Development of the Law, 3 S. Cal. L. Rev. 181 (1930).

n22 Clearly no list, other than a listing including all scholars writing in the field, can either be truly representative of the diverse voices within each of these schools, or complete. I have no doubt that I have included people whom others might have chosen to leave out, and have failed to include people whom others would deem important. To those in each camp, my apologies. However, I have not sought to be comprehensive here. My object is to investigate court behavior generally -- for that purpose an "atmospheric" study will do to illustrate the interaction of courts with this more innovative and challenging scholarship. I would thus posit that, substitute however you will, the basic results will remain substantially unaffected and my conclusions unchanged.

n23 Cf. Delgado, supra note 13, at 1350-51 (noting that by 1992 critical race theorists and "radical feminists" had achieved fair measure of formal incorporation within legal academia).

n24 Foucault has popularized an understanding of the power of the normal, and its manipulation through the infinite ways that a "standardized" behavior is coerced. "The perpetual penalty that traverses all points and supervises every instant in the disciplinary institutions compares, differentiates, hierarchies, excludes. In short, it normalizes." Michel Foucault, Discipline and Punish: The Birth of the Prison 183 (Alan Sheridan trans., 1978) (1975). Coming within the acceptable parameters of a standard normalizes. Foucault stated:

The Normal is established as a principle of coercion in teaching with the introduction of a standardized education and the establishment of the ecoles normals (teachers' training colleges). . . . In a sense, the power of normalization imposes homogeneity; but it individualizes by making it possible to measure gaps, to determine levels, to fix specialties and to render the differences useful by fitting them one to another.

Id. at 184. The normal has been a powerful force within legal academia. Indeed, that this article is written at all is evidence of the power of the normal to create hierarchy within the acceptable (normal) and to define a boundary beyond which what is produced does not belong.

n25 The point here is not just that the lack of citation of outsider scholars somehow mirrors the decline generally in law review citation by the courts. For that analysis, see McClintock, supra note 21. Rather, even in a period of general citation decline, the work of emerging outsider scholars, influential within their communities (at the very least), have failed to make any significant appearance at all. For an illustration of the notoriety of these emerging thinkers, see Rosen, supra note 1, at 27, and Heather MacDonald, Law School Humbug, Wall St. J., Nov. 8, 1995, at A21.

n26 At some point, embrace of the "outsider" brings her "inside." To participate or dominate a conversation dealing with the application of the coercive power of the state to regulate behavior or distribute political power makes the participant part of the normal, the regular, the permitted. Perhaps as a result less is excluded, or some other part of what once had been "normal" is excluded. Perhaps as a result, the normal appears composed of greater variety. Either way, participation adds the outsider voice to the construction of the normal, the acceptable, the standard by which things are judged and disciplined. The boundaries of the normal may change with the addition, but the boundaries remain all the same. See Backer, supra note 14, at 199-200 (stating that: "The consequence of my analysis of revolutionary transformation is an unhappy
one, both for traditionalists hoping to hold on to that which is being lost, and for those who work for the change which may be coming. There is no such thing as revolution or repose in these matters."

n27 The primary database used was the WESTLAW database "ALLCASES."

n28 For example, this was the case with Derrick Bell. Prior to his life as an active academic, Professor Bell was at the forefront of a great number of civil rights cases in his capacity as counsel. Ironically, as the discussion below suggests, Professor Bell might well have been substantially more influential as a litigator than as an academic in presenting his ideas to the courts. Neil Gotanda also appeared in several cases as counsel in civil rights and immigration cases reported in the database. For a discussion of the utility of impact litigation, see Jack Greenberg, Crusaders in the Courts (1994), Andrew J. Koshner, Solving the Puzzle of Interest Group Litigation (1988), and John Denvir, Towards a Political Theory of Public Interest Litigation, 54 N.C. L. Rev. 1133 (1976). But see Backer, Chroniclers in the Field of Cultural Production, supra note 20.

n29 For this search I used the term "critical race" in the ALLCASES database.

n30 For this search I used the search terms "critical legal theor!" and "critical legal stud!" in the ALLCASES database.

n31 For this search I used the search term "radical feminist!" in the ALLCASES database.

n32 For this search I used the search term "multiculturalis!" in the ALLCASES database.

n33 I did not use other terms, particularly "LatCrit Theory," for example, on the assumption that these movements, coalescing in the mid 1990s, were too new to have any impact on the courts. I assume for purposes of my survey that there is a significant time lag between the emergence of movements within academia and their translation to the courts.

n34 See Kopf, supra note 21, at 713-14 (setting forth the caveats listed, and the citations therein).


n36 See Kopf, supra note 21, at 713-14.

n37 See id. at 713.

n38 See id. at 713-14.

n39 Id. at 713; see also Backer, Poor Relief, supra note 14, at 6 (stating that "the broad outlines of the paradigm within which all forms of social structuring occur . . . consist of a number of assumptions about the way society operates and about individuals' relationship to each other"). Indeed, to the extent courts function as a vehicle for confirming established social norms, it is more likely that structural changes in social and legal norms urged in especially outsider scholarship will first gain currency within the political culture before it can be expressed by the courts. See Backer, Chroniclers in the Field of Cultural Production, supra note 20.

n40 Lani Guinier had been nominated for the post of Assistant Attorney General for Civil Rights in the Justice Department. Her nomination was ultimately withdrawn in the context of a bitter campaign centering on the meaning of her scholarly work. She was portrayed as un-American and as a reverse racist through a deliberate campaign to exaggerate, simplify, and ultimately distort her work. She was dubbed a "Quota Queen." The term was meant to allude to former President Reagan's description of some women who he alleged took advantage of the welfare system as "Welfare Queens." See Clint Bolick, Clinton's Quota Queen, Wall St. J., Apr. 30, 1993, at A12 (articulating distortions and criticisms of Professor Guinier's work); see generally Lally Weymouth, Lani Guinier: Radical Justice, Wash. Post, May 25, 1993, at A19; Neil A. Lewis, Clinton Faces Battle Over a Civil Rights Nominee, N.Y. Times, May 21, 1993, at B9.

Traditional outsiders on the Left are not the only people whose works are absorbed and used in this way. Robert Bork's Supreme Court nomination was defeated, in part, because of adverse reaction to his scholarship as reported to Congress and by


n42 See Kopf, supra note 21, at 714. Indeed, I suggest that scholarship, and especially outsider scholarship, may well serve a variety of useful purposes which have little to do directly with the process of adjudicating individual cases. See infra Part II.


n45 In Westlaw search jargon, a space between words signifies "or" and a "!" is a root expander. To translate the search, I was looking for "black" OR "African" WITHIN TWO WORDS OF "American" WITHIN TWO WORDS OF ANY WORD BEGINNING WITH "scholar."

n46 See Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991) (quoting extensively from testimony of Dr. James Blackwell touching on some central ideas of critical race theory); see also infra notes 63-67.


n48 See Earthinfo, Inc. v. Hydrosphere Resource Consultants, Inc., 900 P.2d 113 (Colo. 1995) (deciding computer software developer's action to rescind development contracts based on buyer's failure to make royalty payments); Knight v. Moore, 574 So. 2d 662 (Miss. 1990) (ruling on state attorney general's claim that bingo was form of lottery prohibited under state constitution); Biggins v. Shore, 565 A.2d 737 (Pa. 1989) (affirming ruling allowing widow of former partner to enforce her rights as donee beneficiary of partnership agreement); Union Pump Co. v. Allbritton, 898 S.W.2d 773 (Tex. 1995) (denying employee's product liability action against manufacturer of pump).


Critical Legal Studies (CLS) has effectively drawn all forms of discourse that claim the support of a single prioristic "rationality" into an uncomfortable light -- a light that reveals the pale and confused concept of reason squirming to crawl back into the well shaded crevasses of 'the way things should be.

Id. at 342 (quoting Brainerd).

n50 See Wiltz, 128 F.3d 957. In Wiltz, a suit under the Worker Adjustment Retraining Notification Act for failure to notify employees of the sale of a company subject to WARNAct, the court sought to
define a "site" under WARN. The court explained:

The district court found it was not controlling because the towboats here were essentially floating "branch offices." But given the obvious comparison to a train, plane or car, it is difficult to simultaneously conceive of a towboat as a "site" (unless one subscribes to the wave/particle theory of quantum mechanics). The district court's characterization of tugboats as floating "sites" or branch offices cannot be reconciled with the common sense meaning of "site" or subpart (6).


n51 Judge Boggs would have applied greater latitude to a reviewing court to overturn an arbitral decision where the judge is firmly convinced. See Lattimer-Stevens, 913 F.2d at 1171 (citing Anthony D'Amato, Aspects of Deconstruction, 84 Nw. U. L. Rev. 250 (1989)).

n52 See Stupak-Thrall, 89 F.3d 1269.

n53 See id. at 1302-03. The Stupak-Thrall court stated:

First, Judge Moore tells us that the phrase "valid existing rights" must be ambiguous because "The University of Kentucky . . . has devoted an entire 375 page issue to trying to untangle the phrase. . . ." By my count, the articles containing arguments that this provision in the Constitution is ambiguous total at least 308 pages. If one adds the articles arguing that the provision is unambiguous, then the total number of pages attempting to "ambiguat[e]" or to "dis-ambiguat[e]" this phrase reaches at least 682.

Id.

n54 Id. at 1302.


n56 Knight v. Moore, 574 So. 2d 662, 668 (Miss. 1990) (citing John Van Doren & Patrick Bergin, Critical Legal Studies: A Dialog, 21 New England L. Rev. 291, 296, 299-300 (198586)).


n59 See Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995) (deciding § 1983 action brought by male detainee seeking damages based on his monitoring by female guard).


n61 Johnson, 69 F.3d 151 (Posner, C.J., concurring and dissenting).


n63 See Bui v. State, 717 So. 2d 6 (Ala. Crim. App. 1997) (considering appeal of capital murder conviction considering defendant's appeal based on argument that killing children, as well as wife, because of wife's infidelities was understandable in Vietnamese culture under circumstances).


n66 Knight, 787 F. Supp. at 1333.

n67 Id. (stating that whether Alabama white educational institutions adopt the views of multiculturalists and their "ilk should ultimately be decided on the forge of academic debate, not in the adversarial setting of courtroom."). No sources or any of the academic literature is cited. See id.

n68 See United States v. Bonds, 18 F.3d 1327 (6th Cir. 1994) (determining that judge who attended scholarly conference on DNA did not acquire extrajudicial knowledge which that require recusal).

n69 See Bonds, 18 F.3d at 1331; The court was attempting to distinguish the acquisition of knowledge in a general context in from knowledge acquired specifically to influence the outcome of a particular case. The court stated:

To the extent, if at all, that the conference presented various positions on further developments in DNA technology, this did not constitute personal knowledge of disputed evidentiary facts, any more than would . . . a judge attending a civil liberties conference and hearing Professor Stanley Fish speak before ruling on a First Amendment case. See Stanley Fish, There's No Such Thing as Free Speech . . . And It's a Good Thing Too (1994).

Id.

n70 See Westbrook v. Teton County Sch. Dist. No. 1, 918 F. Supp. 1475 (D. Wyo. 1996) (ruling on school policy prohibiting as unethical criticism by any staff member of other staff, administrators, or Board of Trustees except to building principal, superintendent, or at regular Board of Trustees meeting).

n71 Id. at 1490 n.8 (citing Stanley Fish, Is There a Text in This Class? The Authority of Interpretive Communities (1980)). The court ultimately found the term "Acriticism" too vague for use in a provision regulating speech. See id. at 149091.

n72 See supra notes 47-58.


n74 See id. at 1165 (noting that faculty members agreed that proposed rule "would likely withstand constitutional attack on First Amendment grounds if it included a requirement that the speaker intended to make the educational environment hostile to the individual being addressed").


n76 See id. at 205 (stating that "just as race-based or sexbased insults may be socially intolerable in a way that insults directed to undifferentiated members of the public may not, so too is disability-based harassment different in kind, and potentially offensive in the extreme"). The court cited Richard Delgado as strong support for its position. See id. at 205 n.3 (stating that although case "does not involve actual slurs, the observations that courts and academic writers have made about the uniquely injurious force of such words apply equally to the kind of disability-based harassment involved here"); Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling, 17 Harv. C.R.-C.L. L. Rev. 133, 157 (1982).


n78 See Karins v. City of Atl. City, 706 A.2d 706 (N.J. 1998) (reinstating suspension of firefighter who directed racial slur at on-duty police officer when firefighter was stopped, though not ticketed, for drunk driving while off duty).
n79 See id. at 720-21 (citing The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography 4-5 (Laura J. Lederer & Richard Delgado eds., 1995)) (stating that firefighter's speech and hate speech, which "harms the individual who is the target; . . . it perpetuates negative stereotypes and promotes discrimination . . . by creating an atmosphere of fear, intimidation, harassment, and discrimination").


n82 Id. at 699.

n83 See Trull v. Long, 621 So.2d 1278 (Ala. 1993) (holding that trial court did not abuse discretion by excluding expert medical testimony regarding 'conspiracy of silence' among physicians to explain why particular witness testified in numerous cases).

n84 Id. at 1279 (citing Joan Vogel & Richard Delgado, To Tell the Truth: Physicians' Duty to Disclose Medical Mistakes, 28 UCLA L. Rev. 52 (1988) (urging courts to adopt positive legal duty requiring physicians to report own and other physicians' mistakes to patients and urging adoption of cause of action for failure to disclose)).

n85 See id. 1280-81.


n88 See Hanlon v. Chambers, 464 S.E.2d 741 (W. Va. 1995) (reversing summary judgment in favor of employer in case in which supervisory employee complained of hostile working environment created by subordinate employees, which owner tolerated).

n89 Id. at 751. The court cited MacKinnon, supra note 86, and for the later works cited Catherine MacKinnon, Only Words (1993) [hereinafter MacKinnon, Only Words], and Catherine MacKinnon, Feminism Unmodified (1987) [hereinafter MacKinnon, Feminism Unmodified].

n90 See id. at 752.

n91 Id.

n92 See, e.g., Bryson, 96 F.3d 912 (citing Professor MacKinnon on history of "quid pro quo" harassment cases); Delaria, 998 F. Supp. 1050 (citing to Professor MacKinnon with a quote defining the term "quid pro quo harassment").

MacKinnon, Sexual Harassment of Working Women as the source for the legal distinction between hostile environment and quid pro quo discrimination claims. The court then suggested that courts that have used that distinction to create strict liability for quid pro quo cases have misinterpreted the law. See id. at 569-70; see also Jansen v. Packaging Corp. of Am., 895 F. Supp. 1053 (N.D. Ill. 1995) (using Professor MacKinnon's Sexual Harassment of Working Women as authority for assertion that "it takes more than saber rattling alone to impose quid pro quo liability on an employer"); Gary v. Long, 59 F.3d 1391, 1396 (D.C. Cir. 1995). The Jansen court found no tangible economic harm to the plaintiff, and granted summary judgment for the employer on the quid pro quo claim. See Jansen, 895 F. Supp. at 1060. But see Burlington Industries, 524 U.S. 742; Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (holding that employers are vicariously liable for quid pro quo and hostile environment harassment of supervisors, yet affirmative defense exists if no tangible employment benefits are affected by the harassment, if employer can show exercise of reasonable care to prevent and correct actionable behavior, and if plaintiff unreasonably failed to take advantage of such preventive or corrective opportunities); Vicki J. Limas, Significant Employment Law Decisions in the 1997-98 Term: A Clarification of Sexual Harassment Law and a Broad Definition of Disability, 34 Tulsa L. J.307, 310-324 (1999) (discussing Burlington and Faragher cases).

n94 See e.g., Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996) (affirming summary judgment against mother who brought hostile environment sex discrimination case against daughter's school on respondeat superior theory because girl's peers created hostile environment at school and on bus). The court reasoned that:

At a theoretical level, the problem with sexual harassment is "the unwanted imposition of sexual requirements in the context of unequal power." Catherine MacKinnon, Sexual Harassment of Working Women 1 (1979). . . . In an educational setting, the power relationship is the one between the educational institution and the student. . . . In the context of two students, however, there is no power relationship, and a theory of respondeat superior has no precedential or logical support.

Id. at 1011 n.11. But see Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999), rev'g 74 F.3d 1186 (11th Cir. 1996) (holding that under some circumstances school may be held liable for peer harassment when school can be shown to have acted with deliberate indifference); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (articulating deliberate indifference standard for school liability for harassment of student by teacher).

n95 See e.g., Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (enjoining display of sexually explicit material in the workplace and holding for plaintiff on harassment claim). The court explained that such images in the workplace "detract from the image most women in the workplace would like to project: that of the professional, credible coworker." Id. at 1526. The court refuted the defense that such images have always been shown in the workplace by citing Professor MacKinnon's pithy statement: "If the pervasiveness of an abuse makes it nonactionable, no inequality sufficiently institutionalized to merit a law against it would be actionable." MacKinnon, Feminism Unmodified, supra note 89, at 115.

n96 Drinkwater v. Union Carbide, 904 F.2d 853 (3rd Cir. 1990) (affirming in part and reversing in part grant of summary judgment to defendant on hostile environment claim). The court relied extensively on the work of Professor MacKinnon for support of its position:

In the quid pro quo cases, sexual harassment claims are equally available to men and women, but non-quid pro quo hostile environment cases depend on the underlying theory that "women's sexuality largely defines women as women in this society, so violations of it are abuses of women as women." "The relationship of sexuality to gender is the critical link in the
argument that sexual harassment is sex discrimination." C. MacKinnon, Sexual Harassment at 174, 151 (1979). The theory posits that there is a sexual power asymmetry between men and women and that, because men's sexuality does not define men as men in this society, a man's hostile environment claim, although theoretically possible, will be much harder to plead and prove.

Id. at 861 n.15; see also Egli v. Stevens, No. CIV.A.93-157, 1993 WL 153141 (E.D. Pa. May 11, 1993) (granting summary judgment for defendant when male alleges hostile environment by female supervisors at library). The court reached the same result as the Drinkwater court, yet gave Professor MacKinnon short shrift, stating "one does not have to embrace Catherine MacKinnon's views, cited in Judge Becker's Drinkwater opinion, to have difficulty imagining how men could be among the class of victims to whom Congress sought to give equalizing rights in Title VII." Id. at *8 n.8. But see Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) (recognizing cause of action against employers for same sex, male on male harassment even where conduct could not be defined in terms of sexual activity).

n97 See Bruneau v. South Kortright Central Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996) (holding that school may be held liable on sex discrimination claim, on respondeat superior basis, if fails to act after receiving notice of peer on peer harassment). The Bruneau court quoted language from the Rowinsky decision that originated from Catherine MacKinnon's Sexual Harassment of Working Women. See id. at 172. The Bruneau and Rowinsky courts, however, reached different results.

n98 See Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), cert. granted and judgment vacated, City of Belleville v. Doe, 523 U.S. 1001 (1998) (reversing summary judgment for city on sex harassment claim and affirming summary judgment on retaliation claim). The Bruneau court stated:

Like, when a woman's breasts are grabbed or when her buttocks are pinched, the harassment necessarily is linked to her gender. See Drinkwater v. Union Carbide Corp., 904 F.2d 853, 861, n. 15 (3rd Cir. 1990) ("women's sexuality largely defines women as women in this society, so violations of it are abuses of women.") (quoting Catherine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 174 (1979)).

n99 See Drinkwater, 904 F.2d at 861; City of Belleville, 119 F.3d at 571.


Furthermore, categorization of same-gender sexual harassment as "homosexual" harassment makes the unwarranted assumption that sexual harassment is motivated by sexual attraction on the part of the harasser. . . . Indeed, harassment, like other forms of victimization, is often motivated by issues of power and control on the part of the harasser, issues not necessarily related to sexual preference.

Id. at 355.


n104 Id. at 699 (citing Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism, 42 U. Miami L. Rev. 127, 129 (1987)).

n105 See Taylor, 706 A.2d 685, 699-700.


n107 See Lewis, 99 F.3d 600; Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich. L. Rev. 1077, 1103 n.115 (1991) ("Authentic representatives need not be Black as long as the source of their authority, legitimacy, and power base is the Black community.").


n109 See e.g., Cousin, 145 F.3d 818 (reversing and vacating action by African American voters alleging that county's at-large method of electing judges violated the Voting Rights Act). The court explained its view that the Voting Rights Act specifically predicated its application to achievement of proportional representation. The court then stated: "Yet this is precisely the effect and, proponents would argue, the strength of cumulative voting as a remedy. Id. at 830 (citing Lani Guinier, The Tyranny of the Majority 14-15 (1995)).

n110 See, e.g., White, 867 F. Supp. 1519 (approving final judgment of settlement on Voting Rights Act claim). The court here noted that the evidence presented mirrored the debate among scholars and courts over "the best remedy for voting discrimination. In response to the predominance of single-member districts as a voting rights remedy, some courts and scholars have argued that districting is not the best method of ensuring minority interests are taken into account." Id. at 1535. The court cited Lani Guinier, No Two Seats: The Elusive Quest for Political Equality, 77 Va. L. Rev. 1413, 1447-57 (1991), as a rejection of current alternatives. See id.; see also Sessions, 56 F.3d at 1281 (affirming rejection of challenge to at-large system for electing trial judges). The Sessions court spoke positively of the benefits of cumulative voting because it promotes a healthier style of electoral campaigning, promoting "less contentious elections." Id. The court quoted Professor Guinier: "Negative campaigning is less effective in elections with multiple winners than in elections with only one opponent." See id. at 1314 (citing Lani Guinier, The Representation of Minority Interests: The Question of SingleMember Districts, 14 Cardozo L. Rev. 1135, 1137 (1993)).

n111 See, e.g., Barnett v. City of Chicago, 969 F. Supp. 1359 (N.D. Ill. 1997) (ruling in favor of defendants in claim for intentional discrimination in drawing of ward boundaries). The Barnett court stated that it could not "give much credence to conclusions derived from elections with different decisional rules, other than to conclude that instituting cumulative voting for aldermen would likely increase minority representation." Id. at 1425 (citing Professor Guinier "for one, who has recognized that the use of cumulative voting, among other remedial measures, would likely hasten proportionate interest representation broadening the opportunities for minority interests to participate in the legislative process"); Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich. L. Rev. 1077, 1135-44 (1991); see also McCoy, 6
The McCoy court noted "members of different racial groups who enter into such alliances are more likely to 'find confidence-building measures that build trust and overcome antagonism.'" Id. at 983 (citing Lani Guinier, (E)Racing Democracy, 108 Harv. L. Rev. 109, 133 (1994)).

n12 See e.g., Houston v. Lafayette County, Miss., 841 F. Supp. 751 (N.D. Miss. 1993) (denying Voting Rights Act claims of plaintiffs). The Houston court quoted extensively from the work of Professor Guinier to support the proposition that majority minority districts are bad:

Prior to the recent Supreme Court decision in Shaw, voting rights legal scholars already had begun to scrutinize the worthiness of electoral districts custom designed for minorities. One of the most vocal critics has been University of Pennsylvania Law School Professor Lani Guinier. Professor Guinier, who has written extensively about the subject of voting rights, has raised questions concerning the inherent value of deliberately drawing districts exclusively for blacks and other minority groups.

Id. at 765 (citing Lani Guinier, No Two Seats: The Elusive Quest for Political Equality, 77 Va. L. Rev. 1413, 1455 (1991)). The Houston court, however, relied on Professor Guinier's work to reject a remedy without in turn imposing any other remedy for minority-majority electoral inequality. See id. at 765-67.


n14 See id. at 1348 n.6 (citing Derrick Bell, The Supreme Court 1984 Term: Forward, 99 Harv. L. Rev. 4 (1985)) ("Bell, in another context, has suggested the dilemma facing anyone who attempts this endeavor: 'First, you would have to explain to the framers how [the Black litigants] had gotten free of their chains' and secured such jobs."). The Teague court stated that "Professor Bell's point is well taken." Teague, 708 F. Supp. at 1348.


n16 EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994) (deciding discrimination claim).


n19 See Market Street Assocs. Ltd. Partnership v. Frey, 941 F.2d 588 (7th Cir. 1991).

n20 See Earthinfo, 900 P.2d at 115 (ruling on computer software developer's action to rescind development contracts based on buyer's failure to make royalty payments). The court cited Kennedy, supra note 55, at 1717, 1734, and Unger, supra note 55, at 641.

n21 See Market Street, 941 F.2d at 595. The court stated:

The contractual duty of good faith is thus not some newfangled bit of welfare-state paternalism or (pace Duncan Kennedy, "Form and Substance in Private Law Adjudication," 89 Harv. L. Rev. 1685, 1721 (1976)) the sediment of an altruistic strain in contract law, and we are therefore not surprised to find the essentials of the modern doctrine well established in nineteenth century cases.

Id.


n124 See Karins, 706 A.2d 706; Taylor, 706 A.2d 685; see also supra notes 80-84 and accompanying text. The Karins court quoted Professor Matsuda favorably, stating that "there are certain words and phrases that 'in the context of history carry a clear message of . . . hatred, persecution, and degradation of certain groups.'" Id. at 720 (quoting Matsuda's Public Response to Racist Speech that the court had previously quoted in State v. Vawter, 642 A.2d 349 (N.J. 1994)); see also Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2365 (1989). The Karin court then concluded that Karins's conduct fell within Matsuda's definition of hate speech. See Karin, 706 A.2d at 721. In Taylor, the court cited the same Matsuda article to support its conclusion that "racial slurs are a form of vilification that harms the people at whom they are directed." See Taylor, 706 A.2d at 691 (quoting Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2365 (1989)) ("However irrational racist may be, it hits right at the emotional place where we feel the most pain.").


n127 See Aguilar, 50 Cal. App. 4th 28, 53 Cal. Rptr. 2d 599.

n128 See id. at 34; 53 Cal. Rptr. 2d at 605 (citing Matsuda, supra note 124, at 2335-38, 2357).

n129 Id. at 44; 53 Cal. Rptr. 2d at 616-17.

n130 In very dismissive terms, the dissent exclaimed that:

The majority has undertaken a radical restructuring of existing First Amendment free speech jurisprudence. Its dicta are only supported by the proposal and view of one commentator on allegedly "racist speech" who contends that all allegedly derogatory and demeaning speech in a place of employment is the equivalent of fighting words, because it represents a social evil and causes a secondary effect, outside First Amendment protection, which courts should suppress by orders of prior restraint.

Id. at 44, 52 Cal. Rptr. 2d at 616-17 (Peterson, J., concurring and dissenting). The "commentator," of course, is Professor Matsuda. See id. at 45 n.5, 53 Cal. Rptr. 2d at 616 n.5. Judge Peterson's opinion stated that the "law review article by Professor Matsuda . . . appears to be the true source of the majority's analysis despite its contrary disclaimer. . . . The majority has further relied on authorities citing this article." Id. at 52, Cal. Rptr. 2d at 623-24. The work of Professors Lawrence and Delgado, also cited by the majority, are dismissed without comment.

n131 Id. at 45, 53 Cal. Rptr. 2d at 616 (Peterson, J., concurring and dissenting). The radical nature of Professor Matsuda's notions, as well as those who apply them, are discussed with some incredulity in the footnote which follows. See id. at 45 n.6, 53 Cal. Rptr. 2d at 616 n.6 (Peterson, J., concurring and dissenting).

n132 Id. at 34, 53 Cal. Rptr. 2d at 605. The majority continued: "We have no hidden agenda. Our holding in this case would have been the same if the Matsuda article had never been written." Id.

Thus, if the evidence adduced at trial suggests that the argument that Sutri did not have adequate communication skills is merely a code for references to Surti's Filipino accent, Searle's asserted "legitimate, nondiscriminatory reason" for not promoting Surti may not qualify as nondiscriminatory in actuality. Mari J. Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 Yale L.J. 1329, 1352 (1991) ("A major complicating factor in applying Title VII to accent cases is the difficulty in sorting out accents that actually impede job performance from accents that are simply different from some preferred norm imposed, whether consciously or subconsciously, by the employer.").

Id. at 987.

n134 See Pemberthy v. Beyer, 800 F. Supp. 144 (D. N.J. 1992) (granting petition for habeas corpus upon finding that prosecutor struck Hispanics from jury for, among other reasons, failing to satisfactorily assure prosecutor that they would accept the state's proffered translation of evidence from Spanish to English).

n135 See id. at 158 n.16 (citing Mari Matsuda's Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, as extending language discrimination analysis to accents).

n136 Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991) (affirming judgment for employee in hostile environment employment discrimination case).

n137 See e.g., Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (quoting extensively from paper delivered by Professor Matsuda at conference on topic held at very university that is subject of case).


n139 See id. at 1394 (stating that "perpetuating and encouraging stereotypes of persons as lazy or wasteful and ridiculing their religious and cultural practices are classic forms of racism that enable the perpetrators not only to rationalize the oppression of such people but to reinforce identification with the dominant group"). The court cited Kimberle Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331 (1988).

n140 See Stop Treaty Abuse-Wis., Inc., 843 F. Supp. at 1284 (enjoining racially motivated physical interference with exercise of fishing rights).

n141 See Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996) (deciding water rights case turning on whether phrase is ambiguous).

n142 Id. at 1302-03 (citing Gary Peller, The Metaphysics of American Law, 73 Cal. L. Rev. 1151 (1985) as one of number of articles arguing in favor of ambiguity of constitutional provisions).


n144 See id. at 278.

n145 See Hi-Voltage Wire Works, Inc. v. City of San Jose, 72 Cal. App. 4th 600, 605 n.10, 84 Cal. Rptr. 2d 885, 890 n.10 (Ct. App. 1999) (holding unconstitutional under Proposition 209 municipal program designed to increase participation by minority and women businesses in public construction projects).


n147 Id.

n148 See Able v. United States, 968 F. Supp. 850 (E.D.N.Y. 1997) (ruling on constitutionality of "don't ask/don't tell" rules for exclusion of sexual minorities from service in armed forces).

n150 See Sirico & Drew, supra note 21 (stating that, after finding that 1200 opinions provided 221 citations to legal periodicals, "the federal circuit courts cite law reviews infrequently. Second, they cite primarily the elite journals. Third, they cite mostly recent articles").

n151 See id; see also Kopf, supra note 21, at 714-16. Kopf's study derived eight findings from previous studies of citation patterns. Among these were that (1) law review articles are seldom cited in judicial opinions, (2) treatises are more likely to be cited than articles, (3) elite journals are more likely to be cited than law journals from less well reputed institutions, (4) judges and law professors are not interested in the same topics, (5) state law topics were more likely to be cited than others, (6) judges are more likely to cite more recent articles, (7) citation patterns vary significantly by judge, and (8) cited articles are not likely to influence judicial decision making. See id.

n152 See McClintock, supra note 21(reviewing citation rates of elite law reviews by U.S. Supreme Court, federal circuit courts, federal district courts, and state supreme courts "during three two year periods spaced ten years apart [1975-76, 1985-86, 1995-96]."). Id. at 683. "The number of judicial citations of law reviews in each of the courts surveyed declined dramatically from 1975 to 1996." Id. at 684. The author noted a 47.35% decline in overall citation rates form the 1970s to the 1990s, with the greatest decreases in the federal appellate courts, followed by the state supreme courts. Federal district court citation decline was the least precipitous, declining only 24.8%. Id. at 684-85. This appeared to confirm earlier studies. Id. at 685-686.

n153 Id. at 685.

n154 Merritt & Putnam, supra note 17, at 883-84. In a study of the citation patterns of the Nebraska Supreme Court, the author determined that the court tended to cite articles concerned with issues of trial practice and evidence. See Kopf, supra note 21, at 725-26.

n155 Consider the way Professor MacKinnon was cited to opposite effect in Rowinsky v. Bryan Ind. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996); and Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996).

n156 Some state courts have done the same thing. See, e.g., Hanlon v. Chambers, S.E.2d 741 (W. Vir. 1995); supra notes 8891.

n157 The Alabama courts have provided an interesting example of this. See, e.g., Trull v. Long, 621 So.2d 1278 (Ala. 1993); supra notes 83-85 and accompanying text.


n159 See, e.g., EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994) (citing to Charles Lawrence III).


n162 The opinions of Judge Boggs, alluding to the "nihilism" of the interpretive project of the critical legal studies movement is a case in point. See supra Part I.B.1.ii (discussing Judge Bogg's opinions).


n166 See, e.g., Houston v. Lafayette County Miss., 841 F. Supp. 751 (N.D. Miss. 1993).


n168 Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996).

n169 See supra notes 68-72 (discussing citations to Stanley Fish).

n170 This was the case, for example, with the citation of the work of Neil Gotanda by a California court. See Hi-Voltage Wire Works, Inc. v. City of San Jose, 72 Cal. App. 4th 600, 84 Cal. Rptr. 2d 885 (Ct. App. 1999).


n172 Perhaps in this context, a rigorous comparative study would reveal more. I leave that for a later day.

n173 See supra notes 1-7 and accompanying text.

n174 See Backer, Chroniclers in the Field of Cultural Production, supra note 20, at n. 3 (quoting Girardeau Spann, Race Against the Court: The Supreme Court and Minorities in Contemporary America 19 (1995)). Backer stated:

Law and social hegemonies are the strategies in which power takes effect; they are the embodiment of the general design or institutional crystallization of power. Law exists within and reflects the culture from which it operates. As Girardeau Spann suggests, "the Court is institutionally incapable of doing anything other than reflecting the very majoritarian preference that the traditional model requires the Court to resist."

Id.

n175 Johnson v. Phelan, 69 F.3d 144 (7th Circuit 1995).

n176 See, e.g., Knight v. Alabama, 787 F. Supp. 1030, 1333 (N.D. Ala. 1991); see also supra notes 46-58 and accompanying text.

n177 See Richard Delgado, Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race, 81 Cal. L. Rev. 387, 413 (1993). Consider the observation of Professor Delgado: "There is actually a body of emerging writing that says empathy goes only so far, that we cannot identify with or love anyone who is too different from us, cannot resonate to a 'story' too unlike the one we usually hear." Id.

n178 This condition duplicates, on a cultural level, the commonly applied practice within the international community, that nations or groups invited to join an existing group must accept, as a condition of joining, the entire body of decisions and rules, the acquis communautaire, which has developed since the creation of the group. "Acquis communautaire essentially conveys the idea that the institutional structure, scope, policies and rules of the Community (now Union) are to be treated as 'given' ('acquis'), not to be called into question or substantially modified by new States at the time they enter." Roger J. Goebel, The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland, and Sweden, 18 Fordham Int'l L. J. 1092, 1095 (1995). For a discussion of the concept within the European Union, see id. at 1140-57, and C. Curti Gialdino, Some Reflections on the Acquis Communautaire, 32 Common Mkt. L. Rev. 1089 (1995).


n180 The "martyrdom" of Lani Guinier may provide an example of this form of "progressive" punishment. The most effective way for the liberal dominant community to discredit her notions of the
meaning of voting in a diverse community was to permit her views to be aired and distorted, and then, having acknowledged them, to walk away from her personally and intellectually. See, e.g., Anne Rochell, Jesse Jackson Hits Clinton for Reneging on Promises, Atlanta Constitution, June 20, 1993, at D10.

n181 There is always a danger that insular communities will be detrimentally affected by the larger community, whether or not the larger community intends harm. See Richard Delgado, The Coming Race War? And Other Apocalyptic Tales of America After Affirmative Action and Welfare 105 (1996).

n182 See supra Part I.C.2. (discussing "Hostility"). Richard Delgado suggested an example of academic demonization in his characterization of Anne Coughlin's review of critical scholars as presenting "a picture of disingenuous scholars who lie, play to the crowd, pretend to be radicals, and make money at the expense of scholarly ideals such as the Truth." Richard Delgado, Coughlin's Complaint: How to Disparage Outsider Writing, One Year Later, 82 Va. L. Rev. 95, 96 (1996) (criticizing Anne Coughlin, Regulating the Self: Autobiographical Performances in Outsider Scholarship, 81 Va. L. Rev. 1220 (1995)). Coughlin reviewed the work of Robin West, Jerome Culp, Richard Delgado, and Patricia Williams.

n183 There are good examples from the case law in which outsider scholarship is cited. See, e.g., Johnson v. Phelan, 69 F.3d 144, 151 (7th Cir. 1995) (Posner, C.J., concurring and dissenting) (discussing radical feminists prepared to treat people like animals for purposes of social engineering); Prosser v. Elections Bd. of Wis., 793 F. Supp. 859 (W.D. Wis. 1992) (describing scholarship as emanating from "radical Black"); Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991) (quoting extensively from testimony of Dr. James Blackwell, which touches on some central ideas of critical race theory); Aguilar v. Avis Rent-A-Car Sys., 50 Cal. App. 4th 28, 53 Cal. Rptr. 2d 599 (Ct. App. 1996), aff'd, 21 Cal. 4th 121, 980 P.2d 846 (1999). In Aguilar the majority appears to have been shamed into disavowing its reliance on Professor Matsuda's work.

n184 See, e.g., Aguilar, 50 Cal. App. 4th 28, 53 Cal. Rptr. 2d 599 (regarding Professor Matsuda's work).

n185 See supra Part I.B.5 (discussing citation patterns to Catherine MacKinnon's work).

n186 The cases in which the courts referred to critical legal theory are perhaps the most pointed example of this effect. See supra Part I.B.1.a. This is a commonly understood, if frustrating notion within academia as well. See, e.g., Martha Minow, Beyond Universality, 1989 U. Chi. Legal F. 115-16 ("To be taken seriously in the business of law and legal scholarship means becoming the subject of sustained criticism.").

n187 See supra Part I.C.1 (discussing "Positive Engagement").

n188 Normative structures within an insular community, once that community becomes associated with the larger and dominant community, will invariably be influenced by the larger community. This appears to be the case within the emerging European Community. See Larry Cata Backer, Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union, 12 Emory Int'l L. Rev. 1331 (1998). Backer commented that "it becomes easy to see how the solicitude of a centralizing force for the cultural differences of its constituent parts will destroy the essence of those cultures. See the solicitude of cultural difference for what it is -- a zookeeper's approach to culture." Id. at 1379.

n189 Thus, perhaps, the wistfulness in several of the opinions discussing Professor Guinier's cumulative voting proposal for remedying voting discrimination. See supra note 111. For discussion of the notions of whiteness within the context of color, see Delgado, supra note 179, at 96-97; Neil Gotanda, A Critique of "Our Constitution Is Color-Blind," 44 Stan. L. Rev. 1 (1991); Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1707 (1993).
n190 See Eleanor Marie Brown, Note, The Tower of Babel: Bridging the Divide Between Critical Race Theory and "Mainstream" Civil Rights Scholarship, 105 Yale L.J. 513 (1995). Brown wrote that: "When it comes to legal scholarship addressing race, by contrast, it is striking that despite the existence of critical race theory for nearly a decade, the response to it has generally been a conversation among those who identify themselves as critical race theorists." Id. at 515.

n191 See Guadalupe T. Luna, "Zoo Island": LatCrit Theory, "Don Pepe" and Senora Peralta, 19 Chicano-Latino L.J. 339, 340 (1998). "LatCrit theory offers some corrective measures. LatCrit theory, nonetheless, is not readily accessible to students in traditional curriculums. This is unfortunate because including the legal experience of outsiders would assist them in their positions of power as political actors, legislators, and others responsible for creating and interpreting law." Id.

n192 See supra Part I (discussing "Citation Patterns").

n193 This incomprehensibility, and the extreme reactions which this inability and unwillingness to comprehend which have resulted, have been nicely described by Nancy Levitt. See Nancy Levitt, Critical of Race Theory: Race, Reason, Merit, and Civility, 87 Geo. L.J. 795 (1999).

n194 Consider the oppositional perspective of groups through the eyes of Richard Delgado:

They conclude that, because the world is fair yet we are poor and despised, there must be something wrong with us individually, or with our culture or family - - we are not among the Elect. We, by contrast, having the same belief in a fair world but knowing that we are normal - - like everyone else -- interpret differences in the distribution of social goods like jobs, longevity, wealth, and happiness as evidence of malevolence or neglect on the part of those in power, or else as basic defects in the social system.


n197 For examples of activist critical scholarship, see Gerald P. Lopez, Rebellious Lawyering: One Chicano's vision of Progressive Law Practice (1992), Anthony Alfieri, The Antimonies of Poverty Law and a Theory of Dialogic Empowerment, 16 N.Y.U. Rev. L. & Soc. Change 659 (19871988), and Edgar S. Cahn & Jean C. Cahn, The War on Poverty: A Civilian Perspective, 1 D.C. L. Rev. 1 (1992). For important work of race critical scholars in this area, see Delgado, supra note 194, Dorothy E. Roberts, Racism and Patriarchy in the Meaning of Motherhood, 1 Am. U. J. Gender & L. 1 (1993), and Derrick Bell, Racial Realism, 24 Conn. L. Rev. 363 (1992). There is a tremendous amount of feminist literature that touches on the subjects of women and institutional relief. Like the feminist movement itself, feminism does not speak with one voice. For purposes of this Article, and acknowledging that while many feminist scholars may share in a form of analysis, feminism does not invariably reach a singular conclusion as to the normative consequences of that analysis, I focus on the normative implications of the analytical framework of feminist scholars such as Martha Fineman.

n198 Consider the rationalism inherent in Professor Richard Delgado's culture-subverting notion of "race treason." This idea holds that all the dominant culture needs implode is a "few good white men" who, induced to commit continuing and fundamental acts of "treason" against the racial ordering foundations of their culture ("by identifying themselves with blacks when other whites ask for their help in reinforcing white supremacy") "will seriously jeopardize the white-over-black hegemony that has reigned in this country for over four hundred years." Delgado, supra note 179, 96-97. It is so easy. "If the police and the courts could not be sure that every person who looks white is loyal to the system, that system would fall." Id. at 97. As a logical proposition this may be true. But the emotive significance of the culture is ignored, as is the power of race traitors. If race treason has had so little success with the African American community over the last several centuries at a time when such treason would be rewarded, then why should it work any better when attempted by those who would subvert the dominant order (for unlike Professor Delgado, I believe that whites as well as blacks "know by a kind of instinct that these folks won't be with us when trouble comes down"). See id. at 71; cf., Gary Minda, The Jurisprudential Movements of the 1980s, 50 Ohio St. L.J. 599 (1989).


n200 Ironically, this is faith in the Western religious sense, in a sense that has insinuated itself into the bones of Western civilization for millennia. See, e.g., Thomas Aquinas, The Summa Theologicae of St. Thomas Aquinas 548-49 (Fathers of the English Dominican Province trans., Daniel J. Sullivan rev., 1952). "Faith implies an assent of the intellect to that which is believed. . . . And if this be accompanied by doubt and fear of the opposite side, there will be opinion, while, if there be certainty and no fear of the other side, there will be faith." Id. at 382-83. This survives in modern form in the Catholic Catechism. See Catechism of the Catholic Church Pt. 1 (the Creed), s. 1, ch. 3, art. 2, § 176, at 48 (Geoffrey Chapman trans., 1994). "Communion in faith needs a common language of faith, normative for all and uniting all in the same confession of faith." Id. s. 2, § 185, at 51; see also John Calvin, Calvin: Institutes of the Christian Religion, Book III, ch. II (1559), reprinted in XX The Library of Christian Classics 542 (John T. McNeill ed., Ford Lewis Battles trans., 1960) ("On Faith: It's definition set forth, and its properties examined). "We hold faith to be a knowledge of God's will toward us, perceived from his Word." Id. at 549.

n201 See Richard Delgado, Rodrigo's Eleventh Chronicle: Empathy and False Empathy, 84 Cal L. Rev. 61, 78 (1996). "It is like a certain type of religiosity. If you believe you are saved, you can easily come to believe that you can do no wrong. Because you believe in God, you will believe you are God, or at least that you're in tight with Him." Id. The irresistible force of faith sustains the drive to assimilation of and conformity by the not yet "saved". See id. And yet, Professor Delgado would limit the application of its principles to dominant group culture -- no others suffer this infection. I am not convinced this is so, especially given the (for example) vibrant separatist traditions of African Americans in this country.
n202 See Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991); see also supra notes 46-58 and accompanying text.


n204 "Unilateral power can beget arrogance, including the arrogance of insisting that one's worldview, one's interest, and one's way of framing an issue, are the only ones." Richard Delgado & David H. Yun, Essay II, Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulations, 82 Cal. L. Rev. 871, 890 (1994).

n205 Consider the resulting difficulty of dialogue that results. See, e.g., Richard Delgado & David Yun, The Neoconservative Case Against Hate-Speech Regulation -- Lively, D'Souza, Gates, Carter, and the Toughlove Crowd, 47 Vand. L. Rev. 1807 (1994). Even within the dominant group communication can be difficult. See, e.g., Linda C. McClain, Rights and Irresponsibility, 43 Duke L.J., 989, 1077-87 (1994) (commenting that liberals and communitarians find it hard to communicate because of emphasis on different meaning of responsibility).

n206 Consider in this light the wistfulness of some of the opinions that considered Professor Guinier's notions of cumulative voting or multiple representation. See supra notes 106-112 and accompanying text.

n207 See supra Part I.C.

n208 On the positive aspect of the outlaw from the perspective of the ''other,'' see Dorothy E. Roberts, Deviance, Resistance, and Love, 1994 Utah L. Rev. 179, 182 (discussing notion of African Americans as outlaws of dominant culture, and suggesting that deviance sometimes constitutes act of resistance to hegemony of dominant group).

n209 See J.M. Balkin, Ideology as Cultural Software, 16 Cardozo L. Rev. 1221 (1995). Cultural software is the processes, contexts and understandings we employ in the process of understanding and evaluation. Id. at 1225. Ultimately, then, the absurdists are right, and with a vengeance, when it comes to debating social policy involving issues of central concern to outsider scholars. I refer to that movement in French and English theatre, at its height in the 1950s and 1960s, that lamented and exposed the senselessness of the human condition. Generally, absurdist writers hold that human beings exist in an unpredictable universe in which their actions tend to compound the general unpredictability of phenomena. Forging predictability is futile in this universe because humans are innately incapable of communicating with each other at any but the most superficial level. Cf. Samuel Beckett, Waiting for Godot (1954) (expressing absurdity of, as well as need for, some external rational guide).


n211 See Balkin, supra note 209, at 1225. "Human beings possess an inexhaustible drive to evaluate, to pronounce what is good and bad, beautiful and ugly, advantageous and disadvantageous. Before culture human values are inchoate and indeterminate; through culture they become articulated and refined." Id. Calls for recognition of multiple cultural evaluative processes will fall on deaf (dominant group) ears. Transformative models remain "defeated dreams." Dorothy

n212 See, e.g., Brown, supra note 190, at 515.

n213 Consider classic Marx (whose work modern political Hegelians tend to internalize if consciously forget). Marx and Engels wrote:

The history of all hitherto existing society is the history of class struggles. . . . Oppressor and oppressed stood in constant opposition to one another. . . . The modern Bourgeois society that has sprouted from the ruins of feudal society has not done away with class antagonisms. It has but established new classes, new conditions of oppression, new forms of struggle in place of the old ones.

Modern bourgeois society . . . , is like the sorcerer who is no longer able to control the powers of the nether world whom he has called up by his spells. . . . The weapons with which the bourgeoisie fell feudalism to the ground are now turned against the bourgeoisie itself. But not only has the bourgeoisie forged the weapons that bring death to itself; it has also called into existence the men who are to wield these weapons -- the modern working class, the proletarians.


Consider a modern critical variation. Some apply the pattern of revolution following from conflict and resulting in the replacement of the decadent "old" covenant by the "new." See, e.g., Fineman, supra note 197 (discussing replacement of patriarchy with new social order). Social constructivists fall into the same trap. See, e.g., William N. Eskridge, Jr., Gaylegal Narratives, 46 Stan. L. Rev. 607 (1994).

n214 But there is power in a name. Labeling theory has taught us that we tend to become what we are called. See, e.g., David P. Farrington, The Effects of Public Labeling, 17 Brit. J. Criminology 112 (1977). Yet it also reveals the possibility of alternative shared truths that may well have the effect of beginning a transmogrification. On the notion of naming and truth, and the relationship of both to law and culture, see Backer, Constructing a "Homosexual" for Constitutional Theory, supra note 20, at 529.

n215 Critical theory can be the dominant culture's normative bogeymen. It assumes its greatest social utility as fairy stories evoking images of the evil (witches, goblins, little people, spirits, deformities) that lives in the dark apocryphal forest just outside the safety of the walls of current dominant norms. These are the kind of images used by a dominant culture to reinforce cultural norms. See, e.g., Johnson v. Phelan, 69 F.3d 144, 151 (7th Cir. 1995) (Posner, C.J., concurring and dissenting) (discussing radical feminists); Prosser v. Elections Bd. of Wis., 793 F. Supp. 859 (W.D. Wis. 1992) (describing scholarship as emanating from "radical Black").


Judging is a process of narrative transmogrification: courts hear the stories of litigants and transform them into something juridically digestible. Our society uses these transformed stories in a way that conforms to what society wants to know. Story becomes counter-story, which in turns becomes the basis for the rules which explains the way in which the story is retold.
Id. The citation pattern thus provides reassurance to traditionalists that what we believe is, in fact, true, by a process of selective observation. See Richard Delgado & Jean Stefancic, Norms and Narratives: Can Judges Avoid Serious Moral Error?, 69 Tex. L. Rev. 1929 (1991).

n217 Stridency is a very charged term. It has been used in the late twentieth century, to demonize and make irrelevant much of the work of women, especially those seeking to question the status quo. See Phyllis Schlafly, Defending Domestic Tranquility from Feminism's Assault on Marriage and Motherhood, 2 Tex. Rev. L. & Pol. 293 (1998) (reviewing F. Carolyn Graglia, Domestic Tranquility: A Brief Against Feminism (1998)). Schlafly wrote: "Most textbooks view marriage as especially bleak and dreary for women. The texts are inordinately preoccupied with domestic violence and divorce, describing marriage as archaic and oppressive, not just occasionally, but inherently. This is but one piece of evidence of the strident feminism that dominates college campuses today." Id. at 308; see also Carrie Menkel-Meadow, Portia Redux: Another Look at Gender, Feminism, and Legal Ethics, 2 Va. J. Soc. Pol. & L. 75, 105 (1994) (citing Crossfire (CNN television broadcast, July 4, 1994) ("Hell hath no fury like a woman advocate advancing her own cause! Portia's behavior warrants the frequent criticism that accompanies 'strident' feminist law reformers who blindly see all men as the enemy."). I use it here as a reminder that indeed, the dominant group will tend to hear calls for change as dangerous to its own view of a proper world or social order, and therefore dismiss it by labeling it "strident."


n219 In the context of the administration of the federal-state program of aid to families with dependent children, see Carlson v. Remillard, 406 U.S. 598 (1972), holding that federal eligibility rules broadly void state rules (approved by federal bureaucracy) that denied benefits to the family of a soldier serving in Vietnam, Townsend v. Swank, 404 U.S. 282 (1971), holding that states have no power to vary the terms of optional programs under AFDC, Dandridge v. Williams, 397 U.S. 471 (1970), holding that the Federal Constitution does not create an entitlement (absolute right) to receive from states a certain minimum amount of poor relief (subsistence), Goldberg v. Kelly, 397 U.S. 254 (1970), holding that federal constitutional principles of due process required state welfare administrators to give welfare beneficiaries meaningful notice and meaningful opportunity to be heard before terminating welfare benefits, and Shapiro v. Thompson, 394 U.S. 618 (1969), holding that state residency requirements permitted by AFDC unreasonably burdened the constitutionally protected "right to travel," and right to locate anywhere within federal union.


n221 For a discussion of the philosophy of John C. Calhoun and the way the ideas he developed relating to state sovereignty and political checks on political majorities, reapplied in a modern context, has significance for subordinated or minority communities within a nation-state, see Larry Cata Backer, Critical Turnings in Federalism: On the Intellectual Legacy of American Confederate Federalism in the European Union (1999) (unpublished manuscript, on file with author).


For this effort, impact litigation is important -not for the purpose of coercing change through court action, but to acquire a culturally significant forum for preaching our views. Likewise, admission to the halls of government is important for the purpose
of providing a forum for the expression of our understanding and the memorialization of those expressions as "law."

Id.

FORGING OUR IDENTITY: TRANSFORMATIVE RESISTANCE IN THE AREAS OF WORK, CLASS, AND THE LAW: Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education

Kevin R. Johnson * & George A. Martinez **

BIO:

* Associate Dean of Academic Affairs and Professor of Law, University of California, Davis School of Law. A.B., University of California at Berkeley; J.D., Harvard University. Thanks to Dean Rex Perschbacher for financial and other support. The authors thank Marlon Cobar, U.C. Davis 2000, and Rogelio Villagrana, 2002, for able research assistance that made this article possible. We also thank our editor, Sharon Fiedler, for her hard work. Christopher David Ruiz Cameron, Mary Romero, and Sylvia Lazos offered helpful, although often critical, comments.

** Professor of Law, Southern Methodist University; B.A., Arizona State University; M.A. (Philosophy), University of Michigan; J.D., Harvard University. Thanks to Dean John Attanasio, Southern Methodist University, and the Smart Legal Education Endowment for providing a summer research grant to support my research on this project.

SUMMARY: ... In 1998, the California voters, by a sixty-one to thirty-nine percent margin, passed Proposition 227, a ballot initiative innocuously known as "English for the Children." This measure in effect prohibits bilingual education programs for non-English speakers in the state's public school system. This Article contends that this pernicious initiative violates the Equal Protection Clause of the Fourteenth Amendment because, by employing language as a proxy for national origin, it discriminates against certain persons of Mexican and Latin American, as well as Asian, ancestry. However, in this instance, there is sufficient evidence to establish that Californians passed Proposition 227 with a discriminatory intent and that it therefore runs afoul of the Equal Protection Clause. ... It contends that Proposition 227 amounts to unlawful racial discrimination by proxy. ... In the final analysis, it becomes clear after consideration of these factors that Proposition 227 at its core concerns issues of race and racial discrimination. ... State English-only laws were followed by English-only regulations in the workplace and, ultimately, attacks such as Proposition 227, on bilingual education. ... In the "Findings and Declarations," Proposition 227 refers four times to immigrants or immigrant children. ... Among bilingual education teachers who worked directly with immigrant Latina/o children, feelings about Proposition 227 hit especially close to home. ... The district court's cursory analysis of whether the voters passed Proposition 227 with a discriminatory intent deserves careful scrutiny. ... Discriminatory Intent and Proposition 227 ...

HIGHLIGHT: It's dump on Latino time again. n1

[*1227]

Introduction

In 1998, the California voters, by a sixty-one to thirty-nine percent margin, passed Proposition 227, a ballot initiative innocuously known as "English for the Children." This measure in effect prohibits bilingual education programs for non-English speakers in the state's public school system. This Article contends that this pernicious initiative violates the Equal Protection Clause of the Fourteenth Amendment because, by employing language as a proxy for national origin, it discriminates against certain persons of Mexican and Latin American, as well as Asian, ancestry. By attacking non-English speakers, Proposition 227, in light of the historical context and modern circumstances, discriminates on the basis of race by focusing on an element central to the identity of many Latinas/os.

In the face of constitutional and other challenges, the courts upheld the initiative but failed to sufficiently engage the core Equal Protection issue that the case raised. n8 In Washington v. Davis, n9 the Supreme Court held that, in order to establish an Equal Protection violation, the plaintiff must prove that the challenged state action was taken with a "discriminatory intent." The conventional wisdom considers this requirement to be unduly stringent because it fails to fully appreciate the nature of modern racial discrimination in the United States. n10 Much can be said for this argument. However, in this instance, there is sufficient evidence to establish that Californians passed Proposition 227 with a discriminatory intent and that it therefore runs afoul of the Equal Protection Clause.
the face of the debatable claim of [*1230] some supporters that the law would improve educational opportunities for non-English speaking students, a contention that obscures the core racial motivation behind the law's enactment. n12

This Article outlines the arguments supporting the Equal Protection challenge to Proposition 227. It is now an especially appropriate time to analyze the circumstances surrounding the initiative's passage because, as time passes, it becomes more difficult to marshal the evidence necessary to prove discriminatory intent. n13 To place Proposition 227 into its larger historical context, Part I sketches the history of discrimination in education against persons of Mexican ancestry, citizens as well as immigrants, in California and the Southwest. Part II analyzes the racial edge to the initiative campaign, its provisions, and the disparate impact that the law will have on non-English speakers and, under current conditions in California, on racial minorities. It contends that Proposition 227 amounts to unlawful racial discrimination by proxy. n14 Part III analyzes [*1231] the discrimination by proxy concept's relevance to the understanding of discrimination against Mexican Americans and other minority groups in the United States and contends that the Supreme Court should incorporate the concept more fully into its Equal Protection jurisprudence.

Ultimately, Proposition 227 can be seen as part of a general attack on Latinas/os. Unlike the days of old, the antidiscrimination principle that evolved from the Civil Rights movement of the 1960s has tended to drive blatant anti-Mexican animus underground, making it more difficult to identify, isolate, and eliminate. This disturbing trend raises serious legal questions concerning the scope of the Equal Protection Clause of the Fourteenth Amendment. This Article considers how Latinas/os may employ this constitutional provision to protect their civil rights and draws conclusions relevant to minorities generally. In so doing, we take up the challenge of addressing practical problems in a constructive way with the hope of "providing intellectual leadership in a time of serious retrenchment." n15

I. The History of Discrimination Against Persons of Mexican Ancestry in California Education

A full understanding of Proposition 227 requires consideration of the long history of discrimination against persons of Mexican ancestry in California. Although most of the state was once part of Mexico, California has seen more than its share of racism directed at Mexican Americans and Mexican immigrants. n16 Anti-Mexican sentiment also has pervaded other states in the Southwest, particu [*1232] larly Texas n17 and Arizona. n18 This Section sketches the impact of anti-Mexican animus on educational opportunity in the twentieth century and the changes in the California educational system brought about because of the growing Latina/o population in the state.

A. The Struggle for Equal Educational Opportunity in the Public Schools

Mexican Americans have long struggled to ensure equal access to education. School desegregation and finance litigation, along with a political battle for bilingual education, have been central to the struggle.

1. School Desegregation Litigation

One of the most damaging manifestations of racial discrimination has been the segregation of minorities in the public schools. n19 Mexican Americans in California have faced this obstacle in their effort to become educated citizens. They have been litigating against school segregation at least as far back as the Great Depression.

In 1931 in the town of Lemon Grove, California, the school board decided to construct a separate school for Mexican Americans and begin school segregation. n20 Mexican Americans and Mexican citizens formed the Comite de Vecinos de Lemon Grove (the Lemon Grove Neighborhood Committee) and organized a boycott of the school. The committee made public appeals for support in statewide Spanish and English newspapers. With the aid of lawyers provided by the Mexican consul in San Diego, the committee successfully challenged the school segregation in a lawsuit. [*1233]

Despite the victory in Lemon Grove, by the 1940s the segregation of Mexican Americans was widespread throughout the West and Southwest. n21 In Westminster School District v. Mendez, n22 Mexican Americans in Orange County, California, filed an action against school district officials responsible for placing Mexican American children into segregated schools. The trial court found that the segregation violated plaintiffs' Fourteenth Amendment rights. n23 The court of appeals affirmed, distinguishing cases, including Plessy v. Ferguson, n24 that had upheld segregation. n25 The court of appeals distinguished those cases because the California legislature in this instance had not authorized segregation. n26

In so doing, the court in Mendez left open the possibility that the legislature might enact legislation that lawfully could segregate Mexican Americans. n27 Moreover, the court made it clear that, even absent statutory authorization, English language difficulties
might justify segregating Mexican American children. n28

Interestingly, the plaintiffs had urged the court to "strike out independently on the whole question of segregation" in light of the fact that the country had just fought and won World War II, n29 in which many Mexican Americans had distinguished themselves on the battle field. n30 Although acknowledging that judges "must keep abreast of the times," the court declined to take an independent course, stating that "judges must ever be on their guard lest they rationalize outright legislation under the too free use of the power to interpret." n31 The court instead chose to simply distinguish the earlier segregation cases.

Seven years after Mendez, the Supreme Court decided the watershed case of Brown v. Board of Education. n32 In Brown, the Court held that the segregation of African American children in the public schools violated the Equal Protection Clause of the Fourteenth Amendment. n33 In the years following Brown, the lower courts struggled to apply that decision. In particular, they faced the question whether Brown prohibited only de jure (intentional) segregation or whether it also outlawed de facto (in fact) segregation.

For example, in Soria v. Oxnard School District, n34 Mexican Americans brought a desegregation suit against a school district. District Court Judge Harry Pregerson found an illegal racial imbalance within the district resulting from the board's neighborhood school policy. n35 In reaching this conclusion, Judge Pregerson ruled that de facto segregation violated the law regardless of whether there was an intent to segregate. n36 The court of appeals reversed. The court relied on the recently decided Supreme Court case, Keyes v. School District No. 1, n37 and held that plaintiffs must establish de jure segregation in order to establish a constitutional violation. n38 Keyes, however, never directly addressed the question whether to distinguish between de jure and de facto segregation and never specified whether de facto segregation violated the Constitution. n39

The Soria case suggests that the ability to achieve social change through litigation may be limited. n40 As Soria indicates, litigation led to judicial holdings that de jure segregation was unconstitutional. That litigation effort, however, found it difficult to remedy the de facto segregation that continued to exist in the California schools.

2. School Finance Litigation

In addition to segregation in the public schools, Mexican Americans have also suffered from relatively low funding for schools in predominantly Mexican American neighborhoods. Failures in school desegregation litigation led the civil rights community to attack school financing schemes. n41 Mexican Americans challenged school financing in two precedent-setting cases, Serrano v. Priest, n42 and San Antonio School District v. Rodriguez. n43

In Serrano, Mexican Americans brought a class action alleging that the California public school financing scheme violated the Equal Protection Clause of the United States Constitution and the California Constitution. In particular, they alleged that, because the financing plan was based on local property taxes, it created deep inequalities among the various school districts in the money available per student. n44 The California Supreme Court held that California's school financing scheme discriminated on the "basis of the wealth of a district." n45 In addition, the court held that the "priceless function of education in our society" required that it be classified as a "fundamental interest." n46 Given the wealth-based discrimination and the fundamental interest at stake, the court applied the rigorous "strict scrutiny" Equal Protection standard to the school financing plan. n47 Because the plan did not further a compelling state interest, the plan failed the strict scrutiny test and violated the Equal Protection Clause. n48

Two years later, the United States Supreme Court took a contrary position in Rodriguez. n49 In Rodriguez, Mexican Americans brought a class action alleging that the Texas property tax scheme for public school financing violated the Equal Protection Clause. The Court found that the strict scrutiny standard was not appropriate because education is not a fundamental right under the United States Constitution and distinctions based on wealth do not implicate a suspect class. n50 Applying the lenient "rational basis" Equal Protection test, the Court held that there was no constitutional violation because the financing scheme rationally furthered a legitimate state purpose. n51

Subsequently, the California Supreme Court reaffirmed the validity of Serrano under the California Constitution. n52 Thus, Serrano survives Rodriguez to the extent that it was based on California law. In an effort to satisfy the requirements of Serrano, the California legislature in 1977 enacted a new method of school financing. n53 The new law sought to reduce inequalities among school districts by transferring property taxes raised in affluent districts to poorer districts. n54

However, in 1978, California voters approved Proposition 13, n55 which drastically reduced property taxes in California by more than fifty percent. n56 The impact on public education was devastating. "Most observers agree that Proposition 13 left
California school finance in shambles." n57 By dramatically cutting local property taxes, the initiative instantly cut school budgets, with particularly onerous consequences for Latinas/os. n58 California's scheme for financing public schools continues to permit serious funding inequalities between predominantly white schools and those attended by Mexican Americans and other minorities. n59 Ultimately, Serrano created a right without a remedy. n60

Since Serrano, California state financing for education has dropped compared to the spending of most other states. n61 In 1994-95, California ranked forty-first of the fifty states in expenditures on education. n62 Financing takes on greater significance given the perceived need for bilingual education programs.

3. Bilingual Education

Limited English proficiency has proven to be an educational obstacle to many Mexican Americans and Mexican immigrants. In addition, they historically have been deprived by the lack of instruction in Latina/o culture and history. In response, Mexican Americans and other minorities have advocated that the public schools provide bilingual and bicultural education.

Over twenty-five years ago, the Supreme Court decided Lau v. Nichols. n63 In Lau, Chinese students unable to speak English brought an action against the San Francisco School District, alleging that the lack of instruction in their native language violated Title VI of the 1964 Civil Rights Act. The Court held that the school district had violated the law prohibiting race discrimination by failing to provide an appropriate curriculum to resolve the English language difficulties. n64

Following Lau, in 1976, the California legislature enacted the Chacon-Moscone-Bilingual-Bicultural Education Act. n65 This Act required that, among other things, California public schools must teach students in kindergarten through high school in a language they could understand. n66 In 1987, however, Governor George Deukmejian ended mandatory bilingual education in California by vetoing a bill that would have continued the Chacon-Moscone Act. n67 Although bilingual/bicultural education no longer is mandatory, districts could continue to receive funding for bilingual education if they provided instruction in accordance with the Chacon-Moscone Act. n68

B. The Latina/o Population Explosion and the Impact on California's Public School Enrollment

The legal developments in public education in California can only be fully understood by considering the changing demographics of the state. California's population is the country's most diverse and will continue to become more so for the foreseeable future. Although people of every race and national origin are contributing to this demographic shift, the growth of the Latina/o population has been nothing less than explosive. Alarming many Anglo Californians, it contributed to their unwillingness to support the state's public schools and to their embrace of Proposition 227. n69

"If 'demography is destiny,' then California's destiny is becoming decidedly more Latino." n70 Over seven million, or one-third, of the twenty-one million Latinas/os living in the United States reside in the Golden State. n71 Latinas/os jumped from 18% of the state's population in 1980 to 26% in 1990. n72 Current projections have them comprising 25.8% of the state's population in 2000, 31.6% in 2010, and 36.3% in 2020, n73 when they will be poised to become California's "majority minority." n74 Most California Latinas/os are of Mexican origin. In 1990, 80% traced their roots to Mexico, followed by 11% from Central and South America. n75

Nowhere has Latina/o population growth been more apparent than in Southern California. In Los Angeles County, Latinas/os already make up the majority of all residents, which represents a dramatic increase from 1990, when Latinas/os constituted about 38% of the county's population, and 1980, when they amounted to over 27%. n76 Indeed, "Los Angeles County alone contains 44% of California's Latinos." n77 By 2010, Anglo majorities will have disappeared in at least sixteen local jurisdictions, including the high-growth counties of Fresno, Riverside, and San Bernardino. n78

A comparison of the surnames of new home buyers confirms the shift. Nationally, the top four buyers are named Smith, Johnson, Brown, and Jones. Garcia shows up at number seven. But in Los Angeles, the top four buyers are named Garcia, Hernandez, Martinez, and Gonzalez, all Spanish surnames. The grand "American" name Johnson drops to number seven. n79

Although high birth rates have contributed to Latina/o population growth, the most significant factor continues to be high levels of immigration from Latin America. From 1951 to 1960, a majority of immigrants came from Europe. n80 But from 1992 to 1995, 39% of all immigrants came from Latin America, followed by Asia at 36.2%. Mexico is the leading country of birth for legal immigrants to California. In fiscal year
1995, the state opened its doors to over 33,000 Mexicans, 20% of all documented immigrants. n81

Increased immigration, high birth rates, and "white flight" from urban areas and public schools to suburban areas and private schools, have resulted in Latina/o domination of California's public schools. In 1997-98, of the state's 5.7 million public school

<table>
<thead>
<tr>
<th>Year</th>
<th>Hispanic</th>
<th>White</th>
<th>Black</th>
<th>Asian</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981-82</td>
<td>25.8%</td>
<td>56.4%</td>
<td>9.9%</td>
<td>5.5%</td>
</tr>
<tr>
<td>1987-88</td>
<td>30.1%</td>
<td>50.1%</td>
<td>9.1%</td>
<td>7.3%</td>
</tr>
<tr>
<td>1991-92</td>
<td>35.3%</td>
<td>44.5%</td>
<td>8.6%</td>
<td>8.0%</td>
</tr>
<tr>
<td>1997-98</td>
<td>40.5%</td>
<td>38.8%</td>
<td>8.8%</td>
<td>8.1%</td>
</tr>
</tbody>
</table>

Similar changes have occurred in the enrollment of limited English proficient ("LEP") students, the vast majority of whom are recent immigrants. From 1982 to 1990, there was an increase of over 430,000 LEP students statewide to 1.4 million -- an increase of 226%. n84 LEP students accounted for nearly a quarter of all students enrolled in California public schools. n85 For years, the lion's share of LEP enrollment has been Spanish-speaking students of Latina/o origin. In 1993, 47.3% of Latina/o students were LEP; by 1998, this figure had risen to 49.2%. By contrast, in 1993, 44.1% of Asian students were LEP; by 1998, this figure had dropped to 40.1%. n86

As Latina/o numbers in the schools are increasing, they "are rapidly becoming our largest minority group and have been more segregated than African Americans for several years." n87 Perhaps the best example of this segregation is in Los Angeles, where public school enrollments have long been majority-Latina/o. The Los Angeles Unified School District was sixty-eight percent Latino in 1996-97. n88

Simultaneous with the Latinas/os increase as a percentage of California public school enrollment, California's spending per pu [*1242] pil fell precipitously as a percentage of the national average. The trends are reflected graphically in Figures 1 and 2. FIGURE 1

[SEE TABLE IN ORIGINAL]

[*1243] FIGURE 2

[SEE TABLE IN ORIGINAL]

C. Responses to the Demographic Changes: Disadvantaging Latinas/os and Other Minorities Through Race Neutral Proxies

Many legal and political responses, in addition to decreased funding to the public schools, can be linked to the changing racial [*1244] demographics of the State of California. n89 As the minority population increased as a proportion of the state's population in the post-World War II period, a variety of laws were passed in response. Consider the last decade.

Passed in 1994, Proposition 187, which if implemented would have barred undocumented immigrant children from the public schools and excluded undocumented immigrants from a variety of public benefits, would have disparately impacted the community of persons of Mexican ancestry in California. n90 The initiative galvanized Latina/o voters in the state; they voted overwhelmingly against a law that Anglo voters decisively supported. n91 Proposition 187 drew the attention of Congress, which in 1996, enacted welfare "reform" that eliminated eligibility of many legal, as well as undocumented, immigrants from various public benefits. n92 Latina/o immigrants subsequently flocked to naturalize and become citizens in order to avoid the potential impacts of the new laws, as well as other onerous laws punishing noncitizens, and to participate in the political process to avoid such attacks in the future. n93

More generally, anti-immigrant sentiment contained a distinctly anti-Mexican tilt as the century came to a close. n94 Drastic immigration reforms in 1996 eliminated judicial review of many immigration decisions of the immigration bureaucracy with devastating [*1245] consequences for minority communities. n95 Deportations of aliens, especially "criminal aliens," meant the removal of many Mexican and Central American immigrants. n96 In fiscal year 1998, almost ninety percent of those removed from the United States were from Mexico and Central America. n97 At the same historical moment, hate crimes, police harassment, and violence against Latina/o immigrants and citizens increased. n98

Other laws with similar racial bents often speak in facially neutral terms. The ever-popular "tough on crime" laws, such as the "three strikes" law, target
minority criminals, as does the claim that certain politicians are "soft" on crime, as driven home by the famous Willie Horton advertisements in the 1988 Presidential election. n99 Welfare "reform," often directed at women of color, long has been an issue polarizing minorities and whites, thereby forming a wedge between racial groups. n100 [*1246]

Moreover, the political retrenchment with respect to affirmative action directly challenged the status of racial minorities. Proposition 209, dubbed the "California Civil Rights Initiative," in fact dismantled affirmative action programs designed to remedy discrimination against the state's minority population n101 and ensure diversity in employment and education. n102 The electorate passed this law in the face of strong opposition from Latinas/os and African Americans. n103 Coming on the heels of some high profile judicial decisions rolling back affirmative action, n104 underrepresented minorities found it difficult to understand Proposition 209 as anything other than an attack directed at them. n105 [*1247]

D. Summary

In sum, there has been a history of discrimination against Mexican Americans in the California public schools that has evolved with the times. In the later part of the twentieth century, demographic changes in the racial composition of the state, and its schools, have provoked legal and political responses negatively impacting Mexican Americans.

III. Proposition 227: Discrimination by Proxy

The Supreme Court has acknowledged that a court deciding whether an initiative violates the Equal Protection Clause may consider "the knowledge of the facts and circumstances concerning its passage and potential impact" and "the milieu in which that provision would operate." n106 In the final analysis, it becomes clear after consideration of these factors that Proposition 227 at its core concerns issues of race and racial discrimination.

A. Language as an Anglo/Latina/o Racial Wedge Issue

The ability to speak Spanish has long been an issue in California. For much of the state's history, the public schools adhered to an English-only policy, with punishment meted out to children who braved speaking Spanish in the public schools. n107 Sensibilities changed, however, and some school districts eventually began to offer bilingual education. n108 Nonetheless, "the debate over bilingual education has raged since the 1960s." n109 [*1248]

In Lau v. Nichols, n110 the Supreme Court held that a school district violated provisions of the Civil Rights Act of 1964 that barred discrimination on the basis of race, color, or national origin. The school district violated this act because it failed to establish a program for non-English speaking students. Critical to our analysis, the Court treated non-English speaking ability as a substitute for race, color, or national origin. n111 Other cases also have treated language as a proxy for race in certain circumstances. n112 This reasoning makes perfect sense. Consider the impact that English-only rules have on Spanish, Chinese, and other non-English speakers. It is clear at the outset that, under current conditions, such regulations will have racial impacts readily understood by proponents. n113 "Given the huge numbers of immigrants who enter this country from Asian and Latin American countries whose citizens are not White and who in most cases do not speak English, criticism of the inability to speak English coincides neatly with race." n114 [*1249]

The sociological concept of status conflict also helps explain the intensity of the racial divisiveness generated by laws regulating language usage. n115 Anglo and Latinas/os see language as a fight for status in U.S. society. Courts n116 and commentators n117 have analyzed extensively the Latina/o fight against English only laws and regulations. n118 Some vocal critics claim that the alleged demise of the English language in the United States has "splintered" U.S. society. n119 "Unfortunately, the English-only movement . . . hosts an undeniable component of nativism and anti-Latino feeling." n120 Not coincidentally, English-only initiatives have tended to be in states with significant Latina/o, Asian, Native American, or foreign born populations. n121

With race at the core, the modern English-only and bilingual education controversies are closely related. Latinas/os resist the [*1250] language onslaught as an attack on their identity. "Language minorities understand English-only initiatives as targeted at them . . . . Spanish . . . is related to affective attitudes of self-identity and self-worth. Thus, language symbolizes deeply held feelings about identity and is deeply embedded in how individuals place themselves within society." n122

The intensity of the language debate at times is difficult to comprehend unless one views the laws as symbolic attacks under color of law against minority groups. n123 For example, California voters in 1986 passed an advisory initiative that had no legal impact but to declare English the official language of the state of California. n124

Opponents contended the measure conveyed a symbolic message that culturally and linguistically different groups were unwanted. They alleged that the campaign was a thinly veiled form of racism and
Supporters argued that it was a common sense way to ensure that California's population remained politically cohesive. n125

Importantly, symbolic action of this nature can have concrete long-term impacts. In 1990, Professor Julian Eule observed that recent efforts in Arizona, California, and Colorado declaring English the official language were largely "symbolic and offer little op [\textsuperscript{*1251}] portunity for courts to remedy the gratuitous insult" to non-English speakers. n126 However, he predicted that such measures would be "invoked in efforts to terminate states' bilingual programs" and that "attempts to demonstrate that the initiatives are motivated by racial animus [as required by the Supreme Court's Equal Protection jurisprudence] will encounter . . . proof difficulties . . ." n127

Unfortunately, this is precisely what has happened. State English-only laws were followed by English-only regulations in the workplace and, ultimately, attacks such as Proposition 227, on bilingual education. n128 And, as we shall see, it proved difficult to establish that states enacted such laws with a discriminatory intent.

B. The Case of Proposition 227

Following closely upon "the gratuitous insult" to Latinas/os transmitted by voter approval of English-only measures in Arizona, California, and Colorado, proponents unveiled Proposition 227 in July 1997 and it came before the California voters in June 1998. Although not identifying Latinas/os by name, the measure's text and context leave little doubt that a motivating factor behind its passage was to attack educational opportunities for Spanish-speaking Latinas/os, especially Mexican immigrants. n129

1. The Language of the Initiative

The people targeted by Proposition 227 are identified in the official title of the measure. This title, English Language Education for Immigrant Children, n130 was shortened by advocates during the campaign to English for the Children. n131 In the "Findings and Declarations," Proposition 227 refers four times to immigrant parents, n132 and the state's public school system, which has done "a poor job of educating immigrant children"; n133 the "waste[age] of financial resources on costly experimental language programs whose failure . . . is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children"; n134 and the resiliency of "young immigrant children," who "can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language." n135

In a state where Latinas/os dominate the ranks of immigrants, n136 public school children, and non-English speakers, references to immigrants necessarily refer primarily to Latinas/os. From 1992 to 1995, the largest group of legal immigrants to California -almost forty percent -- came from Latin America, n137 with more hailing from Mexico than any other country. n138 In 1998, Latinas/os constituted over forty percent of California public school children enrolled in kindergarten through twelfth grade. n139 According to the 1990 census, among the state's school age children who lived in households where nobody over age fourteen spoke only English or spoke English well, over seventy percent lived in Spanish-speaking homes. n140 In the California schools, students not fluent in English are classified as "limited English proficient" or "LEP." n141 In 1996, \textsuperscript{*1253} over 1.3 million LEP students attended the state's public schools, n142 with more than a million being Spanish-speakers. n143

In addition to the disparate impact on Latinas/os, the initiative places special burdens on them. First, Proposition 227 proclaims as public policy what every Latina/o immigrant in this country already knows: that English "is the national public language of the United States of America and the State of California . . . and is also the leading world language for science, technology, and international business, thereby being the language of economic opportunity." n144 This statement is curious in light of the fact that Latina/o immigrants and citizens strive to -- and in fact do -- acquire English language skills. n145

Second, the heart of the measure, section 305, eliminates the right of Latina/o parents to choose how their children will acquire English language skills and imposes a one-size-fits-all approach:

All children in California public schools shall be taught English by being taught in English. . . . This shall require that all children be placed in English language classrooms. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year. n146

This flies in the face of this nation's firm tradition of protecting fundamental family decisions, such as the type of education the children should receive, from governmental interference. n147 Section 305 denies Latina/o parents the choice of having their children taught English through gradual exposure rather than through mandatory immersion. It also dismisses the views of bilingual education experts, many of whom believe that non-Englishspeaking \textsuperscript{*1254} children
generally need years of study in a second language to become proficient enough to succeed in it academically. n148

Finally, section 310, which permits parents to petition for bilingual instruction, requires that the child's parent or guardian provide "written informed consent." n149 Such consent, however, cannot be obtained in the time-tested manner, that is, by having the parent sign a consent form. Section 310 instead requires that a "parent or legal guardian personally visit the school to apply for the waiver." n150 Imagine the reaction of Anglo parents if a provision of the California Education Code effectively required them, but not African American, Asian, or Latina/o parents, to personally visit a school before their children could opt out of mandatory education programs.

2. Ballot Arguments

Like the language of the initiative, the Proposition 227 campaign often spoke softly and subtly about race. Most campaign materials did not squarely mention race. Opponents feared raising the claim of racial discrimination because of a possible backlash. n151 The ballot arguments in the voters pamphlet, however, make clear that the initiative singles out Latinas/os. Despite paying homage to "the best of intentions" with which the architects of bilingual programs began their efforts, n152 the proponents sharply criticize those programs and explicitly refer to persons of Latina/o (and no other) descent.

First, the Proposition 227 advocates proclaimed that "for most of California's non-English speaking students, bilingual education actually means monolingual, SPANISH-ONLY education for the first 4 to 7 years of school." n153 No mention is made of the type of education afforded any other group of students, whether African American, Asian, or white. Second, the argument identifies "La [*1255] tino immigrant children" as "the principal victims of bilingual education," because they have the highest dropout rates and lowest test scores of any group. n154

Third, the proponents of the measure state that "most Latino parents [support the initiative], according to public polls. They know that Spanish-only bilingual education is preventing their children from learning English by segregating them into an educational dead-end." n155 If Proposition 227 were truly race neutral, it would be unnecessary to invoke the alleged political opinions of Latina/o parents. n156 Similarly, the rebuttal to the argument against Proposition 227 criticized the measure's opponents as the leaders of organizations whose members "receive HUNDREDS OF MILLIONS OF DOLLARS annually from our

failed system of SPANISH-ONLY bilingual education." n157

3. Statements by Advocates

At first glance, the overt anti-Latina/o sentiments that surfaced during the racially-charged campaigns for Propositions 187 n158 and 209 n159 seemed to be missing from the Proposition 227 campaign. California Governor Pete Wilson campaigned vigorously for passage of these racially-divisive immigration and affirmative action initiatives and gained the reputation as "the greatest bogeyman for Latinos." n160 Quirky Silicon Valley millionaire Ron Unz, who wrote, financed, and directed the campaign for Proposition 227, and had once challenged Pete Wilson for the Republican gubernatorial [*1256] nomination, took a different tack. Having opposed Proposition 187, Unz distanced himself from Wilson and other kindred spirits. n161

From the outset, the sponsors of Proposition 227 denied any racial animus. Unz claimed to support Latina/o parents who kept their children out of bilingual classes and insisted that they learn English. n162 To unveil Proposition 227, he went to Jean Parker Elementary School in San Francisco, n163 where nearly a quarter-century earlier the family of Kinney Lau, an immigrant Chinese student, had successfully sued the city's school district to secure Lau's right to receive a bilingual public education. n164 In media appearances, Unz asserted that Proposition 227 was neither anti-immigrant nor anti-Latina/o n165 and proclaimed that any victory would be morally hollow without Latina/o support. n166 All of which prompted some Latinas/os, such as California Assembly Speaker Antonio Villaraigosa, to regard Unz as "a decent guy, although we have different views of the world." n167

Three of the four principal spokespersons who joined Unz in sponsoring Proposition 227 were Latinas/os. n168 Nevertheless, many [*1257] statements made by supporters demonstrated an intent to single out Spanish-speaking Latinas/os in a way that would not be tolerated if aimed at Anglos. Unz, for example, unfavorably compared today's Latina/o immigrants to the European immigrants of the 1920s and 1930s. n169 He acknowledged that the only group of children given large quantities of "so-called bilingual instruction are Latino-Spanish speaking children" n170 and emphasized that Proposition 227 was "something that will benefit, most of all, California's immigrant and Latino population." n171 Responding to the argument that bilingual education helps immigrant pupils learn better by teaching them respect for their culture, he sharply responded that "it isn't the
Emphasizing that she was a Latina supporter of Proposition 227, cosponsor Gloria Matta Tuchman played a similar role for Unz that Ward Connerly, an African American, did for Governor Wilson in the Proposition 209 campaign. Although few would question the importance of immigrants of learning English, coerced assimilation, which too often calls upon immigrants to renounce their native language and other ties to their heritage, is another matter.

Ron Unz's comments demonstrate the pro-Proposition 227 campaign's efforts to attack Latinas/os by using Latina/o figureheads: "Gloria [Matta Tuchman] is the best possible spokesperson for something like this," Unz said. "Her ethnicity, her gender . . . all those things play an important role." Unz called Jaime Escalante's support a "tremendous boost' to his campaign. . . . Having the most prominent Latino educator serving as honorary chairman really just allows more of these Latino public figures to voice their true feelings on the issue," Unz said." Unz says he hopes Escalante's support of the campaign will help shake loose support . . . from California's GOP leaders. . . ." Consequently, Latina/o supporters were used to serve anti-Latina/o ends.

In the end, it is difficult to state how many Proposition 227 supporters were influenced by race. The web page of One Nation/One California, which helped place Proposition 227 on the ballot, candidly admits that anti-Latina/o sentiment added to support for the measure:

There is a strong public perception that many opponents of "bilingual education" are using the issue as a cover for anti-Latino and anti-immigrant views. Unfortunately, this is often true. Private officials of Voice of Citizens Together, who had campaigned for Proposition 187, in effect predicted a race war and suggested that California's demographic changes themselves were the problem: "[Proposition 227] passed overwhelmingly except for the Mexican and the black vote." The president of the restrictionist Federation for American Immigration Reform, responded to a pro-immigration speech by President Clinton a few days after the measure passed, by stating that "rather than revitalize the cities, immigrants have driven Americans out of the cities. Native-born Americans are fleeing cities like Los Angeles because of the impact of excessively high levels of immigration." The head of the restrictionist Voice of Citizens Together, who had campaigned for Proposition 187, in effect predicted a race war and suggested that California's demographic changes themselves were the problem: 

4. The Latina/o Reaction

Even if what the advocates of Proposition 227 said could be considered race neutral, what many Latinas/os actually heard was yet another direct attack on them. The initiative inevitably attracted support from Californians uncomfortable with the growing Latina/o population and lost support among Latinas/os who saw the measure as an extension of Propositions 187 and 209. Among bilingual education teachers who worked directly with immigrant Latina/o children, feelings about Proposition 227 hit especially close to home. One first grade teacher said "It's a painful subject. I can't even begin to explain to somebody the pain and fright that children are going to
Recalling the nasty Propositions 187 and 209 campaigns, one prominent attorney for the Mexican American Legal Defense and Education Fund called Proposition 227 "the third in a chain of [*1261] anti-immigrant, anti-Latino proposals." n194 The vice president for the National Council of La Raza wondered: "Hasn't the state had enough? Do we need another racially charged, sharp-edged debate about a hotbutton, political wedge issue?" n195 California Congressman Xavier Becerra characterized Proposition 227 as "immigrant-bashing." n196 Speaker of the California Assembly Antonio Villaraigosa called the measure "divisive and polarizing." n197 State Democratic Party Chair Art Torres called it "another attack" on the Latina/o community. n198

5. The Results

At the June 1998 election, Anglos heavily supported Proposition 227 while Latinas/os strongly opposed it. Specifically, although the measure passed by a 61-39% margin, n199 Latinas/os, according to exit polls, opposed the measure by a 63-37%, n200 which was contrary to what the pre-election polls had predicted. n201 The election results are generally consistent with survey results showing that over 80% of Latinas/os supported bilingual education. n202 [*1262]

In light of what we have detailed above about the anti-Latina/o animus behind Proposition 227, n203 the wide split between Anglo and Latina/o voters should surprise no one. What is surprising is that so many never saw the Latina/o rejection coming. Before the election, nearly every poll reportedly showed strong support for Proposition 227 among Latina/o voters. n204 In November 1997, before the initiative had qualified for the ballot, a Los Angeles Times poll claimed that 84% of Latinas/os, as contrasted with 80% of whites, supported it. n205 Latina/o opposition, claimed U.S. News & World Report, was confined largely to "bilingual-education teachers and Hispanic activists." n206 In March 1998, the Field Poll reported that 61% of Latinas/os and 70% of the general population supported Proposition 227. n207 In April 1998, The Economist reported that various polls showed that 55% to 65% of Latinas/os and 63% of all voters still favored the initiative. n208 Frequent repetition by noted political commentators gave credence to the polls. n209 Indeed, the proponents of Proposition 227 in the voter ballot pamphlet distributed to voters stated unequivocally that "most Latino parents" favored the initiative. n210 Ron Unz went so far as to say that the initiative's broad support might unify Californians with "a vote which cuts across party lines, which crosses ideological lines and which crosses lines of ethnicity." n211

It was only Latina/o media outlets that accurately documented the coming tide of resentment among Latina/o voters toward Proposition 227. In early 1998, La Opinion, Southern California's leading Spanish newspaper, and a Spanish television station com [*1263] missioned a poll showing that 43% of Latinas/os favored Proposition 227 but 49% opposed it. n212

Despite Latina/o voter rejection of Proposition 227, after the election the media continued to report that Latinas/os supported the measure. For at least two days after the vote, the Associated Press, Washington Post, Chicago Tribune, Christian Science Monitor, and Dallas Morning News, all erroneously reported that Latinas/os voted in favor of the measure by wide margins. n213 These errors before and after the vote demonstrate that Proposition 227 was conceived, debated, and enacted in an atmosphere of obsession with Latinas/os and their views about the measure.

As the campaign and racially-polarized results demonstrate, Proposition 227 exacerbated already existing racial tensions. n214 A horrible attack on a white principal of a predominantly Latina/o school in the Los Angeles area made this point clear. n215 Latina/o students at a number of high schools walked out of class. n216 Within weeks of Proposition 227's passage, a group of men attacked, kicked, and assaulted two Latinos at a convenience store in Lancaster, California, while yelling "What are you wetbacks doing in here?" n217

C. The Discriminatory Intent Necessary for an Equal Protection Violation?

In Valeria G. v. Wilson, n218 the district court rejected all challenges to Proposition 227. The court specifically held against the plaintiffs on an Equal Protection claim based on the argument that the initiative created a political barrier that disadvantaged racial minorities. n219 In so doing, the court emphasized that, even if the [*1264] measure had a disproportionate impact on a minority group, the plaintiffs failed to establish the necessary discriminatory intent for an Equal Protection challenge. n220 According to the court, the plaintiffs did not attempt to satisfy this "burden [but claimed] that they were not arguing a 'conventional' equal protection claim."

An amicus curiae brief submitted in Valeria G. contended that Proposition 227 violated international law, including the Convention on the Elimination of All Forms of Racial Discrimination, n222 thereby "implying that Proposition 227 was motivated by racial
or national origin discrimination." n223 Finding that the issue was not properly before it, the court simplistically asserted that a better education for limited English proficient children, was the purpose behind the measure. n224

The district court's cursory analysis of whether the voters passed Proposition 227 with a discriminatory intent deserves careful scrutiny.

1. Factors in Discerning a "Discriminatory Intent"

The Supreme Court in Washington v. Davis n225 held that a discriminatory intent was necessary to establish an Equal Protection violation. Although upholding a test used in hiring police officers that had a disparate impact on African Americans, the Court emphasized that the "intent" requirement was not rigid:

An invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in [*1265] various circumstances the discrimination is very difficult to explain on nonracial grounds. n226

However, the Court stated unequivocally that impact alone is insufficient to establish an equal protection violation and speculated that such a rule "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." n227

Subsequently, the Supreme Court held that an Equal Protection violation can be established with "proof that a discriminatory purpose has been a motivating factor in the decision." n228 To make this determination requires:

A sensitive inquiry into such circumstantial and direct evidence as may be available. . . . The impact of the action . . . may provide an important starting point. Sometimes a clear pattern, inexplicable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. n229

Among the factors that the Court has found appropriate to consider in evaluating whether state action was motivated by an invidious intent is the "historical background," "the specific sequence of events leading up to the challenged decision," "departures from the normal procedural sequence," and the "legislative or administrative history." n230 Importantly, "historical evidence is relevant to a determination of discriminatory purpose." n231 [*1266]

The discriminatory intent standard has proven to be a formidable barrier to an Equal Protection claim, although it is not impossible to satisfy. n232 It historically has proven particularly difficult to establish discriminatory motive when an institutional body made the challenged decision. n233 Consequently, some critics claim that initiatives, often legally bullet-proof, are especially damaging to minority rights. n234 History supports this contention. n235 Not only [*1267] racial minorities, but other minorities may be adversely affected. n236 The initiative process effectively encourages voters to take out aggressions against an array of minority groups in a way that has become increasingly difficult to do in American political and community life. Indeed, one political scientist suggests that the increase in initiatives in California in the 1990s reflects the anxieties of middle class whites and is linked to increasing minority representation in government. n237 Such fear about these sorts of passions swaying the political process help explain why the framers of the Constitution opted for a representative form of government. n238

Because of the rigor of the "discriminatory intent" requirement, some courts and advocates, as suggested by Valeria G., appear to have shied away from Equal Protection challenges to invalidate English-only laws passed by the voters in order to strike them down on less demanding grounds. For example, the Arizona Supreme Court invalidated an initiative that required government employees to speak only English on the job on First Amendment grounds. n239 Previously, a federal court of appeals had invalidated the same law for similar reasons, n240 only to have the case dismissed by the Supreme Court as moot. n241 In so doing, the court of appeals expressly acknowledged the national origin impacts of the English-only law. n242 [*1268]

2. Discriminatory Intent and Proposition 227

Because the evidence establishes that race was "a motivating factor" n243 behind the passage of Proposition 227, the law violates the Equal Protection Clause of the Fourteenth Amendment. n244 Language was employed as a proxy for race. Race, although not explicitly raised, can be seen by the near exclusive focus on the Spanish language, the history of discrimination against Mexican Americans in California, including the increase in anti-Latina/o and anti-immigrant animus in the 1990s, statements by the advocates of the initiative, and the raciallypolarized vote. Race obviously was "a motivating factor" behind the passage of Proposition 227.
A judicial finding that Proposition 227 violates the Equal Protection Clause would be consistent with the landmark decision of Brown v. Board of Education. In Brown, Chief Justice Warren wrote that segregation "generates a feeling of inferiority as to the status [of African Americans] in the community that may affect their hearts and minds in a way unlikely ever to be undone." Proposition 227, by banning teaching in the native language of Spanish speakers, creates a similar stigma for Latinas/os. It suggests that Spanish and other languages are inferior to English and not fit for education. Indeed, in such cases as productivity and recognized that "pension cannot rely on age as a proxy for . . . characteristics of race." The Supreme Court has emphasized that an "employer may not use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination. An example is using gray hair as a proxy for age: there are young people with gray hair (a few), but the fit between age and gray hair is sufficiently close that they would form the basis for invidious classification.

The Supreme Court has emphasized that an "employer may not use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination. An example is using gray hair as a proxy for age: there are young people with gray hair (a few), but the fit between age and gray hair is sufficiently close that they would form the basis for invidious classification.

III. Mexican Americans and the Fourteenth Amendment

Mexican Americans and Latinas/os historically have suffered intentional discrimination in the state of California, as well as other states. Over the years, discriminators have used a number of proxies, some more transparent than others, to discriminate against Latinas/os. The proxies for different minority groups may vary. For example, the "alien land" laws prevalent in many states early in the twentieth century discriminated against persons of Japanese ancestry in a facially neutral way by prohibiting real property ownership by persons "ineligible to citizenship," at a time when Japanese were the largest nonwhite immigrant group ineligible for naturalization. Opposition to low income housing in certain circumstances may serve as cover for discrimination against African Americans. In both instances, a proxy for race is employed to discriminate on the basis of race. To this point, the Supreme Court has not generally analyzed the issue by utilizing the proxy concept. In applying the antidiscrimination laws, courts have held that an employer cannot be permitted to use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination. An example is using gray hair as a proxy for age: there are young people with gray hair (a few), but the fit between age and gray hair is sufficiently close that they would form the basis for invidious classification.

Immigration status is often used in today's public discourse as a proxy for race. For example, attacks on "illegal aliens" often may be used as a code, particularly in the Southwest, for Mexican immigrants and Mexican American citizens. This is because Mexican immigrants currently constitute about fifty percent of the undocumented population in the United States. Attacks on "illegal aliens" therefore tend to be directed at Mexican immigrants. Similarly, efforts to deport "criminal aliens" or others who have violated the criminal laws tend to adversely affect minority communities. This is because, in the post-1965 period, most of the lawful immigrant grants have come from Asia and Latin America. Thus, an attack on the "criminal alien," and, similarly, the "alien" welfare abuser, may translate into attacks on immigrants of color.

In the case of Proposition 227, voters discriminated against Mexican Americans and Mexican immigrants by proxy. Through targeting language when the largest bilingual education programs in California by far were for Spanish speakers, the initiative was able to negatively affect a discrete and insular racial minority. A growing Latino population in the California public schools results in reduced financial support, a reduced commitment to bilingual education, and, ultimately to the prohibition of such education. Latinas/os were the known and actual victims. A racially-polarized vote confirmed that the measure used language as a proxy for race.

Current Equal Protection doctrine and the discriminatory intent requirement, however, make it difficult for Latinas/os to establish constitutional violations. Mexican Americans historically have found it difficult to protect their rights under the Equal Protection Clause of the Fourteenth Amendment. For example, in Hernandez v. State, a Mexican American defendant challenged a murder conviction on the ground that Mexican Americans had been excluded from serving on the jury. Hernandez relied on case law holding that the government violated the Equal Protection Clause by excluding African Americans from serving on juries. The Texas Supreme Court, however, held that the Fourteenth Amendment exclusively protected African Americans. In this regard, the court held that Mexican Americans are "white." Because the juries that indicted and convicted Hernandez were composed of white persons and therefore members of his own race, the court refused to find an Equal Protection violation.

The Supreme Court reversed and held in Hernandez v. Texas that the Equal Protection Clause covered "persons of Mexican descent." The Court, however,
only extended a weak form of protection to Mexican Americans. The Fourteenth Amendment covered Mexican Americans only in areas where they were the targets of local discrimination. n271 Thus, in areas where Mexican Americans could not prove that they suffered from such discrimination, they were not entitled to invoke the Equal Protection Clause. n272 Consequently, Mexican Americans found it difficult to assert rights under the Fourteenth Amendment, in part because they lacked funds to satisfy the evidentiary burden of establishing the existence of local prejudice. n273

The view that the Fourteenth Amendment only limited discrimination against African Americans may well be consistent with the original understanding of its framers. As the Supreme Court in the Slaughterhouse Cases explained:

No one can fail to be impressed with the one pervading purpose found in [all the Reconstruction Amendments]; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. . . . The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied . . . . n274

[*1273]

Indeed, the Court stated that the Fourteenth Amendment dealt exclusively with discrimination against African Americans: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." n275

The idea that the structure of civil rights law historically focused on African Americans and Whites has been termed the "Black-White binary." n276 Although some argue that the Constitution must be interpreted in accordance with the intent of the Framers, n277 a dualistic approach to antidiscrimination law is clearly outdated. As famous sociologist Nathan Glazer has proclaimed, "we are all multiculturalists now." n278 Justice Oliver Wendell Holmes explained in Missouri v. Holland that a constitutional issue "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . . We must consider what the country has become" in interpreting the Constitution. n279 Thus, the [*1274] courts should interpret the Equal Protection Clause in a way to fully protect Mexican Americans and other minority groups as well as African Americans and whites.

Some contend that efforts to expand beyond the Black-White dichotomy are "reactionary." n280 However, a Black-White view of the Fourteenth Amendment seems to have been the position of its framers. Interpreting the Constitution by focusing on the framers' intent is traditionally viewed as a conservative position. n281 Moving to a multiracial approach to reflect our changing society represents a proper modern interpretation of the Equal Protection Clause.

The expansion of the law's protection raises a number of difficult issues. As we progress historically away from the hey-day of Jim Crow, racial discrimination ordinarily is no longer as blatant and obvious as it once was. n282 With respect to Latinas/os, discrimination is often conducted by proxy -- targeting characteristics such as the Spanish language, as a surrogate for discriminating against Latinas/os. To provide legal protection to Latinas/os, and in order to keep pace with the changing nature of racial discrimination, the Fourteenth Amendment must be interpreted in a way to cover discrimination by proxy.

Ultimately, interpreting the Constitution in a way that is sensitive to discrimination by proxy would benefit all minority groups. Various subordinated peoples -- African Americans, Asian Americans, Native Americans, Latinas/os, women, lesbians, gay men, and others n283 -- are discriminated against through different proxies. As sociologists have recognized, appeals to "law and order" and for a [*1275] return to "traditional" values can "effectively remarginalize minority cultures without ever expressly invoking issues of race." n284

Once this is considered, to demand that plaintiffs establish discriminatory intent -- that is, some secret racist mental state -- to establish unlawful race discrimination appears incoherent. Legal theorists who have investigated the "grammar" of the term "intent" have shown that when referring to intent, one does not seek to describe a mental event, n285 but is simply asking for a justification for "fishy or untoward actions." n286 The Supreme Court was mistaken to require plaintiffs to establish intent as a prerequisite for proving an Equal Protection violation. In so doing, the Court saddled racial minorities with an incoherent, often impossible task.

Moreover, it was unnecessary for the Supreme Court to establish the intent requirement. As the Court itself emphasized in Brown v. Board of Education, "segregation is unconstitutional not because it is intended to hurt blacks but because, whatever its
intent, it relegates them as a group to a permanently subservient position." n287 As many have argued, this anti-caste principle deserves greater valence in constitutional analysis. n288

Conclusion

This Article contends that Proposition 227, and possibly related measures, discriminates against persons of Mexican ancestry in violation of the Equal Protection Clause of the Fourteenth Amendment. California's history, together with the text of the initiative, the arguments of the proponents, the campaign, and the racially polarized election results, all demonstrate this to be true. n289 [*1276]

If the analysis is less than persuasive, then one must question the "discriminatory intent" requirement itself. Its coherence is far from clear when hundreds of thousands of voters cast ballots and discerning an "intent" is less real than imaginary. Like other discriminatory measures of the past, n290 history books will record Proposition 227's discrimination by proxy as race-based. n291 One worries when legal doctrine requires the difficult efforts at historical reconstruction of "intent" as seen in this Article. Legal doctrine that obscures social reality ultimately loses credibility. One almost feels like philosopher Ludwig Wittgenstein upon completion of his monumental tract:

My propositions serve as elucidations in the following way: anyone who understands me eventually recognizes them as non-sensical, when he has used them -- as steps -- to climb up beyond them. (He must, so to speak, throw away the ladder after he has climbed up it). . . . He must transcend these propositions and then he will see the world aright. n292

FOOTNOTE-1:


n4 In Hernandez v. Texas, 347 U.S. 475 (1954), the Supreme Court first squarely held that the Equal Protection Clause's protections may apply to persons of Mexican ancestry. See Ian F. Haney Lopez, Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory, 85 Cal. L. Rev. 1143 (1997) (analyzing significance of Hernandez in showing how persons of Mexican ancestry were treated as separate race); George A. Martinez, The Legal Construction of Race: Mexican Americans and Whiteness, 2 Harv. Latino L. Rev. 321, 332 (1997) (contending that Hernandez imposes artificially high standards on Mexican Americans seeking protection of Equal Protection Clause); see also infra text accompanying notes 265-73 (discussing Hernandez).

n5 See Christopher Edley, Jr., Color at Century's End: Race in Law, Policy, and Politics, 67 Fordham L. Rev. 939, 950, 951 (1998) ("There is lurking just beneath the surface [of the bilingual education debate] a subtext about culture, color, and race."); see also infra text accompanying notes 129-217, 243-47 (analyzing this issue in context of Proposition 227). This Article focuses on how Proposition 227 discriminates against Latinas/os in California. Needless to say, other groups composed in part of non-English speakers, particularly Asian Americans, may be adversely impacted in ways similar to Latinas/os by the elimination of bilingual education. See Symposium, Rethinking Racial Divides -- Panel on Affirmative Action, 4 Mich. J. Race & L. 195, 210-11 (1998) (comments of Marina Hsieh) (noting negative impact that Proposition 227 will likely have on Asian Americans); see also Jim Chen, Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny, 59 Ohio St. L.J. 811, 856-60 (1998) (collecting data showing great language diversity in United
States). Indeed, Native Americans in California, often not thought of as linguistic minorities, may be adversely affected. See Scott Ellis Ferrin, Reasserting Language Rights of Native American Students in the Face of Proposition 227 and Other Language-Based Referenda, 28 J.L. & Educ. 1 (1999). In our analysis, we recognize that the initiative "will not necessarily coincide with color lines" and will affect "white immigrants from Eastern Europe" as well as Latinas/os. Peter J. Spiro, Questioning Barriers to Naturalization, 13 Geo. Immigr. L.J. 479, 492 n.63 (1999) (discussing English language requirement for naturalization). However, language, under particular facts and circumstances, can serve as a proxy for race, which we establish in this Article.

n6 We use the term "race" here interchangeably with national origin, based on the view that race, like national origin, is a social construction. See generally Michael Omi & Howard Winant, Racial Formation in the United States (2d ed. 1994) (elaborating on theory of social construction of race).


n8 See infra text accompanying notes 218-24 (analyzing litigation).

n9 426 U.S. 229 (1976).


n11 In a similar vein, Professor Girardeau Spann contends that voters passed California Proposition 209, which bars consideration of race and gender in state programs, with a discriminatory intent. See Girardeau A. Spann, Proposition 209, 47 Duke L.J. 187, 300-14 (1997); see also Erwin Chemerinsky, The Impact of the Proposed California Civil Rights Initiative, 23 Hastings Const. L.Q. 999 (1996) (explaining legal ramifications of initiative); Neil Gotanda et al., Legal Implications of Proposition 209 -- The California Civil Rights Initiative, 24 W. St. L. Rev. 1 (1996) (same); Eugene Volokh, The California Civil Rights Initiative: An Interpretive Guide, 44 UCLA L. Rev. 1335 (1997) (same). The courts upheld the measure, which was challenged on another sort of Equal Protection theory. See, e.g., Smith v. Boyle, 144 F.3d 1060, 1064-65 (7th Cir. 1997) (Posner, C.J.). Such historical research, of course, is not impossible. See, e.g., Richard Delgado & Jean Stefancic, Home-Grown Racism: Colorado's Historic Embrace -- and Denial -- of Equal Opportunity in Higher Education, 70 U. Colo. L. Rev. 704 (1999) (documenting history of discrimination against racial minorities in Colorado to demonstrate the need for remedial affirmative action). Our point is that such research is easier to conduct earlier as opposed to later, after memories have faded and documentary evidence has been lost.

n12 See infra text accompanying notes 129-217. Proving a discriminatory intent is made all the more difficult by the fact that two Latina/o intellectuals popularized by the media have ardently advocated the elimination of bilingual education. See Linda Chavez, Out of the Barrio: Toward a New Politics of Hispanic Assimilation (1991); Richard Rodriguez, Hunger of Memory: The Education of Richard Rodriguez (1981).

n13 See Smith v. Boyle, 144 F.3d 1060, 1064-65 (7th Cir. 1997) (Posner, C.J.). Such historical research, of course, is not impossible. See, e.g., Richard Delgado & Jean Stefancic, Home-Grown Racism: Colorado's Historic Embrace -- and Denial -- of Equal Opportunity in Higher Education, 70 U. Colo. L. Rev. 704 (1999) (documenting history of discrimination against racial minorities in Colorado to demonstrate the need for remedial affirmative action). Our point is that such research is easier to conduct earlier as opposed to later, after memories have faded and documentary evidence has been lost.

bilingualism is itself an immutable characteristic"); Susan Kiyomi Serrano, Comment, Rethinking Race for Strict Scrutiny Purposes: Yniguez and the Racialization of English Only, 19 Haw. L. Rev. 221 (1997) (contending that, under certain circumstances, concept of "race" may include language and that, in those circumstances, courts should strictly scrutinize language regulation).


n18 See Acuna, supra note 16, at 82-103.

n19 See Brown v. Board of Educ., 347 U.S. 483, 494 (1954) ("[Separating children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.").


n22 161 F.2d 774 (9th Cir. 1947).

n23 Id. at 776.


n25 See Mendez, 161 F.2d at 779-81.

n26 See id. at 780-81.

n27 See id. at 781 (noting that California could legislatively authorize this type of segregation).

n28 See id. at 784. The court stated that:

English language deficiencies of some of the children of Mexican ancestry . . . may justify differentiation by public school authorities in the exercise of their reasonable discretion as to the pedagogical methods of instruction to be pursued with different pupils, and foreign language handicaps may be to such a degree in the pupils in elementary schools as to require separate treatment in separate classrooms.

Id.

n29 Id. at 780.


n31 Mendez, 161 F.2d at 780.

n32 347 U.S. 483 (1954); see also Derrick Bell, Race, Racism and American Law 544 (3d ed. 1992) ("As with other landmark cases, the Supreme Court's 1954 decision in Brown v. Board of Education has taken on a life of its own, with meaning and significance beyond its facts and perhaps greater than its rationale"); Constance Baker Motley, The Historical Setting of Brown and Its Impact on the Supreme Court's Decision, 61 Fordham L. Rev. 9, 13 (1992) (stating that Brown's "new approach to attacking segregation, per se, in education had been inspired by Mendez").
n33 See Brown, 347 U.S. at 495.

n34 488 F.2d 579 (9th Cir. 1973), cert. denied, 416 U.S. 951 (1974).

n35 See id. at 580, 584.

n36 See id. at 585.


n39 See Keyes, 413 U.S. at 212 ("We have no occasion to consider in this case whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of finding that school authorities have committed acts constituting de jure segregation."); Arthur v. Nyquist, 415 F. Supp. 904, 912 n.10 (W.D.N.Y. 1976) ("Since the plaintiffs in Keyes pleaded and proved de jure segregation, the Supreme Court was not forced to decide whether merely proof of de facto segregation constitutes cognizable legal wrong."); The Supreme Court, 1973 Term, 88 Harv. L. Rev. 43, 70 n.58 (1974) (stating "constitutionality of de facto segregation" was "explicitly left open in Keyes"); Comment, Public School Segregation and the Contours of Unconstitutionality: The Denver School Board Case, 45 U. Colo. L. Rev. 457, 475-76 (1974) ("The questions as to the necessity of proving intent [to segregate] . . . were . . . never at issue in the Supreme Court's consideration of Keyes . . . The distinction between de jure and de facto segregatory conditions was never really at issue in the Court's consideration of Keyes. . . ."); see also Rachel F. Moran, Milo's Miracle, 29 Conn. L. Rev. 1079, 1085-87 (1997) (discussing implications of Keyes).


n42 5 Cal. 3d 584, 96 Cal. Rptr. 601 (1971).


n44 See Serrano, 5 Cal. 3d at 589-90, 96 Cal. Rptr. at 604.

n45 Id. at 604, 96 Cal. Rptr. at 615.

n46 Id. at 608-09, 96 Cal. Rptr. at 618.

n47 See id. at 609-15, 96 Cal. Rptr. at 619-23.

n48 See id. at 614-15, 96 Cal. Rptr. at 623.


n50 See id. at 28, 37.

n51 See id. at 55. After Rodriguez, efforts shifted to state law to ensure educational opportunity through school finance litigation. See Enrich, supra note 41, at 128-93 (analyzing developments in school finance litigation under state law after Rodriguez).


n53 See William A. Fischel, How Serrano Caused Proposition 13, 12 J.L. & Pol. 607, 611 (1997); see also Martha S. West, Equitable Funding of Public Schools Under State Law, 2 Iowa J. Gender, Race & Just. 279, 299-309 (1999) (discussing how Serrano was seriously undermined by Proposition 13 and analyzing developments in other states to same effect).

n54 See Fischel, supra note 53, at 611.


n57 Fischel, supra note 53, at 613.


n60 See Note, Unfulfilled Promises: School Finance Remedies and State Courts, 104 Harv. L. Rev. 1072 (1991). States other than California have experienced similar difficulties in ensuring equitable public school financing schemes. See, e.g., Edgewood Ind. Sch. Dist. v. Meno, 893 S.W.2d 450 (Tex. 1995) (reviewing efforts of Texas legislature to ensure compliance with finding that school financing system violated various provisions of Texas Constitution).

n61 See Fischel, supra note 53, at 613 ("Throughout the 1980s, California was last or near last in the country in terms of the percent of personal income spent on public education. What is not often noticed is that the decline began soon after Serrano.") (footnote omitted); see also infra notes 82-88 (providing statistics on rapid decline in California's spending per pupil in public schools as Latina/o percentage of student body increased).


n64 See Lau, 414 U.S. at 568.


n68 See id. at 55.

n69 See Good Morning America (ABC television broadcast, May 31, 1998)(remarks of Professor Raul Hinojosa-Ojeda) ("Proposition 227 is basically a reaction against the fact that there's a demographic change occurring in the state, and that some people are very anxious about what this demographic change will mean."); cf. Spann, supra note 11, at 312 (arguing that demographic changes -- i.e., that "whites will soon cease to be a majority in the state of California" -- strengthened case for finding of discriminatory intent underlying passage of Proposition 209, outlawing various affirmative action programs under state law).

n70 Fredric C. Gey et al., California Latina/Latino Demographic Data Book 1 (1993).

n71 See id.

n72 See id. at 1, 7, tbl.1-1.


n74 See Gey et al., supra note 70, at 9 tbls.1-3 & fig.1-3. Latinas/os, African Americans, and Asians together accounted for 32% of the state's population in 1980 (19% Latina/o, 8% African American, and 5% Asian) and 44% in 1990 (25% Latina/o, 7% African American, and 9% Asian). See id. at 8 fig.1-2.

n75 See id. at 21 tbl.2-5.

n76 See id. at 21 tbl.2-5.

n77 Jon Stiles et al., California Latino Demographic Databook 2-4 (California Policy Seminar publication 1998).

n78 See RAND California, supra note 73.

n79 See id. ("New Home Buyers: Most Common Surnames" table).

n80 See id. at 2 ("Then and Now: Origins of Legal Immigrants" table).

n81 See Julie Hoang, California Legal Immigrants -- Federal Fiscal Year 1995, Cal. Demographics, Winter 1997, at 1, 6 (Cal. Dep't of Finance newsletter).

n82 See Gey et al., supra note 70, at 8 fig.1-2.


n85 See id. at 1 (reporting that in 1998 Hispanic LEP students constituted 24.6% of all enrollment).

n86 Id.

n87 Orfield & Yun, supra note 83, at 2.

n88 See id. at 8 tbl.4.

n89 See supra text accompanying notes 69-88.


n91 See Johnson, Immigration Politics, supra note 90, at 658-59 & n.143.


n100 See Dorothy E. Roberts, Welfare and the Problem of Black Citizenship, 105 Yale L.J. 1563, 1563 (1996) (“Racial politics has so dominated welfare reform efforts that it is commonplace to observe that 'welfare' has become a code word for race. When Americans discuss welfare, many have in mind the mythical Black 'welfare queen' or profligate teenager who becomes pregnant at taxpayers' expense to fatten her welfare check. Although most welfare recipients are not Black, Black single mothers do rely on a disproportionate share of Aid to Families with Dependent Children.”) (footnote omitted); Sylvia A. Law, Ending Welfare as We Know It, 49 Stan. L. Rev. 471, 493 (1997) (“The popular perception is that welfare mothers are black, and while racism has become socially and legally unacceptable, condemning welfare mothers remains as American as apple pie.”) (footnote omitted).

n101 Previously, the Board of Regents of the University of California had barred consideration of race in admissions decisions. See Jeffrey B. Wolff, Comment, Affirmative Action in College and Graduate School Admissions -- The Effects of Hopwood and the Actions of the U.C. Board of Regents, 50 SMU L. Rev. 627 (1997). In recent years, the state college and university systems in California began charging undocumented persons resident in the state the higher fees charged to nonresidents, which has had predictably negative impacts on persons of Mexican ancestry. See Michael A. Olivas, Storytelling out of School: Undocumented College Residency, Race, and Reaction, 22 Hastings Const. L.Q. 1019 (1995).

n102 See Spann, supra note 11, at 293 (“Proposition 209 is ultimately best understood as an effort to discount the interests of women and racial minorities in order to advance the interests of white males.”); see also Deborah Waire Post, The Salience of Race, 15 Touro L. Rev. 351, 373 (1999) (“The anti-affirmative
action movement is fueled by the assumption that blacks are inferior to whites and that they are being given something they do not deserve.

n103 See Elections '96; State Propositions: A Snapshot of Voters, L.A. Times, Nov. 7, 1996, at A29 (reporting exit poll results showing that 61% of male voters supported Proposition 209 compared to 48% of female voters and that 63% of white voters supported the measure compared to 26% of Black, 24% of Latina/o, and 39% of Asian American voters).

n104 See, e.g., Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (holding that all racial classifications, including those in federal program designed to foster minority businesses, are subject to strict scrutiny); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (finding unconstitutional University of Texas law school affirmative action plan), cert. denied sub nom., 518 U.S. 1033 (1996).

n105 See David Montejano, On the Future of Anglo-Mexican Relations in the United States, in Chicano Politics and Society in the Late Twentieth Century 234, 244 (David Montejano ed., 1999) ("The English-only movement, the anti-immigration campaign, the anti-civil rights sentiment, the reaction to multiculturalism, and so on, all manifest a conservative 'lifeboat' reflex to the changing demographics of the United States, and of the Southwest in particular."); Guadalupe T. Luna, LatCrit Theory, "Don Pepe" and Senora Peralta, 19 Chicano-Latino L. Rev. 339, 349-50 (1998) (stating that restrictionist immigration laws, affirmative action rollbacks, Englishly, and welfare "reform" are propagated by political leaders "who address the public through the use of racial images and stereotypes that are derogatory towards Mexicans and those of Mexican descent") (footnote omitted).


n107 See Julian Samora & Patricia Vandel Simon, A History of the Mexican American People 162 (rev. ed. 1993). As Professor Cruz Reynoso has described:

I grew up before we had bilingual education. We were punished for speaking Spanish in school. It was well intentioned; the teachers wanted us to learn English. Many of us, however, took it as an attack upon our culture, language, upon everything that we stood for. That educational experience turned negative rather than positive. Proposition 227 . . . has been viewed by the Latino community as an abrasive anti-Latino step taken by the electorate.


n108 See supra text accompanying notes 63-68.


n110 414 U.S. 563 (1974); see also supra text accompanying notes 63-68 (discussing Lau in context of history of bilingual education litigation).

n111 See Gloria Sandrino-Glasser, Los Confundidos: De-Conflating Latinas/os' Race and Ethnicity, 19 Chicano-Latino L. Rev. 69, 14748 (1998); see also Note, "Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States, 100 Harv. L. Rev. 1345, 1357-59 (1987) (contending that "a strong case can be made for the proposition that the designs of English-only advocates satisfy the intent requirement" for proving Equal Protection violation).
n112 See, e.g., Yu Cong Eng v. Trinidad, 271 U.S. 500, 524-28 (1926) (holding that law prohibiting Chinese merchants from keeping books in Chinese violated their Equal Protection rights); Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999) (finding that Alabama policy of offering driver's license examinations only in English discriminates against non-English speakers and national origin minorities); Olagues v. Russoniello, 797 F.2d 1511 (9th Cir. 1986) (finding that investigation of those who requested bilingual ballots, which were printed only in Spanish and Chinese, discriminated on basis of national origin), vacated as moot, 484 U.S. 806 (1987); see also Garcia v. Spun Steak Co., 13 F.3d 296, 298-99 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc) (emphasizing that language regulation can mask impermissible race discrimination); Gutierrez v. Municipal Court, 838 F.2d 1031, 1038-40 (9th Cir. 1988) (same), vacated as moot, 490 U.S. 1016 (1989).

n113 Indeed, evidence suggests that racism is at the core of certain English only organizations. One well-known group, for example, was publicly embarrassed when a racist, anti-Latina/o document came to light that forced a prominent Latina leader to resign. See Chavez, supra note 12, at 91-92 (describing incident).

n114 Bill Ong Hing, Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society, 81 Cal. L. Rev. 863, 874 (1993); see e. christi cunningham, The "Racing" Cause of Action and the Identity Formerly Known as Race: The Road to Tamazunchale, 30 Rutgers L.J. 707, 709-10 (1999) (discussing connection between culture and race).

n115 See Moran, Status Conflict, supra note 109, at 341-45.

n116 See, e.g., Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994) (holding that employer's English only rule did not violate Title VII); Gutierrez, 838 F.2d at 1031 (enjoining enforcement of English-only rule); Long v. Baeza, 894 F. Supp. 933 (E.D. Va. 1995) (finding that similar policy did not violate Title VII); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980) (upholding employers English-only rule); EEOC v. Synchro-Start Prods., Inc., 29 F. Supp. 2d 911 (N.D. Ill. 1999) (holding that EEOC had stated valid claim based on employer's English-only rule).


n118 See Michael W. Valente, Comment, One Nation Divisible by Language: An Analysis of Official English Laws in the Wake of Yniguez v. Arizonans for Official English, 8 Seton Hall Const. L.J. 205, 20910 (1997) (compiling various English only laws proposed in Congress and those enacted by states). Discrimination on the basis of accent is a related concern. See Mari J. Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 Yale L.J. 1325 (1991); see also Fragante v. City of Honolulu, 888 F.2d 591 (9th Cir. 1989) (addressing Title VII claim alleging accent discrimination); Carino v. University of Oklahoma, 750 F.2d 815, 819 (10th Cir. 1984) ("A foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions."); Forsythe v. Board of Education, 956 F. Supp. 927 (D. Kan. 1997) (quoting Carino).

Lazos, Judicial Review, supra note 10, at 442.

See id. at 435-40.

As Professor Rachel Moran has observed:

Participants in the debate over bilingual education have often responded in deeply emotional ways that seem to transcend immediate concerns with the allocation of scarce resources. Some have openly acknowledged that more than pedagogy is at stake because government support of bilingual education signals acceptance of and respect for the Hispanic community.

Moran, Status Conflict, supra note 109, at 341 (emphasis added) (footnote omitted).

See T. Alexander Aleinikoff & Ruben G. Rumbaut, Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?, 13 Geo. Immigr. L.J. 1, 14 (1998) (stating that, in light of strong empirical evidence that immigrants learn English, initiatives like Proposition 227 "seem aimed less at pursuing the intended goal (teaching English) than at tightening the circle of membership"); Terry, supra note 1 ("Proposition 227 is about much more than what is printed in the initiative. It is about race, class, culture, shifting demographics, politics, fear and sometimes even education.").

See Cal Const. art. III, § 6; see also Moran, Status Conflict, supra note 109, at 332 n.63 (reporting survey results reflecting raciallypolarized vote).

Moran, Status Conflict, supra note 109, at 332 (footnote omitted). One complicating factor was that the measure was supported by a Japanese American, U.S. Senator S.I. Hayakawa. See id. at 331-32. Oddly enough, Hayakawa wrote that, although he supported the proposition, he was "a firm believer in effective bilingual education." See S.I. Hayakawa, A Common Language, So All Can Pursue Common Goals, L.A. Times, Oct. 29, 1986, at B5.


Id.

See infra text accompanying notes 129-217.

See infra text accompanying notes 130-217.


"English for the Children" was also the name of the principal group advocating passage of Proposition 227. Its chairman was Ron Unz, who drafted the initiative. See, e.g., Ballot Pamphlet, supra note 2, at 34 (Argument in Favor of Proposition 227).


Id. § 300(d) (emphasis added).

Id. (emphasis added).

Id. § 300(e) (emphasis added).

See supra text accompanying notes 80-81.

See supra text accompanying notes 80-81. This does not include undocumented immigrants. In October 1996, the estimated undocumented population in California was about two million with immigrants from Mexico constituting roughly 54% of the total undocumented population. See U.S. Dep't of Justice, 1997 Statistical Yearbook of the Immigration and Naturalization Service 200 tbl.N (1999) [hereinafter INS Statistical Yearbook].

See Hoang, supra note 81, at 1, 6 (reporting that, in 1995, 20% of all legal immigrants intending to settle in California were born in Mexico).

Almost one-fourth lived in Asian-language-speaking homes and five percent in other-language-speaking homes. See id.

n141 See, e.g., Valeria G. v. Wilson, 12 F. Supp. 1007, 1011 (N.D. Cal. 1998); see also supra text accompanying notes 84-86 (discussing increased numbers of Latina/o limited English proficient students in California schools).

n142 See Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, at 51 n.86 (relying on Exhibit B to Declaration of Christopher Ho), Valeria G. v. Wilson, Case No. C 98-2252 CAL (N.D. Cal. 1998).

n143 See id.


n145 See Aleinikoff & Rumbaut, supra note 123, at 11-14 (reviewing empirical data).


n147 See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidating state law requiring all children to attend public school).


n150 Id. (emphasis added). For discussion of various issues that have arisen concerning waivers, see Thomas F. Felton, Comment, Sink or Swim? The State of Bilingual Education in the Wake of California's Proposition 227, 48 Cath. U.L. Rev. 843, 871-73 (1999) and supra note 3, citing cases involving Proposition 227, including one that involved parental waivers.


n152 Ballot Pamphlet, supra note 2, at 34 (Argument in Favor of Proposition 227).

n153 Id..

n154 Id.

n155 Id.

n156 As it turned out, the polling was inaccurate; Latinas/os voted against the initiative by a margin of nearly two to one. See infra text accompanying notes 199-217.

n157 Ballot Pamphlet, supra note 2, at 35 (Rebuttal to Argument Against Proposition 227). Along similar lines, Proposition 227 proponents argued that California lacked the financial resources to effectively implement bilingual education, which long had been criticized from many fronts. See Amy S. Zabetakis, Note, Proposition 227: Death for Bilingual Education, 13 Geo. Immigr. L.J. 105, 120-22 (1998); see also supra text accompanying notes 41-62 (analyzing inequality in California public schools caused by school finance system).

n158 See Johnson, Immigration Politics, supra note 90, at 654-58 (documenting disturbing anti-Latina/o statements made by drafters Ron Prince and Barbara Coe and by elected public officials).

n159 See Benjamin A. Doherty, Comment, Creative Advocacy in Defense of Affirmative Action: A Comparative Institutional Analysis of Proposition 209, 1999 Wis. L. Rev. 91, 103-07 (describing racial messages in Proposition 209 campaign, including David Duke's racist appeals in support of the initiative).


n161 See id.; see also Lou Cannon, Bilingual Education Under Attack, Wash. Post, July 21, 1997, at A15 (quoting Unz as calling Governor Wilson's campaign for Proposition 187 "despicable" and as saying no one associated with that campaign, or others with "antiimmigrant views," would be permitted to join Proposition 227 campaign).

n162 See Zabetakis, supra note 157, at 111.


n165 See Morning Edition (National Public Radio broadcast, Jan. 8, 1998) (transcript no. 98010806-210) (quoting Unz: "This is in no way an anti-Latino initiative or an anti-immigrant initiative or anything other than something that will benefit, most of all, California's immigrant and Latino population."); Cannon, supra note 161 (quoting Unz: "It would be a disaster if this initiative was perceived as anti-immigrant because it is not.").

n166 See Rodriguez, English Lesson in California, supra note 151, at 15 (quoting Unz to this effect).


n168 They were: Gloria Matta Tuchman, a Mexican American school teacher, see Nick Anderson, Latina Teacher Pushes Fight Against Bilingual Education, L.A. Times, Oct. 20, 1997, at B2 [hereinafter Anderson, Latina Teacher Pushes] (describing Matta Tuchman), Jaime Escalante, an East Los Angeles high school teacher who served as honorary campaign chairman, see Phil Garcia, Noted Teacher Backs Initiative, L.A. Daily News, Oct. 19, 1997, at N10 (describing Escalante), made famous by the movie Stand and Deliver (Warner Bros. 1987) starring Edward James Olmos as Escalante, and Fernando Vega, a Democratic Party activist and former school board member who became honorary chairman of the Northern California campaign, see Ballot Pamphlet, supra note 2, at 34. The fact that certain supporters were Latina/o does not undermine the discriminatory intent analysis. See infra text accompanying notes 173-80. Minorities, as African American businessman Ward Connerly demonstrated in being the anti-affirmative action point person in California, frequently are placed in high-profile roles in defending discriminatory measures. See infra note 180 (referring to "racial mascot" phenomenon).

n169 See Mark S. Barabak, GOP Bid to Mend Rift with Latinos Still Strained, L.A. Times, Aug. 31, 1997, at B8 (quoting campaign letter sent by Unz for Proposition 227 -- "Poor European immigrants [earlier this century] came here to WORK and become successful . . . not sit back and be a burden on those who were already here!") -- and mentioning only one group, Latinas/os, and one non-English language, Spanish, as problematic).


n171 Morning Edition (National Public Radio broadcast, Jan. 8, 1998) (transcript no. 98010806-210) (emphasis added). The fact that Unz and some supporters may have wanted to benefit Latinas/os should not make a legal difference so long as it is clear that language was used as a proxy for race. See infra text accompanying notes 250-64. Under current Supreme Court precedent, all racial classifications, even if arguably benign, receive strict scrutiny. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). Such intentions, however, may be relevant to the discriminatory intent analysis. See infra text accompanying notes 225-42.

n172 Asimov, supra note 163 (quoting Unz). Furthermore, Unz told one journalist that bilingual education "is a bizarre government program," see Cannon, supra note 161, at A15, and another that even the respectable academic research supporting it was "garbage," see Nick Anderson, Debate Loud as Vote Nears on Bilingual Ban, L.A. Times, Mar. 23, 1998, at A1 [hereinafter Anderson, Debate Loud].


n175 See supra text accompany note 145 (discussing English language acquisition by Latinas/os).


n177 Nick Anderson, Latina Teacher Pushes Fight, supra note 173 (quoting Unz).


n180 Minorities frequently find themselves employed as visible supporters for political ends considered by many to be antiminority. See Sumi Cho, Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption, 40 B.C. L. Rev. 73, 121 (1998) (referring to "increasing use of people of color as spokespersons or 'racial mascots' for racially regressive policies").


n182 Terry, supra note 1. Long after the election, Unz wrote an article analyzing the racially-charged campaigns over Propositions 187, 209, and 227 and attributed the divisiveness in part to demographic changes brought by immigration. "Terrified of social decay and violence, and trapped by collapsed property values, many whites felt they could neither run nor hide. Under these circumstances, attention inevitably began to focus on the tidal force of foreign immigration." Ron Unz, California and the End of White America, Commentary, Nov. 1999, at 17.

n183 See Laura M. Padilla, Internalized Oppression, Latinos and Law, at 44 (Unpublished manuscript on file with author).


n185 See Padilla, supra note 183, at 45.


n188 See Hansen, supra note 179.

n189 See infra text accompanying notes 190-91, 199-217.


n192 See Cannon, supra note 161.

n193 Anderson, Debate Loud, supra note 172 (quoting Eliana Escobar).

n194 Streisand, supra note 148 (quoting Joseph Jaramillo); see also Anderson, Latina Teacher Pushes Fight, supra note 173 (quoting MALDEF attorney Theresa Fe Bustillos to same effect).

n195 Anderson, Debate Loud, supra note 172 (quoting Charles Kamasaki).


n197 Marelius, supra note 160 (quoting Villaraigosa).

n198 Unz, supra note 196 (quoting Torres).
The official vote was 3.6 million (60.88%) for and slightly less than 2.3 million (39.12%) against. See Bill Jones, [Cal.] Secretary of State, Statement of Vote: Primary Election June 2, 1998, at 86 (1998).

Interestingly, 6% of the supporters recognized that Proposition 227 "discriminates against non-English speaking students" compared to 32% of the opponents. See Los Angeles Times Exit Poll, supra, at 3.

According to polling data, Latina/o support for Proposition 227 eroded as election day neared. See Field Poll, Voters Moving to the No Side on Props. 226 (Union Dues) and 223 (School Spending Limits) 4 (May 29, 1998).

Surprisingly to some, early surveys by the Los Angeles Times and the Field Poll showed that Latino registered voters supported the initiative by a wide margin. Rodriguez also reported that "early polls" showed registered Latina/o voters supporting Prop. 227 "by as big a margin as 66 percent to 30 percent." See id.

Ballot Pamphlet, supra note 2, at 334 (Argument in Favor of Proposition 227).


See supra text accompanying notes 129-98.

See McLeod & Guara, supra note 201.

See, e.g., Streisand, supra note 148 (reporting results of L.A. Times poll).

Id.

The court of appeals rejected a similar challenge to Proposition 209. See supra note 11 (discussing nature of unsuccessful challenge).

n219 See id. at 1023-24. The court of appeals rejected a similar challenge to Proposition 209. See supra note 11 (discussing nature of unsuccessful challenge).

n220 See Valeria G., 12 F. Supp. 2d at 1025.

n221 Id.


n223 Valeria G., 12 F. Supp. 2d at 1027.

n224 See id. ("As this court has already stated, the objective of both sides in this dispute is the same -- to educate all [limited English proficient] children.").


n226 Id. at 242 (emphasis added); see Reno v. Bossier, 520 U.S. 471, 489 (1997) ("The important starting point for assessing discriminatory intent . . . is the impact of the official action whether it bears more heavily on one race than another.") (citations omitted) (quotation marks in original deleted).


n228 Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977) (emphasis added) (footnote omitted); see Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) (stating that discriminatory intent "implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (footnote & citation omitted).

n229 Arlington Heights, 429 U.S. at 266 (citing, inter alia, Yick Wo v. Hopkins, 118 U.S. 356 (1886) and Gomillion v. Lightfoot, 364 U.S. 339 (1960)).

n230 Arlington Heights, 429 U.S. at 267, 269; see United States v. Fordice, 505 U.S. 717, 747 (1992); see also Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 819 (4th Cir. 1995) (exploring such circumstances before finding that zoning decision was made without discriminatory intent); Todd Rakoff, Washington v. Davis and the Objective Theory of Contracts, 29 Harv. C.R.-C.L. L. Rev. 63 (1994) (advocating objective test of social meaning of discrimination that considers multitude of factors).


n232 See, e.g., Hunter v. Underwood, 471 U.S. 222 (1985) (invalidating Alabama constitutional provision disenfranchising certain convicted criminals because it was designed with racial animus); Rogers v. Lodge, 458 U.S. 613 (1982) (finding that at-large electoral scheme in Burke County, Georgia was maintained for discriminatory purposes); Castaneda v. Partida, 430 U.S. 482 (1977) (holding that "key man" system for selection of grand juries proved prima facie case of race discrimination in violation of Equal Protection Clause); United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1226 (2d Cir. 1987) (finding that "racial animus was a significant factor motivating" white residents who opposed low income housing project), cert. denied, 486 U.S. 1055 (1988); Smith v. Town of Clarkson, 682 F.2d 1055 (4th Cir. 1982) (finding that city decision to effectively bar low income housing facility was motivated by discriminatory intent); see also Goosby v. Town of Hempstead, 180 F.3d 476 (2d Cir. 1999) (holding that town maintained at-large voting scheme with discriminatory
intent in violation of Voting Rights Act and Equal Protection Clause); cf. State v. Russell, 477 N.W.2d 886 (Minn. 1991) (invalidating state sentencing scheme under Minnesota Constitution because of stark racial disparities in sentencing that resulted).


n235 See, e.g., Oyama v. California, 332 U.S. 633 (1948) (invalidating as applied "alien land law" passed by California voters designed to limit rights of persons of Japanese ancestry); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (finding unconstitutional initiative responding to immigration into Oregon of Catholics, who frequently attended parochial schools, by requiring all children to attend public schools); Truax v. Raich, 239 U.S. 33 (1915) (striking down law passed by Arizona voters barring certain employers from employing fewer than 80% "qualified electors or native born citizens").


n240 See Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (en banc).


n242 See Johnson, Immigration Politics, supra note 90, at 670-71 (reviewing language in panel opinion in Yniguez, which was never published after it was vacated, that "since language is a close and
meaningful proxy for national origin, restrictions on the use of language may mask discrimination against specific national origin groups or, more generally, nativist sentiment.”) (footnote omitted); Karla C. Robertson, Note, Out of Many, One: Fundamental Rights, Diversity, and Arizona's English-Only Law, 74 Denv. U.L. Rev. 311, 329-32 (1996) (contending that Ninth Circuit should have invalidated Arizona law on Equal Protection, not First Amendment grounds, because it discriminated on the basis of national origin). 


n244 See supra text accompanying notes 106-217. Similar arguments have been made with respect to other state action that disparately affects racial minorities. See, e.g., Jill E. Evans, Challenging the Racism in Environmental Racism: Redefining the Concept of Intent, 40 Ariz. L. Rev. 1219, 1277-87 (1998) (stating how intent is difficult to prove in environmental racism cases).


n246 Id. at 494; see Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 8-12 (1976) (discussing harmful effects of discrimination and segregation, including stigmatization of racial minorities).

n247 See Yxta Maya Murray, The Latino-American Crisis of Citizenship, 31 UC Davis L. Rev. 503, 546-59 (1998) (contending that English-only movement and rules stigmatize Latinas/os in the United States and help to ensure that they remain second class citizens); see also 29 C.F.R. § 1606.7(a) (1998) (stating, in regulation under Title VII of Civil Rights Act of 1964, that "the primary language of an individual is often an essential national origin characteristic" and that suppression of language may "create an atmosphere of inferiority, isolation and intimidation"); Jeffrey D. Kirtner, Comment, English-Only Rules and the Role of Perspective in Title VII Claims, 73 Tex. L. Rev. 871, 893-98 (1995) (identifying various harms to Latinas/os, including stigmatization, flowing from English-only rules in workplace).

In addition, Proposition 227 may ultimately have gender impacts that have been largely ignored. Because women often are the primary childcare providers, they may have to deal with children, who drop out of school due to the elimination of bilingual education. This may exacerbate the poverty that currently exists among many single Latina mothers. See Laura M. Padilla, Single-Parent Latinas on the Margin: Seeking a Room with a View, Meals, and Built-In Community, 13 Wis. Women's L.J. 179, 197-206 (1998).

n248 See supra text accompanying notes 16-105.

n249 See, e.g., People v. Naglee, 1 Cal. 232 (1850) (rejecting claim that "foreign miners tax" imposed on persons of Mexican ancestry violated the Treaty of Guadalupe Hidalgo).

n250 See infra text accompanying notes 251-59.


n252 See, e.g., Arlington Heights, 429 U.S. at 252.

n253 McWright v. Alexander, 982 F.2d 222, 228 (7th Cir. 1992); see e.g., Slather v. Sather Trucking Corp., 78 F.3d 415, 418-19 (8th Cir. 1996) ("Age discrimination may exist when an employer terminates an employee based on a factor as a proxy for age."); Metz v. Transmit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987) (holding that salary savings that employers sought to realize by discharging older employee and replacing him with younger one constituted age discrimination); Gustovich v. AT&T Communications, Inc. 972 F. 2d 845, 851 (7th Cir. 1972) ("Wage
Discrimination can be a proxy for age discrimination, so that lopping off high salaried workers can violate the "Age Discrimination in Employment Act). Discrimination by proxy has been recognized in the scholarly literature. See supra note 14 (citing authorities). One difficulty in application concerns the fact that some "classifications that correlate with race . . . may further permissible objectives because of that correlation rather than despite it. Alexander & Cole, supra note 14, at 463. However, "irrational proxy discrimination, based upon inaccurate stereotypes or generalizations is morally troublesome because it imposes unnecessary social costs." Alexander, supra note 14, at 169; see also id. at 193 ("Proxy discrimination based upon inaccurate and usually bias-driven stereotyping are intrinsically immoral for the same reasons as are the biases with which they are intimately linked.").


n256 See infra text accompanying notes 257-59.


n258 See INS Statistical Yearbook, supra note 137, at 199 (estimating that Mexico is country of origin of 54% of undocumented immigrants in United States).


n260 See supra text accompanying notes 84-86.

n261 See United States v. Carolene Prods. Co., 304 U.S. 144, 15253 n.4 (1938) ("Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

n262 See supra text accompanying notes 63-88.

n263 See supra text accompanying notes 106-217.

n264 See supra text accompanying notes 199-217.


n266 251 S.W. 2d 531 (Tex. 1952).

n267 See id. at 535.

n268 Id.; see George A. Martinez, Philosophical Considerations and the Use of Narrative in Law, 30 Rutgers L.J. 683, 686 (1999) (stating that Texas Supreme Court in Hernandez failed to "recognize harm [Mexican Americans] suffered from having no Mexican Americans on juries.").

n269 See Hernandez, 251 S.W. at 535.


n271 See id. at 477-79.


n273 See id. at 400-01.
n274 U.S. (16 Wall.) 36, 71-80 (1872).

n275 Id. at 81.

n276 See, e.g., Delgado, supra note 265; see also Kevin R. Johnson & George A. Martinez, Crossover Dreams: The Roots of LatCrit Theory in Chicano/o Studies Activism and Scholarship, 53 U. Miami L. Rev., 1143, 1157-59 (1999) (contending that studies of subordination of various racial minority groups has long been established in ethnic studies scholarship); Mary Romero, Introduction, in Challenging Fronteras: Structuring Latina and Latino Lives in the U.S. xiv (Mary Romero et al. eds., 1997) (criticizing "binary thinking of race relations in this country that is so ingrained in the dominant culture that it continues to shape what we see.").


Holmes, viewed by many as "a legal icon in the history of American legal thought," Gary Minda, One Hundred Years of Modern Legal Thought: From Langdell to Holmes to Posner and Schlag, 28 Ind. L. Rev. 353, 361 (1994), rejected formalistic approaches to law in favor of a jurisprudence that took account of human experience and social need. See Oliver Wendell Holmes, Jr., The Common Law 1 (1881)("The felt necessities . . . and the intuitions of public policy . . . have had a good deal more to do . . . in determining the rules by which men should be governed."). Professor Paul Brest wrote that:

According to the political theory most deeply rooted in the American tradition, the authority of the Constitution derives from the consent of its adopters. Even if the adopters freely consented to the Constitution, however, this is not an adequate basis for continuing fidelity to the founding document, for their consent alone cannot bind succeeding generations. We did not adopt the Constitution and those who did are dead and gone.


n281 See, e.g., Bork, supra note 277, at 143 ("In the legal academies in particular, the philosophy of original understanding is usually viewed as thoroughly passe, probably reactionary, and certainly the most dreaded indictment of all -- outside the mainstream").

n282 See John O. Calmore, Race/ism Lost and Found: The Fair Housing Act at Thirty, 52 U. Miami L. Rev. 1067, 1073 (1998) ("Racism introduces itself anew and covertly to the breadth of contemporary institutions, culture, and society. This advanced, insidious racism operates so effectively that we seldom distinguish serious racist harms from a variety of other harms that categorically run from 'bad luck' to 'natural catastrophes.'").


n284 Omi & Winant, supra note 6, at 123-128.

n285 See Daniel Yeager, A Plea for "A Plea for Excuses": Exculpation and the Explication of Responsibility 14-15 (unpublished manuscript on file with
authors); see also Paul J. Gudel, Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law, 70 Tex. L. Rev. 17, 80, 84-85 (1991); note 10 (citing authorities criticizing discriminatory intent standard).

n286 Yeager, supra note 285, at 15-16.


n288 See Sunstein, supra note 287.

n289 See supra text accompanying notes 16-228.


n291 History already is recording the many initiatives passed by California voters as a response to the increased minority population in the state. See generally Peter Schrag, Paradise Lost, California's Experience, America's Future (1998) (making this argument).

Robert S. Chang * & Natasha Fuller **

** BIO:**

* Professor of Law, Loyola Law School, Loyola Marymount University. A.B. Princeton University; J.D., M.A. Duke University. I'd like to thank Kevin R. Johnson for inviting us to write this introduction, and the U.C. Davis Law Review for their patience. I'd also like to thank Jerome Culp, Adrienne Davis, Berta Hernandez, Todd Hughes, Kevin R. Johnson, Amy Maldonado, Frank Valdes, Leti Volpp, and the Los Angeles Critical Race Theory Reading Group for their insights.

** Juris Doctor Candidate, expected Summer 2000, Loyola Law School, Loyola Marymount University. B.A., University of California, Los Angeles.

** SUMMARY:** ... In his concluding thoughts to his last field report, Mirande discusses the common themes and issues that emerged as the class progressed, along with the implications for progressive lawyering and advocacy: ... Many of these themes can be found in his strongest field report, the one that provides his title. ...

[*1277]

Borrowing from Eric Yamamoto's definition of race praxis, we understand LatCrit praxis to be "a critical pragmatic process of race theory generation and translation, practical engagement, material change, and reflection . . . which integrates conceptual inquiries into power and representation with frontline struggles for racial justice."

n1 especially with regard to Latina/o communities.

n2 The four articles in this cluster can be seen as case studies that explore different aspects of LatCrit praxis. Pedro Malavet examines the role literature and the arts can play as a form of antisubordinationist practice. n3 Nicholas Gunia focuses on Jamaican music as a particular site of antisubordinationist practice, showing us that resistance comes in many forms and that LatCrit practitioners must have a broad theory for social change that is not limited to legislatures, courtrooms, classrooms, and law reviews. n4 Alfredo Mirande Gonzalez employs personal narrative to tell us how he used narratives in his classroom to better prepare students to work with subordinated groups. n5 In doing so, he presents, obliquely, a pedagogical model for training law students. Sumi Cho and Robert Westley present a case study of U.C. Berkeley's Boalt Coalition for a Diversified Faculty to make the important point that LatCrit praxis must go beyond theory and progressive lawyering to include a third dimension, political organizing. n6 They argue that if we pay sufficient attention to this third dimension and its submerged histories it will reveal that student movements were central to the development of CRT and will expose the limitations of anti-essentialist theorizing.

Together, these four articles present a vibrant picture of LatCrit praxis, a project that, as Francisco Valdes notes, is by its very nature "perpetually under construction." n7 They also present important questions about narrative responsibility that can help guide future work that employs narrative methodology. We turn now to examine the way each article constructs or performs LatCrit.

** Case Study 1 Literature and the Arts as Antisubordinationist Practice**

Professor Pedro Malavet confesses to being an "accidental crit." n9 His contribution to this symposium can be described as his intellectual journey as his involvement with LatCrit transforms him, especially as a member of the planning committee for LatCrit IV. n10 Along the way, he challenges what he perceives to be the (ab)use of language in postmodern discourse, contrasting this with the way "popular cultural narratives[ ] may sometimes be spoken in plain and simple language, and . . . still be perfectly able to transmit complex ideas that constitute antisubordination praxis." n11 Some of these popular cultural narratives are the subject of the plenary session -- Literature and the Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production -- which plays an important role in Professor Malavet's intellectual transformation.

Before providing an account of that session, Professor Malavet encourages the use of narrative within CRT.
n13 While we agree with the basic contours of his defense of narrative, n14 there is one important point that invites elaboration. Malavet states that "LatCrit scholarship must and does include storytelling" n15 in order to challenge current norms and essentialist constructions of Latinas/os. He equates current norms and essentialism with the current structures of oppression, and storytelling is presented as an oppositional methodology. But storytelling is not the sole province of the left or counterhegemonic social formations. Storytelling is a neutral technique that can perhaps be used more easily to maintain the status quo than to attack it. n16 One example comes from the 1990 United States Senate race in North Carolina between Jesse Helms, the white incumbent, and Harvey Gantt, the African American challenger. A commercial for the Helms campaign featured "a white working class man tearing up a rejection letter while the voice-over said, 'You needed that job and you were the best qualified. . . . But it had to go to a minority because of a racial quota.'" n17 [*1280] This story is both normative and essentialist. It pushes the norm of an unexamined colorblind meritocracy; it is essentialist in the way that it reinforces stereotypes about un(der)qualified minorities. It is a powerful story that helped Jesse Helms win the election.

If storytelling is understood as a neutral technique, how should it be employed in LatCrit discourse? While LatCrit storytelling should be careful to avoid the pitfalls of essentialism, n18 we understand the best LatCrit stories to be differently normative from those that maintain oppressive structures. These stories resist hegemonic constructions of Latinas/os and other subordinated communities, and they offer an enriched notion of justice through the inclusion of previously excluded stories. Professor Malavet makes precisely this point when he says that "storytelling can be used to fill historical gaps," and "storytelling, particularly by outsiders, provides a balanced historical view, ensuring that the particular stories about minority communities are not suppressed." n19 But if LatCrit scholars are to deploy stories as a LatCrit praxis methodology, the goal of storytelling must go beyond descriptive "accuracy"; the "is" must be connected to an explicit or implicit "ought." We will describe this as the narrative responsibility of a LatCrit storyteller. n20

LatCrit storytellers already fulfill this responsibility. For example, stories about the Bracero Program that brought Mexican workers into the United States and their wholesale deportation through Operation "Wetback" n21 operate far beyond the descriptive realm to provide some normative "oughts": (1) we ought not to have treated Mexican immigrants and American citizens of Mexican ancestry in this manner; (2) we ought to remember this history when we consider the current treatment of agricultural workers who are subject to terrible abuses whether or not they are documented; (3) we ought not to have allowed the Immigration and [*1281] Naturalization Service to defy court orders so that by the 1990s, hundreds of alien children fleeing the violence in Central America were held in squalid refugee camps in Arizona, California, and Texas with little access to healthcare, formal education, or legal services; n22 we ought to reconsider the way Latinas/os are essentialized as perpetually foreign which creates easy targets for nativism during times of cultural or military or economic uncertainty. n23 The list of normative propositions can go on and on. One of the tasks for LatCrit is to challenge settled, exclusionary norms through "counterstories" n24 in order to create more inclusive justice norms.

This is in fact how Professor Malavet employs narrative in his article. We read the story of his intellectual transformation as an allegorical tale. Malavet spent his formative years in Puerto Rico where he occupied a relatively privileged position based on his class and racial features. He was seduced by the liberal myth of meritocracy to believe that equality of opportunity existed such that one was limited only by one's reach and efforts. n25 Paradise is lost, though, when he moves to the States and learns that he is a person of color, an appellation he resists at first because:

"Personas de color," the literal Spanish translation . . . was a very offensive reference to blackness and to mulatez (mulattoness) that was used in my community on the isla. What I had not learned until recently, is that when a White American looks at me, he or she sees a persona de color . . . . How will I break it to mamita (mommmy) that I am colored? n26

This realization of his newfound place in the racial economy of the United States mainland spurs his disenchantment with the liberal myth of meritocracy and his eventual engagement with LatCrit.

In addition to telling a personal odyssey, this story can elicit empathy from those able to relate to his experiences, n27and may create [*1282] connections with other communities. n28 Professor Malavet's story echoes the story of racial realization told by James Weldon Johnson in The Autobiography of an Ex-Coloured Man. n29 Weldon is very light-skinned and did not learn of his "real" race until the second term of school. The principal of his school walked into his classroom:

"I wish all of the white scholars to stand for a moment." I rose with the others. The teacher looked at me and, calling my name, said: "You sit down for the
present, and rise with the others." I did not quite understand her, and questioned: "Ma'm?" She repeated, with a softer tone in her voice: "You sit down now, and rise with the others." I sat down dazed. I saw and heard nothing. When the others were asked to rise, I did not know it. . . . . . [After school, he runs home to his room and his looking-glass.] For an instant I was afraid to look, but when I did, I looked long and earnestly. . . . How long I stood there gazing at my image I do not know. When I came out and reached the head of the stairs, I heard the lady who had been with my mother going out. I ran downstairs and rushed to where my mother was sitting . . . . I buried my head in her lap and blurted out: "Mother, mother, tell me, am I a nigger?"

Malavet's and Johnson's stories, side by side, tell a similar story about the racial economy of the United States and challenge the norm of ahistorical colorblindness as the solution to this country's race problem. Narrative can be very powerful.

Case Study 2 Jamaican Music as a Particular Site of Antisubordinationist Practice

In Half the Story Has Never Been Told, Nicholas Gunia attempts to tell the untold half, a gap left because of the way reggae music "has been devalued and underrepresented by scholars that privilege the knowledge and views of the establishment over those of the . . . . . masses." n31 In doing so, he is engaging in the kind of storytelling encouraged by Professor Malavet. n32

Through his examination of Jamaican music, Gunia reminds us that social change is not always accomplished by the efforts of progressive lawyers or legal scholars. While not saying that we should now go out and produce music or express ourselves in other art forms, he shows us what the music can teach us if only we "listen." As repositories of cultural memory, music can provide glimpses of history, emotions, and lives that cannot otherwise be accessed. Further, productive alliances may be made with those artists who are engaging in antisubordinationist practices. Each has much to gain.

While Gunia's article teaches about Jamaican race and class politics, and shows how reggae music has served as a powerful antisubordinationist practice in Jamaica, n33 its lessons for LatCrit are less obvious. We might take Gunia's presentation as an invitation to explore the different ways that music has operated in different contexts and communities. n34 Or, more crudely, we might ask where Jamaicans map in our racial cosmology and in LatCrit discourse.

Gunia tells us that "roughly eighty percent of all Jamaicans are black, while an additional fifteen percent are mixed, or brown Jamaicans, and also of African descent. The remaining five percent of the population is comprised of Europeans, Chinese, East Indians and Arabs." n35 Later, he tells us that "many Jamaicans, who identify themselves as white, emigrate to the United States only to find out that they are black." n36 Presumably, persons who identify as black in Jamaica continue to do so upon emigration to the United States, but perhaps not as Black American or African American. Consider the identity formation known as "West Indian Black." n37 Gunia's [*1284] article implicitly raises the question about the impact that immigration from the Caribbean will have on the racial taxonomy/logic of the United States. As one commentator, Dennis Conway, observed:

New immigration from such non-traditional source regions as Africa, the Caribbean, and South Asia is bringing multicultural plurality to the Black- or AfricanAmerican community. Not only is Latin American and Caribbean immigration contributing to HispanicAmerican diversity, but also to an emerging panAmerican heterogeneity. Accordingly, conventional, ascriptive distinctions of U.S. racial and ethnic minorities into "black" and "hispanic" are likely to face challenge, or at least undergo reconceptualization under the dawning (political) reality of non-white, cultural heterogeneity and diversity. n38

It seems obvious that language, colonialism and postcoloniality, religion, and culture will play important roles in this reconceptualization of nonwhite identities. Gunia's work reminds us of the importance of culture if we are to understand who "we" are and who "we" will become. The way we experience culture and the way we participate in the production of culture strongly informs who we are. Gunia discussed music as a form of antisubordinationist practice. An avenue of further inquiry is the way antisubordinationist practices, like music, construct individual and group identities. n39 Antisubordinationist practices may help to produce political (as opposed to essential) identities. Understanding how this operates may help with the difficult work of building and maintaining coalitions. [*1285]

Case Study 3 Using Narrative to Teach Students How to Serve Subordinated Communities

Professor Mirande sets out "to illustrate how narratives and storytelling can be used in teaching . . . as a pedagogical tool for preparing students to work with subordinated groups." n40 While the actual case study he reports on is from an undergraduate course, n41 it is also potentially relevant for clinical law teaching and for civil rights litigation courses. Mirande required the students in his class to produce field
reports of their experiences working with certain groups. n42 In many ways, Mirande modeled his class after his own experience as a student in Stanford Law School's Lawyering for Social Change Program. n43 One important difference is that in the class he taught, Mirande began writing field reports of his own, reflecting on the class and the issues raised in it. n44 He wrote these field reports to a fictional character, Fermina Gabriel, but his students were the intended audience.

This raises an audience question. Written originally for his students, Mirande's field reports contain lessons that he felt unable to convey in the conventional classroom setting. But what does he hope to convey to a law review audience by reproducing them here, especially when he himself admits in his introduction that the field reports "may appear on the surface to be anecdotal, unfocused, and lacking obvious transitions from one section to the next"? n45 Is this a guidebook or model for teachers? If his article is meant to be a guidebook or model, some more explicit instructions would have been helpful. If meant for students, are they supposed to model their field reports after his? It would have been interesting to see, or at least have descriptions of, what the student field reports were like and how, through their exposure to Mirande's field reports, they learned to work with subordinated [*1286] communities. Without more explicit instructions, we were uncertain what teachers, students, judges, and/or lawyers were to make of the often deeply personal material contained in the field reports.

This raises the question of narrative responsibility that we raised earlier. n46 Is there a strong connection between the "is" and an implied or explicit "ought." In his concluding thoughts to his last field report, Mirande discusses the common themes and issues that emerged as the class progressed, along with the implications for progressive lawyering and advocacy:

1) how one relates to the "Other";
2) bereavement;
3) centrality of family and biography in shaping our conceptions of law and subordination;
4) "voice," representation, and authenticity as it relates to advocacy on behalf of subordinated groups; and
5) internal diversity within subordinated groups

Themes (1), (4), and (5) contain important lessons for progressive lawyering. Many of these themes can be found in his strongest field report, the one that provides his title. It is a funny, allegorical tale that warns of the pitfalls of objectifying and commodifying those "unfortunates" whom progressive lawyers serve.

Although Mirande exhaustively discussed themes (2) and (3) in his field reports, we were uncertain how they related to his class or to progressive lawyering, unless they contribute to themes (1), (4), and (5). Mirande had his students read Renato Rosaldo's account of Ilongot headhunting. n47 Rosaldo was unable to relate to the practice until, fourteen years later, he experienced the grief/rage [*1287] brought on by the death of his wife. n48 Mirande writes that he "relates to [Rosaldo's] piece in a very personal, visceral way." n49 We were not sure how his ability to relate to Rosaldo's experience translated into better classroom practice or progressive lawyering methodology, unless by talking about his bereavement he was inviting his students to explore their own grief in the student reports. n50 Personal narrative may free the narrator from the false voice of objectivity, but without further elaboration, personal narrative may collapse into self-absorption. n51 This highlights one of the pitfalls of using personal narrative and the care required to use it effectively. n52

There is one point that requires further comment. Professor Kevin Johnson in his Foreword notes that Mirande may be interpreted as lacking gender sensitivity in his depiction of Fermina, who, among other things, "looks great in her black Charra outfit." n53 To be fair to Mirande, this description comes at the end of a long paragraph spinning out an extraordinary fictional life:

Fermina was born in the barrio of South Colton. Her father was an orange picker and later worked at the cement plant in Colton. After graduating second in her class at Colton High School she attended Valley Community College for two years and then went on a scholarship to the University of California at Santa Cruz. After working for the farm workers in Delano she entered the joint J.D. and Ph.D. Program in sociology at Stanford. After graduating from Stanford she worked for the Milagro Immigration Clinic in Watsonville. She teaches part time at U.C. Santa Cruz in the History of Consciousness Program. Oddly enough, her real passion is literature. She just published her first novel and is working on a collection of poems and short stories. On the weekends, [*1288] Fermina participates in a folklorico group and she occasionally sings at El Sombrero Restaurant in Watsonville. . . .

Fermina loves to ride horses and is a charter member of the Lienso Charro del Nortel, and was on the Olympic Equestrian Team in Atlanta. n54
And, she looks great in her black Charra outfit. She really is a "Super Chicana." n55 But what does this description do for his narrative? After all, the field reports are about the author, not her. She has no voice, no real presence in the field reports. As only a foil, despite her extraordinary life, she cannot be said to serve meaningfully as a role model for his male or female students.

The description of Fermina leads us to wonder about some of his other narrative choices. In the text, he talks about how his brothers and he "were forced to grow up very rapidly." n56 The supporting footnote states: "I recall for example, that I started 'dating' at age eight, and that I would actually go to the movies by myself with a girl at this age. It seems pretty amazing as I look back on it." n57 Growing up is equated with having, or at least emulating, mature heteronormative relations. And now, he has a Super Chicana as his epistolary companion. Mirande's narrative choices reflect problematic constructions of Chicana/o femininity and masculinity.

The need for (more than) gender sensitivity when critiquing racism and other forms of subordination is highlighted in Bernice Zamora's poem, Notes from a Chicana "Coed":

To cry that the gabacho [derogatory term for Anglos] is our oppressor is to shout in abstraction, carnal.
brother He no more oppresses us than you do now as
you tell me "It's the gringo who oppresses you, Babe."
. . . you're quick to shout, "Don't give me that
Women's Lib trip, mujer, woman [*1289] that only
divides us, and we have to work together for the
movimiento; movement the gabacho is oppressing us!"

This poem highlights the untenable position women of color often find themselves in when they are asked to subsume their gender for the sake of racial solidarity. n59 It teaches us about the importance of self-reflection and self-critique to protect against inadvertent reenactments of the kinds of subordination we claim to be working against. n60 Mirande, writing against subordination, must take care not to repeat the sins that he condemns.

Case Study 4 Critical Race Theory (Rev. Ed.)

Professors Sumi Cho and Robert Westley have written a provocative article that seeks to revise CRT to bring about their vision of its political potential. The first revision involves the history and development of CRT. The second rejects the primacy of anti-essentialist theory underlying the work of a number of critical race theorists. n61 This article is likely to set off a rich discussion.

In the first part of the article, Professors Cho and Westley set out "to retrieve an obscured history that was central to the development of critical race theory." n62 Although they disclaim the intent to add to the already-existing genesis stories, n63 they are essentially creating another genesis story, n64 one that emphasizes student activism generally and the Boalt Coalition for a Diversified Faculty (BCDF) specifically. n65 In doing so, they are writing against the grain of standard accounts that "emphasize the agency of individual scholars" n66 and "obfuscate ongoing power relations in legal academia by perpetuating the notion of selfcorrecting institutional reform -- i.e., that the struggle over physical space for people of color on law school faculties was primarily a matter of prevailing in the 'free marketplace of ideas.'" n67 Cho and Westley reject the liberal undertones of the story of individual agency and selfcorrecting institutions. They criticize that story as a false narrative of inevitable progress that minimizes the role of power politics in bringing about change.

In telling the submerged history, Professors Cho and Westley seek to remind critical race scholars to not forget the political movements that helped create the space in the legal academy for them to do their work. They also argue that recognition of this history "has significant implications for the mutual obligations between radicals in the academy and political communities." n68 These obligations become the centerpiece of the second half of their article.

In the second half of their article, Cho and Westley propose a [*1291] mode of synergistic movement theorizing that contains both substantive and methodological commitments. Synergism represents the contestation with power by racially conscious political movements by "doing" race conscious theory whose "scientism" -- data, logic, verifiability, etc. grows organically from political context. As outsider intellectuals, our goal and strategy articulation should become an open process, a dialogue, intersubjective and genealogically wed to the resistant discourses and practices that perform the movement. n69

They applaud first wave CRT scholarship n70 but are critical of second wave CRT scholarship, much of which they see as not being grounded in political movements or perhaps arising out of other concerns. n71 In particular, they focus on the postmodern turn, where "scholars retooled race variously as a social construction, a dangerous trope, a performance, in contrast to outdated and discredited notions of race as a biological fact of difference among groups." n72 This moment in the development of CRT was characterized by the hope that race and gender essentialism would be overturned and that it was anti-essentialist theory that
would provide the analytic tools that would unmask incoherent group classifications "as a stratagem of oppressive power." n73 Cho and Westley argue that this critique misunderstood the way anti-essentialist theory could be co-opted by the existing structures of power to delegitimize race or gender or sexuality-based social movements. n74 Understood in this way, unbounded anti-essentialist theory can be disabling to community organizing, n75 and "once set in motion, antiessentialism unmodified has no limiting principles to prevent minority groups from being deconstructed until all that remains are disunited and atomized individuals themselves." n76 Cho and [*1292] Westley criticize the second wave's fascination with anti-essentialism as "the ahistorical pursuit of the 'theoretical' that represents an abdication of political engagement and the relinquishment of the full promise of antisubordinationist intellectual production." n77 Anti-essentialist theory is understood here to be antithetical to effective political organizing. If this is right, those within the field of CRT may be working at cross purposes; perhaps CRT needs to reform itself and embrace what Professor Cho describes elsewhere as "essential politics." n78

This is a fundamental and powerful critique. It challenges the current conventional wisdom within CRT, in which anti-essentialism is the "dominant theory and culture within CRT." n79 We see this as challenging, or at least questioning, the theoretical and political commitments of some second-wave critical race scholars. Cho and Westley's article is a friendly, possibly controversial, critique by race crit insiders. Our hope is that the conversation started here can be conducted in a constructive manner, n80 in the same way that Cho and Westley offer their critique. Whether or not one agrees with their revised account of CRT, one should recognize the point they make about the importance of political organizing, that race theorizing and progressive lawyering are only part of the picture if one is to engage in an effective antisubordinationist praxis.

An Invitation in Lieu of a Conclusion

These brief descriptions reveal the richness of the discourse taking place within CRT and LatCrit. We have tried to identify some important themes and preliminary impressions, but we leave to the readers the task of engaging fully with the authors.

FOOTNOTE-1:


n2 This definition is consistent with what Professor Francisco Valdes, one of the chief architects of LatCrit, identifies as four functions of LatCrit theory: (1) the production of knowledge; (2) the advancement of transformation; (3) the expansion and connection of struggle(s), and; the cultivation of community and coalition. See Francisco Valdes, Foreword: Under Construction -- LatCrit Consciousness, Community, and Theory, 85 Cal. L. Rev. 1087, 1093-94 (1997), 10 La Raza L.J. 1, 7-8 (1998).


n4 See Nicholas A. Gunia, Half the Story Has Never Been Told: Popular Jamaican Music as Antisubordination Praxis, 33 U.C. Davis L. Rev. 1333 (2000).


n7 Valdes, supra note 2, 85 Cal. L. Rev. at 1096, 10 La Raza L.J. at 10.

n8 This discussion does not necessarily track the order in which these articles appear.

n9 Malavet, supra note 3.

n10 In addition to attending a few of the earlier gatherings, he served as a member of the planning committee for LatCrit IV. This symposium can be understood as the documentary record of that conference.

n11 Malavet, supra note 3, at 1296. Malavet qualifies this statement, saying that he does "not mean to imply that popular culture is always 'plain and simple' in language." Id. at 1295 n.11.

n12 Kevin Johnson provides a Faustian twist to Malavet's intellectual transformation, describing it as an "'accidental' descent into LatCrit theory." Kevin R. Johnson, Foreword -- Celebrating LatCrit Theory: What Do We Do When the Music Stops? 33 U.C. Davis L. Rev.
We reserve comment on where LatCrit is properly located in jurisprudential cosmology.

n13 See Malavet, supra note 3, at 1298-1303 (responding to critiques by Tushnet, Posner, and Farber and Sherry).


n15 Malavet, supra note 3, at 1302.


n17 Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1707, 1767 n.261 (1993) (citing Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 202 (1992)). Another example, although only partially successful, is the reverse discrimination story often told by Tom Wood, one of the named authors of California Proposition 209, which ended affirmative action in public education, government contracting, and public employment. When Dateline investigated his account, they found that of the five possible philosophy teaching jobs he might have applied for in the Bay Area, four of the jobs went to white men. The fifth went to a woman who was by all accounts better qualified than Wood, who in the first 15 years following his Ph.D. degree had published nothing and who in the 20 years after his degree had held only two one-year university positions. See Dateline NBC, (NBC television broadcast, Jan. 23, 1996) (transcript on file with author).

n18 See generally Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990).

n19 Malavet, supra note 3, at 1303.

n20 This is not meant to downplay the importance of personal narrative. Placing an emphasis on the "ought" helps to strengthen the narrative's relevance and impact.


n24 Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411, 2414 (1989) ("Stories build consensus, a common culture of shared understandings, and deeper, more vital ethics. Counterstories, which challenge the received wisdom, do that as well.").

n25 See Malavet, supra note 3, at 1325.

n26 Id. at 1327.


n30 Id. at 16-17.

n31 Gunia, supra note 4, at 1334.

n32 See Malavet, supra note 3, at 1298-1303.

n33 See Johnson, supra note 12, at 775-76.
n34 This is not to question the inclusion of Gunia's presentation at the conference or in this symposium. One of the great things about LatCrit has been its inclusiveness and its willingness to explore unchartered territory such as the possible connections between Filipinas/os and Latinas/os. This is indeed the way Pedro Malavet approaches Gunia's presentation. See Malavet, supra note 3, at 1308-10.

n35 Gunia, supra note 4, at 1334.

n36 Id. Perhaps they undergo the same kind of racial dislocation described above. See supra notes 25-30 and accompanying text.

n37 Cf. Tanya K. Hernandez, The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws, 76 Or. L. Rev. 731, 764 n.93 (1997) (noting "the occasional middle-tier treatment of West Indian Blacks in the African American community"). What of Jamaicans (of any hue) whose intergenerational emigration pathway to the United States might have included extended stays in Caribbean countries or Central America?


n39 Lessons may be learned from the examination of white minstrelsy in the construction of white identities. See generally Eric Lott, Love & Theft: Blackface Minstrelsy and the American Working Class (1995).

n40 Mirande, supra note 5, at 1348.

n41 See id. at 1352.

n42 The students received field placements in four groups, "the homeless, day laborers, at-risk youth of color, and an after school tutoring program for low income, mostly Latina/o children at the Centro de Aztlan." Id. at 1352.

n43 See id. at 1351.

n44 Apparently, the impetus to write his own field reports grew out of his frustration over not having "an outlet for venting or expressing his response to issues that were emerging in the class." Id. at 1348.

n45 Id. at 1354.

n46 See supra note 20 and accompanying text.

n47 Rosaldo began his book with the following account of Ilongot headhunting:

If you ask an older Ilongot man of northern Luzon, Philippines, why he cuts off human heads, his answer is brief, and one on which no anthropologist can readily elaborate: He says that rage, born of grief, impels him to kill his fellow human beings. He claims that he needs a place "to carry his anger." The act of severing and tossing away the victim's head enables him, he says, to vent and, he hopes, throw away the anger of his bereavement.


n48 Rosaldo was making an important point about anthropological method through the "use of personal experience serves as a vehicle for making the quality and intensity of the rage in Ilongot grief more readily accessible to readers than certain more detached modes of composition." Id. at 11.

n49 Mirande, supra note 5, at 1358.

n50 Mirande did not report whether students engaged with his field reports in this way.

n51 Rosaldo himself cautions, "If classic ethnography's vice was the slippage from the ideal of detachment to actual indifference, that of present-day reflexivity is the tendency for the self-absorbed Self to lose sight altogether of the culturally different Other." Rosaldo, supra note 47, at 7.

n52 As for theme (3), Mirande says that "my conceptions of equality, subordination, and social justice were shaped at an early age." Mirande, supra note 5, at 1370. We were not sure what lessons teachers or students could draw from his many family narratives.

n53 Johnson, supra note 12, at 776 (citation omitted).

n54 Mirande, supra note 5, at 1355 n.10.
n55 See id.
n56 Id. at 1350.
n57 Id. at 1350 n.5.

n58 Bernice Zamora, Notes from a Chicana "Coed," in Making Face, Making Soul (Haciendo Caras): Creative and Critical Perspectives by Feminists of Color 131-32 (Gloria Anzaldúa ed., 1990). Gabacho is also used sometimes in a derogatory manner to refer to assimilated Mexican Americans.

n59 For excellent, critical examinations of this situation, see This Bridge Called My Back: Writings by Radical Women of Color (Cherrie Moraga & Gloria Anzaldua eds., 1981).

n60 The text that we criticize plays only a minor role in Mirande's overall thesis. In this sense, it is gratuitous, which is perhaps why we find its presence so troubling. It is the narrative responsibility of a LatCrit storyteller to choose carefully the stories one tells, especially if they are going to be used as teaching materials. Uncritical, regressive notions of Chicano masculinity and Chicana femininity have little place in LatCrit.

n61 At the outset, we should reveal that we are among those who believe in the anti-essentialist theory that Professors Cho and Westley criticize. Although we are not the direct or named objects of the critique, the reader may want to consider our position in reading this section.

n62 Cho & Westley, supra note 6, at 1377.
n63 Id. at 1379-80.

n64 According to one originary myth, critical race theory, although it had historical antecedents, began in the late 1980s as a racial intervention in critical legal studies and as a leftist intervention in liberal race discourse. See Kimberle Crenshaw, Remarks at Opening Plenary, Conference on Critical Race Theory, Yale Law School (Nov. 14, 1997) (transcript on file with author); see also Introduction to Critical Race Theory: The Key Writings that Formed the Movement xiii (Kimberle Crenshaw et al. eds., 1995). By describing it as an originary myth, we are not disputing the veracity of the account; instead, we do so to acknowledge the mythic quality that stories of origin have, remembering that the original Greek mythos meant a true story.

n65 Cho and Westley were active participants and leaders of BCDF in the late 1980s and early 1990s. Throughout their narrative, they adopt the objective voice. Their refusal to interject themselves in the text can be read as being consistent with their rejection of individual agency stories and their conception of BCDF as a collective. We wonder, though, what is lost and gained by assuming the objective voice in recounting a movement in which the authors actively participated. A more personally situated account might have shed more light on how to do the tough political work of organizing across and between groups. Also, we could learn more directly about how their experiences affected and informed their teaching, scholarship, and activism.

n66 Cho & Westley, supra note 6, at 1378.
n67 Id. at 1380.
n68 Id. at 1378.
n69 Id. at 1410.

n70 See id. at 1412. ("Many CRT founders wrote about movements or with movements in mind, attempting to intervene through their writings to produce new understandings of old problems in order to generate better theory.").

n71 See id. at 1423 ("Second wave race crits benefited from the elevated status and newfound theoretical ascendancy of CRT. Accordingly, they faced pressures and rewards when entering the 'race for theory,' not necessarily a race that is conducive to the synergistic ethos we described above.").

n72 Id. at 1414.
n73 Id. at 1413-14.
n74 Id. at 1414.
n75 Id. at 1417-19.
n76 Id. at 1416.
n77 Id. at 1410.
n79 Cho & Westley, supra note 6, at 1414.

n80 For two particularly thoughtful engagements with essentialism/anti-essentialism and its implications for personal identity and political work, see john a. powell, The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity, 81 Minn. L. Rev. 1481 (1997) and Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 Cal. L. Rev. 741 (1994).
PERFORMING LATCRIT: Literature and the Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production: The Confessions of an Accidental Crit

Pedro A. Malavet *

* Assistant Professor, the University of Florida College of Law. J.D. and LLM, Georgetown University Law Center. Professor Malavet has been an Adjunct Professor of law at Georgetown and at the Pontifical Catholic University of Puerto Rico. I would like to thank Frank Valdes for encouraging me to write an ambitious Essay and Berta Esperanza Hernandez-Truyol for making me write it and for providing great comments on a series of drafts. Larry Cata Baker, Kevin R. Johnson, Guadalupe Luna, and Sharon Rush also provided helpful comments. Finally, I wish to thank the participants in the arts panel for making this a wonderfully educational and thoroughly enjoyable experience.

SUMMARY: ... In Part II, I will discuss the substantive content of the Arts Panel by describing each presentation in detail. ... Music, for example, has a much wider and current impact than literature in popular culture because it is more accessible. ... All these stories show a vibrant Latina/o popular culture that is not "somewhere else" but is firmly here in the United States. ... Two commentators, Adrienne Davis and Elvia Rosales Arriola, both law professors, reacted to the panelists' presentations. ... His description promised a fascinating look at Jamaican popular culture, through its music. ... Davis focused on the issues of race and sexual discrimination. ... Here was our most clear example of a form of popular culture that reflects the very worst of our society. ... I look forward to the day when, enlightened by her theory of viewing, those of us who disapprove of the content will be able to see and expose the offending material, and thereby retake the stories that are being fabricated therein. ... The panel focused on popular culture, which has both good and bad elements. Popular culture can be a powerful form of resistance to oppression on the one hand. ...
CRT all too often are essentialist attempts to silence different voices. n12 Some of the charges regarding the form of critical speech, when coupled to my own aversion to language abuse and experience with a few intemperate bits of discourse, give me great pause. I find that the [*1296] intentional misuse of language simply for the sake of showing off or of being exclusionary is very elitist. For example, abuse of language can be nothing more than a self-indulgent attempt to develop a secret speech that sets your little clique apart, both in private and in public. Or, it can be the forced use of overly complicated language simply for the sake of making an exaggerated pseudo-intellectual display, rather than to write effective scholarship.

Of course, a demanding use of language is essential to critical scholarship. More generally, mastering language is an essential skill for a lawyer or academic, and challenging the language skills of our audience can have strong pedagogical effects. But as a teacher and scholar, I am offended by the notion that simple language is a sign of simple-mindedness. For example, as I will discuss in detail below, the objects of the Arts Panel, illustrate how popular cultural narratives, may sometimes be spoken in plain and simple language, and are still perfectly able to transmit complex ideas that constitute antisubordination praxis. n13 Additionally, the capacity to present complex concepts in language that make them accessible to students and to persons outside our field takes a great deal of talent. Moreover, making our work accessible to uninitiated audiences is part of our educational mission.

In the LatCrit context, deconstructionist postmodern analysis clearly demands a careful approach to language that allows scholars properly to explore the hidden complexities of our subjects. n14 The LatCritical n15 use of language in legal scholarship is thus exciting, intellectually stimulating, and effective. I hope that in my new LatCritical travels, I am consistently able to reach the necessary [*1297] balance to use language for proper critical analysis, and avoid the misuse thereof that I find so distasteful.

In Part I of this Essay, I will describe the process that led the Planning Committee to include the Literature and Arts as Antisubordination Praxis: n16 LatCrit Theory and Cultural Production ("Arts Panel") on the program, as well as the selection of the participants. In Part II, I will discuss the substantive content of the Arts Panel by describing each presentation in detail. In Part III, I will give my own reactions to the presentations and will seek to place them within the planned description and the written questions submitted to the panel. I conclude by discussing my own, reluctant, difficult and ultimately accidental gravitation towards LatCrit theory generally.

I. The Planning Process

Very early in the preparation for LatCrit IV, Planning Committee member, Professor Roberto Corrada, suggested that we include a panel on "Literature and the Law." He wanted it to focus on the use of narrative in legal scholarship. n17 I joined Roberto in strongly [*1298] supporting this plenary because of my personal experience with the rich diversity in Latina/o narrative form. Therefore, my main suggestion with regard to the inclusion of the Arts Panel was that we include a broad artistic spectrum that focused on popular culture. In other words, I urged that the Arts Panel discuss storytelling in literature as well as in music, dance, painting, performance art, and theater. n18

I made these suggestions on the study of narrative while fully conscious of the attacks leveled against CRT generally, and against the use of narrative in particular. n19 Storytelling, when used by scholars of color, is ultimately attacked as being dishonest and failing to meet the objective standards of a methodological quality required of academics. The exchange between Mark Tushnet and Gary Peller, n20 the sustained critique by Richard Posner, n21 and the [*1299] strongly worded attacks of Daniel Farber and Suzanna Sherry, illustrate the increasingly bitter nature of the reactionary culture war that has overtaken the legal academy. n22 Discrediting outsider jurisprudence and outsider storytelling could prevent people of color from meaningfully participating in the legal discourse about civil rights in this nation. The suppression of the voices of scholars of color would again create the incongruity identified by Richard Delgado in the Imperial Scholar, n23 that the civil rights discourse in legal scholarship is being dominated by the normative voices of white males and, thus, is fundamentally incomplete. n24 Reserving [*1300] the discourse for white males only would deprive the aggrieved groups a voice in the civil rights debate, which is antidemocratic, n25 and preserves the "perpetrator perspective" in the legal discussion of equal rights. n26 Such a result would be particularly dangerous in this era of backlash when racism is being publicly denied, but empirical evidence shows that bigotry in fact remains alive and well. n27 The retrenchment of existing hegemony must be resisted and storytelling is essential ammunition in the culture wars over civil rights generally and over critical theory in the legal academy in particular. Of course, understanding why we cannot abandon the field of civil rights discourse to white academics requires an understanding of the concept that "truth" is not
The concept of essentialism suggests that there is one legitimate, genuine universal voice that speaks for all members of a group, thus assuming a monolithic experience for all within the particular group -- be it women, Blacks, Latinos/os, Asians, etc. Feminists of color have been at the forefront of rejecting essentialist approaches because they affect erasures of the multidimensional nature of identities and, instead, collapse multiple differences into a singular homogenized experience. n31

Minority and subordinated communities utilize narratives to counter the "singular homogenized experience" produced by the essentializing of identities imposed by majority society. Narrative, thus, is a vehicle to speak the truth to the "power" n32 -- the dominant American society. n33 LatCritters n34 embrace and celebrate the narrative. n35 More specifically, LatCrit scholarship must and does include storytelling, because it is both antinormative and anti-essentialist. In fact, our failure to use narrative would contribute to the preservation of privilege and, thus, to normativity and essentialism. n36

However, the embrace of storytelling must be undertaken on many levels, including the inner safety of the Annual LatCrit Conference. At our conference, we should explore its alternative forms and complexities. Learning how to tell narratives from a panel of interdisciplinary academics, will help to enrich our scholarship in two ways: first, it will prevent us from making ourselves vulnerable to attack by making our storytelling better, n37 and second, it will expose us to different forms of storytelling. n38

Storytelling can be used to fill historical gaps. Historians provide perspective on world and local events, but legal academics need specific facts that we can then tie to legal authorities. Historical analysis takes a macro-view of events, whereas, we in the law, particularly in Anglo-American law, need to take a micro-view of factual particulars from which we can make general policy. Storytelling, particularly by outsiders, provides a balanced historical view, ensuring that the particulars of stories about minority communities are not suppressed because of the silencing of all but "normative" voices, thus avoiding essentialism.

Popular culture, n39 and its many forms of narrative expression, can fill in the gaps left both by historical analysis and by the enforced homogeneity of essentialism, by showing scenes from every-day life. Thus, popular culture provides insights into the ambiente, the daily environment, passions and customs of a particular segment of our society. Music, for example, has a much wider and current impact than literature in popular culture because it is more accessible. n40 Music makes ideas accessible to the masses who have fallen through the huge cracks of the educational system and have failed to acquire the skills to read, or to those who simply do *not* or perhaps would not read the literature. For instance, in Puerto Rico the declamador n41 Juan Boria, and the album by singers and artists Lucecita Benitez and Alberto Carrion, who turned the poems into lyrics, introduced many of us to the AfricanCaribbean poetry of Luis Pales-Matos and Fortunato Vizcarondo. These poems are an all too rare, honest, and extended discussion about the African in the Puerto Rican. n42

Additionally, music can easily cross borders and be listened to by immigrants and/or adopted by the dominant culture. Therefore, the influence of their own traditional music within immigrant communities in the U.S. is profoundly self-empowering. One poignant example of such an occurrence took place in the 1950s, Felipe Rodriguez (La Voz), one of Puerto Rico's most famous singers, packed them in at the Teatro Puerto Rico in New York with his boleros, slow songs that told a story, a la Frank Sinatra. n43 Rodriguez told stories about daily life, and about love and loss in Puerto Rico and in the Latin American world generally. n44 Finally, the stories can crossover to the dominant culture. In the 1920s and 30s, tango music brought Spanish to an entire generation of "sophisticated" Americans and Europeans. Those who bothered to understand the lyrics would have found poignant descriptions of life in the slums of Buenos Aires at the beginning of the twentieth century. n45 n46

Others tell stories in different media. Picasso's "Guernica" is probably one of the most powerful anti-war statements ever made, n47 and the murals of Diego Rivera often focused attention on the plight of workers everywhere. n48 More recently, Leguizamo's (John, not Irineo) n49 "Freak," which aired on HBO, presented an incredibly disturbing and uncompromising look at growing up Latino in New York City. This one-man theater show, which HBO taped live, was a raw portrayal of a poor, Latina/o immigrant family. n50 All *n306* these stories show a vibrant Latina/o popular culture that is not
"somewhere else" but is firmly here in the United States.

For me, as a Puerto Rican, popular culture takes on added political significance because Puerto Ricans have endured five hundred years of colonial rule. The first colony, the Spanish colony, lasted from 1493 to 1898. The second colony, the American colony, endures today. In that context, the affirmation that there is a Puerto Rican popular culture means, in part, that there is a social consciousness distinct from that of our colonial rulers. Puerto Rican culture is the culture of a people who had a distinct consciousness before the first estadounidense (citizen of the United States) came ashore in Guanica on July 25, 1898. Puerto Rican culture is not the culture of the taino natives who greeted Columbus in the Caribbean, it is not the culture of the Africans, free and enslaved, who came or were brought to the island. Puerto Rican culture is not the culture of the conquistadores, Spanish or American. Puerto Rican culture is rather, a combination of all those influences that has produced a culturally separate people, even if we do not have political or territorial sovereignty. n52 [*1307]

II. The Arts Panel n53

Each presenter discussed a different form of grass-roots popular cultural expression. Nicholas Gunia, a student at the University of Miami School of Law, focused on Jamaican Music. His contribution to our discussion was based on his work while earning a Degree in Arts from Dartmouth College. n54 Dr. Lillian Manzor, an Associate Professor at the University of Miami’s Department of Foreign Languages and Literatures, n55 addressed the transformative power of performance art, by examining the intersections of latina-ness, race, and sexuality. The last presenter was Filmmaker Celine Salazar Parrenas, n56 of the Modern Thought and Literature Depart [*1308] ment at Stanford University, whose talk analyzed video verite pornography, in the context of Southeast Asian prostitution. Two commentators, Adrienne Davis n57 and Elvia Rosales Arriola, n58 both law professors, reacted to the panelists’ presentations.

Nicholas Gunia based his presentation in the Arts Panel on his thesis, Half the Story Has Never Been Told: A Popular History of the Jamaican People. He scrutinized song lyrics that embodied the mindset of the masses in Jamaica, as a primary source of history or historical narrative. His description promised a fascinating look at Jamaican popular culture, through its music. n59 However, to my surprise, it was the presenter himself who started my educational experience. Initially, for what I now confess are reasons that reveal the influence of essentialism and stereotypes on my own perceptions, I convinced myself that Gunia was not Jamaican, because he simply neither looked nor sounded Jamaican to me. n60 However, embarrassed at my own reflexive reaction to the exclusion of all our LatCrit talk, though I do the walk, I quickly learned that he was Jamaican. While he orally described his presentation the day before the panel, he burst into song that was warmly bathed in his [*1309] Jamaican accent. Gunia’s performance was transformative in the two most literal of ways. First, he became clearly Jamaican right before my eyes. Second, I realized that I was being essentialist about what constitutes Jamaican. n61

Mr. Gunia himself addressed the issue of being Jamaican, but under the essentialized lens perhaps not looking or sounding Jamaican, during his talk. He self-mapped as Jamaican of Arab descent and explained that position within the Jamaican racial hierarchy, which, like so many other Caribbean models, privileges persons based on skin shades, favoring the lighter hues.

Having traveled through the issue of race, Gunia then captured the purpose of our panel in his presentation. Initially, he described how popular music is a narrative form that chronicles the struggles of the storytellers and their audience. It becomes an important part of praxis because it serves to establish a historical record of events, feelings, and conditions that otherwise would remain invisible and unheard. n62 Gunia also explained that "music is perhaps the most effective and accessible medium for communicating and promoting values, ideas and beliefs [in Jamaica]." because of its accessibility to the masses. In addition to its educational value, in the Jamaican Babylon system, n63 music is an expression of political resistance to dominant structures, thus becoming a widespread "forum for dialogue." n64 [*1310]

Finally, Gunia noted how Jamaican music reflects not only the good and bad aspects of popular culture but also serves as a vehicle for cultural changes. For an example of how music can reflect negative cultural tropes, he explained that sexism, even to the extreme of violence against women, is sometimes matter-of-factly described in popular songs. n65 On the other hand, as an indicator of music’s value in providing a platform for change, he also commented that the women are now beginning to sing back to the Jamaican men. The women have started to make it clear, by way of song, that they will neither tolerate nor submit to violence. The women’s choice of media proves its power. Their antiviolence songs are certainly a reflection of the growing social consciousness of the society in its music, because music is the natural forum that Jamaican society uses for cultural expression.
Gunia's talk also pointed out the difference between true popular culture, i.e., the culture from and of the people, and the pop tunes imposed by capitalistic corporate music business and payola-driven record distribution. Mostly because of time constraints, he did not have the opportunity to develop the latter theme.

The next presenter was Dr. Lillian Manzor, who titled her talk: "'De Donde Vengo? and Where Can We Go From Here? Tropicana's Milk of Amnesia/Leche de Amnesia." She focused on how artists "address performatively intersections between gender and ethnicity, sexuality and national identity, and between language and political action." n66 By way of introduction, she explained that Tropicana was not a reference to the famous Havana night club, but rather to Carmelita Tropicana, the stage name of a Cuban-American lesbian performance artist from New York. The performance art, [*1311] storytelling of Carmelita was yet another powerful example of how outsiders present their own stories. Even the choice of the name Carmelita has hidden significance, since the word carmelita refers to the color brown, thus, a hidden reference to race. n67

Dr. Manzor explained the relevance of narratives to the LatCrit exploration by establishing that Carmelita Tropicana's performance constituted the redeployment of autobiographical memory or narrative to initiate a dialogue between contradictory histories of cultural assumptions, presumptions, and imposed normativities. She illustrated her presentation with a video of one of Carmelita's shows. Carmelita Tropicana appears dressed in a white guayabera, black pants and a straw hat, smoking a big cigar. The artist's appearance, combined with her voice, was essential to the power of her presentation, thus the medium of her storytelling became very important. Finally, Dr. Manzor explained this effect of narrative by noting that Carmelita Tropicana, as a cubana, challenged Angla/o essentialist notions about Cuban Americans, and, as a lesbian, challenged Cuban American essentialist notions about themselves, particularly on matters of politics, race and gender.

Thus, Dr. Manzor explained, Latinas/os' "parodic reappropriation" becomes a means of tactical intervention that counters Angla/o constructions of Latin(a)ness, as well as Latina/o essentialism, in the visual arts. Performance art, she concluded, is an alternative practice that allows Latinas, specifically, to intervene and subvert a representational system that is an accomplice of a repressive social order prevalent in the U.S.

The last presenter was filmmaker Celine Salazar Parrenas, of the Modern Thought and Literature Department at Stanford University. Just reading her title sent shivers down my spine: "Little Brown Fucking Machines Powered By Rice": Recalcitrant Bodies in Southeast Asian Sex Tourist Videos.

Parrenas explained that the phrase "Little Brown Fucking Machines Powered by Rice" is a U.S. military cliche applied to women from Southeast Asia. In her view, this unfriendly appellation reflects the attempt "to naturalize Southeast Asian women's biologic drive for deviant sex and cultural propensity for pathologic hypersexuality." She also noted that johns in the Southeast Asian sex-tourist trade made the videos about their personal encounters [*1312] with the prostituted women. However, she added that these "private" videos are often publicly distributed in video rental stores. n68

In her description, Parrenas explained that, in the films, the johns constantly hide their faces while they show their bodies when they speak into the camera. The johns' bodies are of all shapes and sizes, but the women are uniformly very thin and frail. Sometimes, the johns order the women to take the camera and "direct" their filming; however, the men react violently when the women accidentally or intentionally point the camera in their direction. In fact, Parrenas observed that the control over the storytelling was part of the johns' sexual gratification. Specifically, the "sexual representations of racial bodies" was part of the johns' self-indulgent power trip. They wanted to show these were hypersexual Southeast Asian women, who wanted to participate in the videos, "not for the money, but for the love of good hot sex."

Parrenas, who described herself as a Filipina American, admitted that it was difficult to witness "explicit sex acts by and of Southeast Asian women as 'Little Brown Fucking Machines Powered by Rice.'" She made herself nevertheless witness these representations precisely in order to develop a "theory of viewing" that would allow her to cope with exposure to such offensive material. n69 If the audience looked at them through the lens of this new theory of viewing, she argued, the sex videos would be turned into political praxis. Parrenas's purpose is to find the women in the videos to see if their real stories can be told as part of her research. Moreover, she wants to expose this material to critical viewers, rather than racist, self-indulgent eyes. n70 Through uncritical viewing, she told us that these videos "presumably recruit witnesses complicit to [*1313] male domination through generating pleasure from the experience of viewing." Parrenas, in so doing, is herself transforming critical theoretical methodology. For example, her approach challenges the traditional feminist tendency "to condemn visuality and visibility, especially in porn." n71 She further critiques the
Propensity "in racial discourses of representation to flee from the complexity netted by sexual representations of racial bodies." n72 [*1314]

Parrenas concludes by observing that "in what I will call the 'recalcitrant body' in Southeast Asian sex tourist porn, I Parrenas argue that there is something to be seen in the image of the Southeast Asian woman prostitute in her (and our) experience of pleasure and pain. [Viewing the prostitute's image of pain] is an experience that counters the narration offered by the john." n73 Therefore, even though difficult, the product of Parrenas' research, both a powerful and important new theory of viewing, will convert gonzo pornography into praxis. n74

The commentators, Professors Adrienne Davis and Elvia Rosales Arriola, reacted to and contextualized the panelist's presentations to LatCrit. n75 Davis focused on the issues of race and sexual discrimination. n76 Arriola focused on latina-ness and on matters of sexuality and gender. Arriola illustrated her presentation by reading two poems: Judith Ortiz Cofer's The Latin Deli: An Ars Poetica, n77 and Sandra Cisneros' Loose Woman. n78 Both Davis and Arriola developed the intersectionalities between the narrative described in the three presentations and LatCrit theory. n79 [*1315]

III. My LatCritical Viaje (Trip) Through the Arts Panel

Caminante, son tus huellas
el camino y nada mas;
caminante, no hay camino,
se hace camino al andar

-- Antonio Machado n80

In this Part of the Essay, I will first give my own reaction to the presentations. Then, I will provide my own musings about the substantive description and how the presentations generally fit therein and within LatCrit discourse.

Nicholas Gunia's description of music as historical chronicle resonated with me. n81 But also, as his presentation had suggested, music can describe economic struggle. I realized that this was not a foreign concept to me. In Navidad que Vuelve (Christmas Returns) my father examined the song Los Reyes No Llegaron, n82 (The Wisemen/Kings did not Arrive) which was a perfect description of the level of poverty in Puerto Rico in the 1950s. Los Reyes tells the [*1316] story of a young orphan who thinks that the wisemen have forgotten him, because they did not bring him a present. n83 More recently, the maddening Crucible of Empire, n84 a PBS special, depicted the transmission by song of a more political message. The Crucible effectively used songs to explain the contemporary views in support of the Spanish-American War. The producers studied songs like Brave Dewey and His Men to show how popular sentiment was manipulated to favor military intervention. n85

Additionally, music can overcome many challenges, sometimes plainly containing political subtexts such as education. Gunia described how music can be a teaching tool that allows the singer to bypass society's problems, such as illiteracy, and still manage to educate. In Puerto Rico, the use of song is similar to the Jamaican model. Sadly, in 1951 on my isla (island), a high illiteracy rate made it difficult to educate people on how to vote. Consequently, the government and political groups produced songs to instruct people on how or why to fill out the ballot, which used colors and graphic signs to help the illiterate use the forms. For example [*1317] "Referendum, referendum, referendum quiere decir . . ./ la consulta que se le hace al pueblo" is a song explaining that the referendum is a consultation of the people by ballot. This song was commissioned by the Popular Democratic Party and used in support of the approval of the Puerto Rico Constitution of 1952 by popular ballot. n86

Gunia also talked about music transmitting values, including cultural values. My first memories of rap music were of listening to two hugely successful songs on Puerto Rican radio that depict the "transmission of values" possibilities of song. The first one, titled La Escuela (the school), asked kids to stay in school. The other one, titled La Abuela (the grandmother), extolled the values of the grandmother raising her grandchildren.

Finally, Puerto Rico also shows parallels with the Jamaican experience because popular music, which can be orally passed along from person to person, is very difficult to suppress and, thus, is an important form of antisubordination praxis in a repressive colonial society. Moreover, in the colonial context, cultural expression takes on the added dimension of political self-awareness and assertiveness. In Puerto Rico, this has happened during both colonies. During the Spanish colony, for example, the song El Ciclon, ("the Hurricane") was in fact a reference to Spanish colonial rulers. The author described how the singing birds in their cages, a reference to the many persons put in jail by the new government imposed by Spain, stopped singing when the Ciclon was coming. n87 Songs also recognized our wish for independence and accompanying self-awareness as a people. El Grito de Lares/ se ha de repetir/ y todos sabremos/ vencer o
morir (The Cry of Lares/ shall be repeated/ and we all shall know how/ to win or to die) is part of song remembering the attempted anti-Spanish revolt in Lares, Puerto Rico on September 23, 1868. n88 And Lola Rodriguez de Tio provided us with a call to arms in the revolutionary version of La Borinquena, our national anthem (now with different lyrics). The opening lyrics of the Rodriguez de Tio version of La Borinquena called on Puerto Ricans to fight for independence: !Despierta boricuena,/ que han dado la senal!! !Despierta de ese sueno,/ que es hora de luchar! (Wake up bori [1318] queno n89/ the signal has been given!/ Wake up from that dream/sleepiness/ that it is the time to fight!). n90 Compare those fiery words to the completely submissive text of the current official version, which opens as follows: La Tierra de Borinquen,/ donde he nacido yo,/ es un jardin florido/ de magico primor . . . (The land of Borinquen/ where I have been born/ is a flowery garden/ of magical beauty . . . ). Understandably, her contemporaries described Dona Lola as a polvora (explosive black powder). n91

But we have also engaged in the use of song an antisubordination praxis with our second colonial rulers. The musica de protesta, music of political protest, in Puerto Rico in the late 60s and 70s, includes a heavy dose of pro-independence sentiment. n92 Andres Jimenez, "El Jibaro," demanded that we stand up to the American tyranny, by exclaiming: !Cono, despierta boricua!, loosely translated into "damn, wake up people of Puerto Rico." n93

In his choice of popular music as a medium for narrative, Gunia captured my attention because he was speaking of a familiar musical narrative form. In contrast, my reaction to Dr. Lillian Manzor's presentation was more to the content of the story that she was describing, than to the medium by which it was expressed.

First, in my continuing process of using LatCrit for self-analysis, listening to Manzor's description of her subject me di cuento que yo conozco a Cubanas lesbianas (I realized that I have some friends who are Cuban lesbians), and it also reminded me how I have moved away from my homophobic upbringing, a staple of la cultura latina. I now can not only listen to but also appreciate stories by and about lesbian Latinas, without either ignoring or devaluing the storyteller, or tuning out the story. [*1319]

My old ways would not have allowed me to notice that there was something very familiar about Milk of Amnesia. The Cuban and Puerto Rican experience have many parallels; our relationships to our Spanish and American colonial lords probably being the most important. Unfortunately, outside our respective islands, attitudes toward socialism and the politics of privilege often divide our communities. But that is never present in the LatCrit context, which is why Leche de Amnesia seemed so natural. I was also captured by Carmelita Tropicana's rather subversive perspective on the Cuban American experience. I am an exile from my island and relate to the critical frame of reference that Carmelita Tropicana's exile illuminates, n95 not the least of which is the shared pain of feeling like an outsider both in exile and upon our occasional return. n96

Furthermore, I was struck by how the content of Carmelita Tropicana's performance showed the power of outsider stories within our communities. She was presenting a queer vision in a patriarchal and sexist society, re-introducing blackness into the Cuban experience, and presenting a liberal political vision opposed to the "conservative-Republican" stereotype of Cubans. Carmelita Tropicana challenged the notion of a single-minded, conforming, Cuban-American community, thus adding depth and dimensionality to a Latina/o story in the United States. In her use of music, and style, I also saw the parallels between Cuban and Puerto Rican cultures, specifically, the affinity that makes our communities so very similar.

Going from the familiar, powerful, but lighthearted tragicomedia of Carmelita Tropicana, to "Little Brown Fucking Machines Powered by Rice," the intensely negative and painful portrayal of women in the works that filmmaker Celine Parrenas studied, was a difficult change of pace. When I read Parrenas's title, I knew that this presentation was going to be completely different in tone from Gunia's and Manzor's presentations. It would be simple hypocrisy [*1320] if I said that all forms of sexually explicit media are bad. n97 But it was not difficult to understand what was wrong with these depictions of American men traveling to Southeast Asian countries to hire prostitutes and videotape their encounters from their dominant, racist perspective. Moreover, I could easily imagine how difficult it must be for anyone to study these videos, but it must be especially challenging for a Filipina American, as Parrenas describes herself.

I saw in her description incredible dehumanization, in yet another medium for storytelling. Here was our most clear example of a form of popular culture that reflects the very worst of our society. In this painful and offensive form of storytelling, it was the white, male American who was trying to control his telling of the women's stories. Unlike the Jamaican Babylon music, which was music by Jamaicans about Jamaicans, or Carmelita Tropicana's retaking of the telling of her own stories, the johns manufactured the Southeast Asian women's stories in the works that Parrenas studied. While this is an extreme example of
a dominant culture stealing the power of storytelling away from the legitimate subjects of the stories, it is certainly not the only one. But the contrast between this and the presentation about Jamaican music and Latina lesbian performance art makes the point that by taking control of the storytelling we -- people of color -- engage in praxis.

When the panel members met the night before the plenary, I was taken aback by the strong emotion evident in Parrenas's discussion of her research. At times, she was almost on the verge of tears, angry or sad, perhaps both, when she talked about the videos and the process in which they were made. n98 Studying these sexually explicit videotapes was obviously painful research, since she had to view the degrading scenes in order to expose and study them. I had initially thought that it was "lucky" that Parrenas had chosen not to show any of the videos. But viewing, rather than banning the work, was precisely Parrenas's suggestion, provided that the viewer was equipped with a new theory of viewing. She has not yet articulated what this theory entails, rather, she is developing it through her research. I look forward to the day when, enlightened by her theory of viewing, those of us who disapprove of the content [*1321] will be able to see and expose the offending material, and thereby retake the stories that are being fabricated therein. Consequently, even though difficult research, Parrenas's new theory of viewing, will convert gonzo pornography into praxis. As I realized these things, I muttered to myself, "Ok, I think that I am beginning to get it." n99

Initially, it might appear that the Arts Panel completely ignored the title "Literature and the Arts." But, while the presenters focused on art forms not traditionally viewed as literary, the law professors discussed narrative in legal scholarship and in literature more generally. Additionally, the audience, composed mostly of law professors, will use the presentations to inform their scholarship, thus turning any art form into written narrative. Below, I will discuss how the entire panel addressed the three categories that the substantive description invited us to cover.

The description first directed the panelists and commentators to answer: "Why narrative." n100 But the panelists first answered the follow-up question of how narratives are presented. This was the natural result of the purposeful choice of nonlawyer scholars. But our scholars told us about stories in evaluative, not in simply descriptive terms. In doing so, they impliedly answered the question of why narrative. By indicating how powerful stories about ourselves and outsiders are when presented in narrative form, and by exploring their meaning and impact, we know why narratives are important and essential contributions to legal scholarship.

My personal process of understanding the stories, illustrates how the narrative educates and enlightens. The narratives about Puerto Rico that I described above are my narratives, they are my [*1322] context, my normativity, and I must use them, if I am to tell my legal scholarship story.

The second major category of discussion was the affirmation that culture is politics, particularly in communities of color. "Critics of postmodern theory complain that cultural politics has replaced real politics with 'the representation of politics'." n101 By culture I mean popular culture, the cultural production by and of the people, in fact, the genuine storytelling of the people. This popular narrative, when genuine, culturally and politically relevant, is inherently hortatory and, therefore, constitutes praxis, not a "pseudo alternative of virtual participation in politics through the deployment of symbols rather than the organization of protest." n102 The symbols of the nondominant culture become praxis when wielded by the real parties in interest against the dominant culture.

In the context of the United States, where Latina/o culture is still a minority culture, or perhaps more accurately, outsider culture, narrative is the voice of the excluded. n103 In the Jamaican context, on the other hand, the dominant popular culture may not be the dominant political culture, perhaps a result of postcolonialism. In Puerto Rico, where the dominant popular culture of Puerto Ricans is subject to the colonial domination of the United States, [*1323] maintaining our cultural identity is an exercise in antisubordination praxis against the American empire. n104

The third series of questions asked the panelists to explore the links between "Capitalist Power and Cultural Production." n105 The panel focused on popular culture, which has both good and bad elements. Popular culture can be a powerful form of resistance to oppression on the one hand. However, on the other, it can reflect a cultural power hegemony, enforcing all the biases and forms of privilege and subordination native to that community. Additionally, capitalism, and the media business more specifically, has the capacity to impose or to dictate pseudo-popular culture. Unlike this pseudo-popular culture, the panelists described true popular culture, which comes from the people, not what is imposed on them. n106

Parrenas, in contrast, exposed an offensive form of storytelling that is increasingly popular, or at least commercially viable through video rentals. Although
not expressly addressed, capitalistic corporate radio and music retail operations can package the product to [\textsuperscript{1324}] the exclusion of much worthy work. For example, payola \textsuperscript{107} can also distort the true popularity of music. The law has an important role to play in preventing the formation of monopolies or oligarchies on the one hand, and in uncovering and punishing payola on the other. But this discussion is for another occasion.

IV. Conclusion: Mi propia version (My own version) Mapping Consciousness

Tantos que dicen tener un pasado y tantos que creen que el amor han logrado. Pero definir el amor, es dificil la ecuacion. Todos tenemos que dar nuestra propia version.

-- Sylvia Rexach \textsuperscript{108}

Despite its many shortcomings, I love the law. I found law practice to be fun, especially because I was practicing it with my father. Like my papito (daddy) before me, I jumped at the opportunity to teach and write about the law. When I first came into legal education, I naively expected to write about comparative law, civil procedure, and other fields of interest to me. \textsuperscript{109} Constitutional law and CRT were never areas in which I was especially interested, or so I thought. In fact, before my involvement with the Annual LatCrit Conference, I knew very little about CRT, except perhaps the essentialist critiques of it that I heard in faculty lounges. Moreover, I resented any pressure to work in these areas, especially when it came from my fellow professors of color. This view of the world was the natural result of my personal experiences and biases. I had \textsuperscript{1325} grown up normative, and in my initial experiences in the U.S., I had bought into the notion of the inherent fairness of American society. Yes, I had swallowed this mythical notion hook, line, and sinker. The beauty of the liberal myth of meritocracy is that it feeds the healthy egos of those of us who have achieved some level of success. Oh yes, I was an arrogant little brat who saw myself as having an equal shot at the proverbial "American Dream." However, notwithstanding my epiphanies about meritocracy, I still live along a critical fault line. I have a nation in which I am normativo \textsuperscript{110} because I grew up in Puerto Rico, where I was neither ethnically nor racially excluded from anything. But, on the other hand, I am an outsider everywhere I travel, to my isla or in these borderlands, at work and play, at all of my homes (professional, social, and personal).

Even though I grew up as normative it has taken me a long time to understand my non-normativity within these borderlands. Paradoxically, however, I should have had a clue about my non-normativity. I have always been a political outsider in my island, which is why I proudly and accurately describe myself as a "subversive." \textsuperscript{111} But my personal experience and education had not really \textsuperscript{1326} sensitized me to issues of race, sex, sexuality, and gender and their centrality in the proper study of law. \textsuperscript{112} I suppose that I had not really been exposed to, or frankly accepted, outsider stories, except for those of the political stripes that I had readily embraced. This is clearly the result of the insulation that I enjoyed as the child of a lawyer and a teacher. My status in my isla as an outsider subversivo/independentista was a matter of class and politics. My family had solid financial means, but we were not of the "first families" \textsuperscript{113} of Ponce. We were political outsiders because my father supported independence and put his law practice at the service of persons who needed it, regardless of their politics.

However, not until I moved to the states did I really understand how much of an outsider I really could be. Here, the status of outsider is based on what I am, rather than on who I am. Let me illustrate with a short narrative.

I started my teaching career at the Pontifical Catholic University of Puerto Rico. I was recruited to teach by its then Dean, Carlos Rivera Lugo. This was a terrific opportunity for me, since at that time I was working with my dad, Pedro Malavet Vega, and with my padrino (godfather), \textsuperscript{114} Jose Enrique Ayoroa Santaliz, in their law firm. I was, thus, a second-generation lawyer. I was also about to become a second-generation law professor, since my father started \textsuperscript{1327} his law teaching career at the Catholic University of Puerto Rico \textsuperscript{115} just a few years after he graduated from that very same law school. I was the only lawyer in my firm that had not taught law courses. Therefore, Profesor (Professor) Malavet was a pretty natural step although I grew a beard in an attempt not to look as young as my students (I was then 29).

When I first heard the phrase "people of color," I did a doubletake, because it was being used by an African American colleague at the University of Florida. For me "personas de color," the literal Spanish translation of "people of color," was a very offensive reference to blackness and to mulatez (mulattoneess) that was used in my community on the isla. Personas de color reflected racial bias in that the speaker purposely avoided even the use of the word negro (black), rather they euphemistically said negrito (the diminutive of black, which is used to refer to adults who are black) or persona de color. Then, I learned that "person of color" was a term adopted by people interested in diversity to refer to the many nonwhite hues in the
American diaspora. What I had not learned until recently, is that when a white American looks at me, he or she sees a persona de color -- and it sure is not a statement in favor of making the diaspora normative. Dad has "pelo malo" ("bad hair") n116 and I am sure that he will understand, but how will I break it to mamita (mommy) that I am colored?

As one of seventeen Puerto Rican law professors in the Estados Unidos de Norteamerica n117 (obviously excluding my friends on the Island, which is a U.S. "territory," n118 and where Puerto Rican law professors are choretos, meaning, there are a whole lot of them, all over the place), I have been slowly learning the importance of out [*1328] sider jurisprudence and of CRT, after what at best was rather lukewarm initial interest. I now realize that the sophistication and incredible relevance of CRT provides me with a solid philosophical foundation for my legal scholarship.

LatCritical studies have enticed me to explore the literature of disciplines such as philosophy n119 and cultural studies. n120 This interdisciplinary contemplation is an exciting challenge, and it creates a link to my comparative work. For example, with his article Philosophical Considerations and the use of Narrative in Law, n121 philosopher George Martinez educated and challenged me on the "philosophical/jurisprudential issues" raised by the use of narrative in legal scholarship. Although, I am uncomfortable with his statement that narrative is not reason, n122 because I still cling to the belief that storytelling is at least an attempt at rational thinking, I now know that this is wishful thinking, as Professor Martinez shows in his publication.

Nevertheless, because I am a comparativist, I still see narrative as essential to the scientific discussion of the law. n123 Law is a living, [*1329] breathing, sentient organism, not an automaton. n124 As such, the law must be studied within its habitat or context, which is precisely what comparativists do. We study foreign legal systems in their proper context, and try to present them to our domestic audience in ways that make sense from within our own contextual frame of reference. n125 Comparativism also allows me to engage in LatCritical praxis. The compelling link between CRT and comparative schol [*1330] arship is that the analysis of foreign systems enables us to see and expose the hidden assumptions of our own legal system. Therefore, by confronting the policy decisions founded upon unintentional essentialist notions, comparativists can ensure that the results of our laws are intended. Moreover, comparativistic analysis can also expose unconscious or intentional biases, and permits us to correct the mistakes produced by misguided or purposeful attempts at normativity. These juridical mistakes are based on essentialist visions of the law, rather than on a proper evaluation of what the law really can and should do for a multicultural society.

Additionally, CRT scholarship has given me a factual grounding that has been eye opening. Many of these facts come from, or have been illustrated by, narratives. I can now look at American law, as I look at the law more generally, contextualized by a newly informed perspective because of narrative. CRT is giving me the intellectual tools to become a more effective legal scholar and law teacher, n126 and narrative has been an essential part of that experience. [*1331]

The time for me to develop intersectionalities and to map mi propia version of the law has come. The Annual LatCrit Conference is an essential guide in my new scholarly camino (path), which is why it was my great privilege to learn at LatCrit IV.

FOOTNOTE-1:


n2 Hector Gagliardi, Por las calles del Recuerdo 5 (1970). Author's translation: Our poor america (meaning the continents, not the one country), which started to pray when the testaments where pre-history . . . when history was full of warriors, the soul full of mystics, thinking was full of philosophers, beauty was full of artists, and science was full of wise men . . .

Everything that crossed the sea was better and, just when we were beyond salvation, the popular culture appeared to save us.

n3 See footnote n1.

Id. I realize that this quote is told from an Eurocentric perspective that might be read to exclude the Native American contribution, but the Native American contribution is a crucial element in the Latin-American popular culture that distinguishes us from the conquistadores peninsulales (peninsulales is a reference to persons born on the Iberian Peninsula).


n5 While definitions are often dangerous, if not impossible, see Francisco Valdes, Under Construction: LatCrit Consciousness, Community, and Theory, 85 Cal. L. Rev. 1089, 1089 n.2 (1997) 10 La Raza L.J. 3, n.2 (1998) (noting that defining LatCrit is difficult), I like this one:

Critical Race Theory is the most exciting development in contemporary legal studies. This comprehensive movement in thought and life -- created primarily, though not exclusively, by progressive intellectuals of color -- compels us to confront critically the most explosive issue in American civilization: the historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender, class, and sexual orientation).

Cornel West, Foreword to Critical Race Theory: The Key Writings that Formed the Movement xi (Kimberle Crenshaw et al. eds., 1995) [hereinafter The Key Writings].

n6 "Pomo" is short for postmodernism, the current philosophical age. Although I find his treatment of postmodernism overly harsh, David West provides some helpful descriptions. See David West, The Contribution of Continental Philosophy, in A Companion to Contemporary Political Philosophy (Robert E. Goodin & Phillip Pettit eds., 1993). West wrote:

Postmodernism proposes a last desperate leap from the fateful complex of Western history. Anti-humanism, with its critique of the subject and genealogical history, has shaken the pillars of Western political thought. Heidegger's dismantling of metaphysics and Derrida's deconstruction carry the corrosion of critique to the fundamental conceptual foundations of modernity.

Id. at 64. West also commented that: "Postmodernists seek to disrupt all forms of discourse, and particularly forms of political discourse, which might encourage the totalitarian suppression of diversity." Id. at 65.
Spanish is my vernaculo, my native first language, English, my necessary second language, and French, my chosen third language, which I studied in college.

See infra note 16 and accompanying text (defining "praxis"); see also infra note 30 and accompanying text (defining "normativity").

Author's translation: "Oh Lord, who [the heck] tells me to get into these problems!"

By abuse of language I mean its use in hurtful and negative ways.


See infra notes 19-38 and accompanying text (discussing debate over narrative).

I do not mean to imply that popular culture is always "plain and simple" in language. In fact, popular culture is incredibly complex and textured. However, on occasion, the popular artist uses plain and simple language to make very complex messages accessible to everyone in their community.

For example, until LatCrit scholarship challenged the traditional civil rights discourse in law, no one had explored the weaknesses of the black/white binary paradigm. See Juan F. Perea, The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought, 85 Cal. L. Rev. 1213 (1997), 10 La Raza L.J. 127 (1998); Juan F. Perea, Ethnicity and the Constitution: Beyond the Black and White Binary Constitution, 36 Wm. & Mary L. Rev. 571 (1995); see also Rachel F. Moran, Neither Black nor White, 2 Harv. Latino L. Rev. 61, 68-69 (1997) (finding that Latinas/os are not adequately represented in American civil rights debate).

"LatCritical" is a term that I believe aptly captures LatCrit's scholarly approach.

I was introduced to the term by Berta Esperanza Hernandez-Truyol.

Francisco Valdes has written about praxis in the LatCrit enterprise:

Following from the recognition that all legal scholarship is political is that LatCrit scholars must conceive of ourselves as activists both within and outside our institutions and professions. Time and again, the authors urge that praxis must be integral to LatCrit projects because it ensures both the grounding and potency of the theory. Praxis provides a framework for organizing our professional time, energy and activities in holistic ways. Praxis, in short, can help cohere our roles as teachers, scholars and activists. The proactive embrace of praxis as organic in all areas of our professional lives thus emerges as elemental to the initial conception of LatCrit theory. Praxis therefore serves as the second LatCrit guidepost.


Corrada suggested an approach similar to the 1998 conference entitled Temas de Justicia: Latino/a Literature & The Law, which was sponsored by the University of Denver College of Law. I would translate the Spanish part of the title as "themes" or "subjects" of justice. The pamphlet for the Denver Conference, described it as follows:

This conference brings together Latino/a authors and law professors (and some who are both) to learn about the different ways in which messages about Latino/a Justice and Injustice in this country can be conveyed, both to inspire the community and to change the system.

In particular, the conference seeks to explore how narratives can be used to bring greater humanity and sensitivity to the system of American Justice.

n18 I thus suggested the following panel description, based upon the description of the Denver symposium:

LATINA/O ARTS AND THE LAW PANEL

This panel brings together scholars to discuss the different ways in which messages about Latino/a Justice and Injustice are and can be conveyed by the arts. In particular, the panel seeks to explore how narratives can be used to bring greater humanity and sensitivity to the system of Justice. Narratives come in many forms, but, at their best, these cultural images educate, enlighten and provoke. Narratives can help us to remember martyrs and protest injustice; they can become insightful and powerful social, political and legal commentaries. See generally Temas de Justicia: Latino/a Literature & The Law, supra note 17.


n20 One very strong early attack came from the perhaps unexpected quarters of an icon of the Critical Legal Studies ("CLS") movement. Professor Mark Tushnet's broadside on the use of narrative, by Critical Race and Critical Feminist Scholars, charges them with a "lack of integrity" in their storytelling. See Tushnet, supra note 19, at 251. A careful reading of the piece, in my view, discloses that he simply does not like the stories being told, and their contribution to American legal discourse. His attempt to dress that up as an analysis of "missteps" in narrative that fail to connect the particular to the general, rings rather hollow. Professor Gary Peller, in a sharply worded response to Tushnet, in my view, correctly charges that Tushnet's stated conclusion that the narrative works of critical scholars, the overwhelming majority of whom were persons of color, lacked "integrity" was driven not by objective cultural review, but rather by conservative political bias. See Gary Peller, The Discourse of Constitutional Degradation, 81 Geo. L.J. 313 (1992); see also Mark Tushnet, Reply, 81 Geo. L.J. 343 (1992) (accusing Professor Peller of misreading his article and failing to understand its intellectual complexity, and of betraying his scholarly class). See generally Mark Kelman, A Guide to Critical Legal Studies (1987) (providing background of CLS); West, supra note 5, at xxii-xxvii (outlining background on initial relationship and eventual split of CLS and CRT).

n21 Less unexpected attacks came from those already identified with the political right. See, e.g., Posner, supra note 19, at 368-84 (illustrating one particular example of narrative that Posner described as "the methodological signature of Critical Race Theory" to make general point that black scholars' storytelling is one-sided, and "questionable by the conventional standards of scholarship"); see also Richard Posner, The Problems of Jurisprudence 393-419 (1990) (criticizing "radical communitarians").

n22 See Farber & Sherry, supra note 19, at 133-37 (describing CRT, or as authors label it "radical multiculturalism," as analogous to mental disease of paranoia and representing abandonment of moderation and dearth of common sense). In addition, the authors assert that narratives used by "radical multiculturalists" lack scholarly analytical frameworks, are exclusionary even to the point of racism and anti-Semitism, and ultimately "prove" untruthful. See id. But see Kathryn Abrams, How to Have a Culture War, 65 U. Chi. L. Rev. 1091, 1126 (1998) (responding that 'Farber and Sherry's flawed and inflammatory critique moves us in precisely the wrong
direction"); Richard Delgado, Chronicle: Rodrigo's Book of Manners: How to Conduct a Conversation on Race Standing, Imperial Scholarship and Beyond: Beyond All Reason, 86 Geo. L.J. 1051, 1072 (1998) (arguing that narratives are fact-patterns that illustrate discussion, and that "the scholarly community should be less concerned about scholarship that fails to state a claim in the most familiar manner . . . and receptive to the newer modes of scholarship, such as the Essay and chronicle, which may be full of analysis and new ideas and, in that sense, eve more useful than the usual fare"). For more general illustrations and explanations of the use of narrative in legal scholarship, see, for example, Kathryn Abrams, Hearing the Call of Stories, 79 Cal. L. Rev. 971 (1991), Richard Delgado, Storytelling for Oppositionists and Others: A Pleas for Narrative, 87 Mich. L. Rev. 2411 (1989), Charles Lawrence, III, The Word and the River: Pedagogy as Scholarship as Struggle, 65 S. Cal. L. Rev. 2231 (1992), and Carrie Menkel-Meadow, Excluded Voices: New Voices In The Legal Profession Making New Voices In The Law, 42 U. Miami L. Rev. 29 (1987).


n24 Professor George Martinez has explained why white scholars cannot speak for communities of color:

The fact that minorities have a different conceptual scheme from whites makes it plausible to suppose that there is a distinctive voice of color which is based on that distinctive conceptual scheme. t also explains why whites cannot write in the voice of the outsider because they have a different conceptual framework.

George A. Martinez, Philosophical Considerations and the Use of Narrative in Law, 30 Rutgers L. Rev. 683, 689 (1999).

n25 In his conclusion, Delgado cited the following case excerpt, which now reads like a chilling warning:

To leave non-whites at the mercy of whites in the presentation of non-white claims which are admittedly adverse to the whites would be a mockery of democracy. Suppression, intentional or otherwise, of the presentation of non-white claims cannot be tolerated in our society. . . .In presenting non-white issues non-whites cannot, against their will, be relegated to white spokesmen, mimicking black men. The day of the minstrel show is over.


n26 In addition to the defects identified by Richard Delgado, depriving persons of color of voice in the debate preserves the "perpetrator perspective" in civil rights scholarship. See Allan D. Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, in The Key Writings, supra note 5, at 29 (stating that "fault" and "causation" are "central to the perpetrator perspective," i.e., conscious and intentional are only illegal types of discrimination, which allows "aloof" whites to preserve privilege by simply denying culpability); see also Charles R. Lawrence, III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, in The Key Writings, supra note 5, at 235 (finding that intent requirement in civil rights cases means that "the legal establishment has not responded to civil rights claims that threaten the superior societal status of upper and middle class whites.").


n28 Cf. Jerome McCristal Culp, Jr., Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy, 77 Va. L. Rev. 539, 548 (1991) ("Whenever one raises the question of . . . the personal experiences of people of color, one hears the response by many that color does not and cannot matter to the
As a teacher of Civil Procedure, I emphasize to my students that the judicial resolution of disputes requires that all parties to a case be afforded due process of law. See Fuentes v. Shevin, 407 U.S. 67; 92 S. Ct. 1983 (1972) (holding state prejudgment property seizure procedures subject to Due Process Clause of 14th Amendment); International Shoe Co. v. Washington, 326 U.S. 310 (1945) (finding state exercise of personal jurisdiction over nonresident defendant subject to Due Process Clause of 14th Amendment). The Due Process Clause therefore requires that the judge base his or her decision on the "truth," which in this context means the "legal truth" that is established in court, on the basis of applicable rules.


The title "Speaking Truth to Power" was made famous by Professor Anita Hill's book of that title, in which she describes her experience during the confirmation hearings for Supreme Court Justice Clarence Thomas, but it had been used before. See Anita Hill, Speaking Truth to Power (1997); Manning Marable, Speaking Truth to Power: Essays on Race, Resistance, and Radicalism (1996); Aaron B. Wildavsky, Speaking Truth To Power: The Art and Craft of Policy Analysis (1979).

In fact, it has been done for a very long time in the context of the American debate over race. See, e.g., Frederick Douglas, Narrative of the Life of Frederick Douglas, An American Slave, Written by Himself (B. Quarles ed., 1845).

The term "LatCritter" -- to the best of my knowledge -- was coined by Professor Celina Romany during her Closing Keynote at LatCrit IV. It has now become a part of the LatCrit lexicon.

I can only describe my experience with storytelling in legal scholarship as a personal and professional epiphany. Although it may unconsciously have started earlier, a very clear moment of discovery was my reading of Kevin Johnson's contribution to the special joint symposium issue published by the California Law Review and the La Raza Law Journal. See Johnson, supra note 17. I read this article on the plane ride back from attending LatCrit III in Miami. I found the piece so powerful that I drove from the airport to my office so that I could send a note to Kevin telling him how I had been so moved by his piece. Another piece that really resonated, because the experience was so very familiar, was by Berta Esperanza Hernandez-Truyol. See HernandezTruyol, supra note 30. There are of course many others in LatCrit scholarship and in CRT scholarship more generally. See Richard Delgado, The Rodrigo Chronicles (1995) (discussing confrontations between people of different races in American society); Patricia Williams, The Alchemy of Race and Rights: Diary of a Law Professor (1991).

See, e.g., Culp, supra note 28, at 546-47 ("When we leave out the personal in the realm of the law, what is left out is the
truth of the experiences of black people in American society.

n37 I do not mean to imply that narrative scholarship suffers from the errors argued by the opponents of storytelling, I am simply saying that we can always work to improve our methodology. Interdisciplinary discussion is especially important in this regard, because many of us in the legal academy lack formal training in some of the fields that can enrich our scholarship.

n38 I should confess a predisposition to the use of many narrative forms in serious scholarship partly because I have edited several books in Spanish that use storytelling to make historical, political, cultural, sociological and legal commentary. Most of the books were authored by my father, Pedro Malavet-Vega. There are several law books. See Pedro Malavet-Vega, Manual de Derecho Notarial Puertorriqueno (Corripio 1988); Pedro Malavet-Vega, Manual de Derecho Penal Puertorriqueno (Corripio 1997); Pedro Malavet-Vega, Evolucion del Derecho Constitucional en Puerto Rico (Corripio 1998). The others are sociological, historical and cultural studies. See Pedro Malavet-Vega, Navidad Que Vuelve (Corripio 1987) [hereinafter Malavet-Vega, Navidad]; Pedro Malavet-Vega, Del Bolero a la Nueva Cancion (Corripio 1988) [hereinafter Malavet-Vega, Bolero]; Pablo Marcial Ortiz-Ramos, A Tres Voces y Guitarras (Corripio 1991); Pedro Malavet-Vega, Historia de la Cancison Popular en Puerto Rico (1493-1898) (1992) [hereinafter Malavet-Vega, Historia]; Pedro Malavet-Vega, Las Pascuas de Don Pedro (Corripio 1994).

n39 By popular culture, I mean the culture of the people, by the people, for the people, not commercially-imposed mass-distribution. I also distinguish it from folklore. See generally Pedro Malavet-Vega, La Vellonera Esta Directa: Felipe Rodriguez (La Voz) y Los Anos Cincuenta 27-30 (Corripio 1987); Malavet-Vega, Historia, supra note 38, 37-49.

n40 Pablo Milanes, Silvio Rodriguez and Iraquere, the Cuban Jazz group, send powerful messages about the Cuban Revolution. Andres Jimenez, Antonio Caban Vale, Roy Brown, Lucecita Benitez and the group Haciendo Punto en Otro Son, used their songs to transmit a message of pride in Puerto Rican culture in a more or less subversive manner. The salsa of La Sonora Poncena and El Gran Combo has often offered a paradoxical mix of cultural and racial pride with misogyny and racial denial. The Dominican group Juan Luis Guerra y 4:40 shot to the top of the Latin pop charts with merengue that did not talk exclusively about sex, but rather about social justice, for example songs like "El Costo de La Vida," and the song about helping students learn, rather than spending money on the Columbus Lighthouse, which cost millions of dollars and displaced hundreds of poor people, who were mostly replaced by upper-middle-class condo owners. Ruben Blades's album Buscando America has many songs with powerful social content and covers themes of violence and repression in Latin America. Joan Manuel Serrat has introduced several generations to the poetry of Antonio Machado, for example, Cantares, about Machado and his famous poem, and to causes like protecting the Catalan language from Spanish influence and environmental activism (El Mediterraneo).

n41 While the English language has a word that includes in its definition the term "a reader of poetry" ("bard"), I find it amazing that there is no generally used specialized verb in English for the reading or telling of poetry, in Spanish, "declamar," which, out loud, is never really "read" is it? I say generally used, because if you look it up in the dictionary, you will find the verb "to declaim," which I cannot recall ever hearing, whereas "declamar" is a very commonly used term in Spanish. See Webster's Collegiate Dictionary 930 (9th ed. 1983).

n42 One of them asks: "why are you hiding your black grandmother in the kitchen." Fortunato Vizcarrondo, Y tu aguela a'onde ejta, Dinga y Mandinga (Poemas) 77 (Instituto de Cultura Puertorriquena 1983). The poem is titled, using an affected dialect, Y tu aguela a'onde ejta? See id. A favorite of mine is Majestad Negra by Luis Pales Matos. The
album by Carrion and Benitez is titled Paloma.

n43 See Malavet-Vega, supra note 39. Rodriguez passed away recently.

n44 In a study of 50 songs that Felipe Rodriguez included in his repertoire, Malavet-Vega found that most of them discussed male-female relationships. See id. at 395. But in the text of the songs there are other important themes as well, such as the family, the home, work, children, childhood, church or religion, history and social or political facts, weddings, illness, God or Jesus, and death. See id. at 405. Another exponent of this genre was the Trio Los Panchos, one of the most popular Latin American musical groups of all time that toured every place that afforded them a Spanish-speaking audience including many locations in the United States. In fact, the group was formed in New York City in 1944. See Ortiz-Ramos, supra note 36, at 143.

n45 Many tangos, while written in Spanish, are nonetheless full of words in lunfardo, a Spanish dialect that was the language of the streets of Buenos Aires and the Provincia Oriental del Uruguay at the beginning of the twentieth century. It is not surprising that the authors would use this "unseemly" language, since tango was born in the academias or whorehouses of the two capitals on opposite banks of the River Plate (Buenos Aires, Argentina and Montevideo, Uruguay). Tango dancing was considered so unseemly that only men danced it. See Pedro Malavet-Vega, El Tango y Gardel 157-72 (Zip Editora, S.A. 1975) [hereinafter Malavet-Vega, El Tango y Gardel]; see also Pedro Malavet-Vega, Cincuenta Anos No Es Nada (Corripio 1986).

n46 Martin was born and raised in Puerto Rico. Lopez is the daughter of Puerto Rican parents and was born in New York. Both have been nominated in multiple categories in the MTV Music Video Awards. See MTV Shows (visited Sept. 3, 1999), <http://www.mtv.com/sendme.tin?page=mtv/tubescan/vma/> (on file with author). Both Martin and Lopez are currently singing in English, which might appear to distinguish them from the tango example. However, it was never really the Spanish language in the tangos which crossed over to Anglo audiences, rather, it was the Latin beat.

n47 The painting returned to Spain in 1981 and was displayed behind 15 mm. of bullet-proof glass until its recent relocation to the Reina Sofia Museum in Madrid. Picasso had forbidden its return from the New York Gallery of Art to Spain until Spaniards lived under a democratic government. See Picasso Virtual Museum at Texas A&M (visited Sept. 21, 1999), <http://www.tamu.edu/mocl/picasso/> (on file with author).

n48 See The Virtual Diego-Rivera Web Museum (visited Sept. 3, 1999) <http://www.diegorivera.com/biogra.htm> (on file with author) (including illustrations of Rivera's work and biographical information). In 1993, Rivera was commissioned to paint a large mural at the RCA building in New York. See id. After the mural was painted, Nelson Rockefeller demanded that the portrait of Lenin that Rivera had included in it be replaced. See id. Rivera refused, but offered to put a group of American figures opposite Lenin. See id. Rivera was dismissed. See id. In 1934, the mural was painted over. See id. Rivera was then commissioned to paint a smaller version of the RCA mural at the Palacio de Bellas Artes in Mexico City. See id.

n49 Irineo Leguizamo, a jockey in Argentina, was a favorite of Carlos Gardel, the most famous tango singer of his day. See MalavetVega, El Tango y Gardel, supra note 45. John Leguizamo is an actor.

n50 The author made reference to problems of racism, xenophobia, alcoholism, family violence, and gender identity. The one moment that stands out in my mind, was when the author and performer saw his father, whom he thought was the Maitre'd at a restaurant, working his real job as a dishwasher there. The show made the audience laugh, cry, and quietly think about the meaning of the story being told to them in the theater. His performance was rewarded by an Emmy award. See Emmy Awards (CBS television broadcast, Sept. 12, 1999).
n51 The first black person in Puerto Rico was a free African, Angolan-born Juan Garrido, who sailed with Juan Ponce de Leon. See Federico Ribes Tovar, A Chronological History of Puerto Rico 19-20, 29 (1973) (stating that first black slaves arrived in 1510).

n52 See generally, Malavet-Vega, Historia, supra note 38 (discussing development of Puerto Rican culture during four hundred years of Spanish rule); see also Jose Luis Gonzalez, El Pais de Cuatro Pisos, y Otros Ensayos (Huracan 1981) (challenging traditional views on Puerto Rican identity).

n53 After substantial discussion, designated members of the Planning Committee, took over the difficult task of writing the overall program. The Substantive Program Outline described the panel as follows:

Literature and Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production

This plenary is designed to begin a dialogue about the value of including the arts in the LatCrit enterprise and to theorize about whether LatCrit should be expanded in such a way. This plenary panel brings together scholars, writers and artists to discuss the different ways in which messages about subordination and injustice can be communicated to as broad an audience as possible. In particular, the panel seeks to explore how narratives can be used to bring greater humanity and sensitivity to the system of Justice. Narratives come in many forms, and Latina/o communities have been particularly creative in incorporating justice issues into a wide array of artistic formats -- from social protest music to poetry, to movies and the plastic arts. At their best, these forms of cultural production become powerful social, political and legal commentaries that serve to educate, enlighten and provoke in ways that would be otherwise impossible given elite monopolization of the means of communication. By the same token, Louis Armstrong was once asked, "what is jazz?" His response: "I can't really tell you, but if you don't know what it is, don't mess with it." He may have a point. In exploring the question whether LatCrit scholars should "mess" with narratives (and/or other forms of artistic expression), participants in this panel are invited to address the following themes:

[1] Why Narrative?

See LatCrit IV Substantive Program Outline, supra note 4.

n54 Mr. Gunia earned his B.A. from Dartmouth in 1997 (resume on file with author).

n55 Dr. Lillian Manzor graduated magna cum laude in 1977 from the University of Miami. She obtained her Masters in 1982 from the University of Southern California. She received her Ph.D. in 1988 from the University of Southern California. Her specialties include contemporary Latin American theater, the Boom In/exclusions, and Caribbean women writers.

n56 Celine Salazar Parrenas works as a filmmaker, film curator, and is a Ph.D. candidate in Stanford University's Modern Thought and Literature Program. She focuses on interdisciplinary film studies. She received her B.A. in Ethnic Studies from U.C. Berkeley and her M.F.A. in Film Directing from U.C.L.A. She has taught in the American Cultures Program and Ethnic Studies at U.C. Berkeley and is a part-time instructor of Cinema Studies at San Francisco State University.

n57 Adrienne Davis is a Professor of Law and Co-Director of the Gender, Work, & Family Project at the Washington College of Law at American University. She joined the faculty in 1995. Prior to that, she taught law for four years in California. Professor Davis's scholarship examines the interplay of property and contract doctrine with race, gender, and sexuality in the nineteenth century. Drawing on legal, literary, and historical sources, Professor Davis's work shows how property and contract law incorporate and influence social norms. She is the recipient of a grant from the Ford Foundation to research meanings and representations of black women and labor. She teaches property, contracts, and a
variety of advanced legal theory courses, including courses on law and literature, race and the law, and reparations. She will be a co-editor on the second edition of West's casebook on Feminist Jurisprudence, due out in fall of 2000.

n58 Elvia Rosales Arriola is currently a Visiting Professor of Law at DePaul University College of Law. She taught at the University of Texas from 1991 to 1999. She is a former New York Assistant Attorney General for Civil Rights and Karpatkin Fellow at the National Headquarters of the American Civil Liberties Union. Her scholarly works, which typically include historical, personal and literary narratives, range broadly in the area of feminism, gender and sexuality, and Latina critical legal theory.

n59 Mr. Gunia sent me a written description of his presentation via electronic mail several weeks before the conference. See E-mail from Nicholas Gunia to Pedro A. Malavet, Apr. 23, 1999 (on file with author) [hereinafter Gunia E-mail].

n60 The LatCrit Conference has always been a place for me to grow and to deal with my own "issues," which usually revolve around sex and gender, but sometimes also around matters of race. I had jumped to a lot of incorrect conclusions based on looks. Shame on me. This was yet another reminder about how respect for diversity requires constant vigilance and the avoidance of quick judgments.

n61 I am describing two things: first, my own realization that Gunia was Jamaican, and second, that I had clear markers of who and what I constructed as Jamaican. Interestingly, I should not have found it surprising that Gunia could speak English with two different accents. I speak Spanish one way when I am speaking to a non-Puerto Rican Spanish speaker, and in a very different way when I speak to Puerto Ricans.

n62 See

Gunia E-mail, supra note 59. Gunia put it this way:

The vast body of Jamaican music can be collectively viewed as a narrative of the struggles of the Jamaican people against various subordinating forces, which range from such antiquated institutions as slavery and colonialism to such contemporary problems as gender inequality and the escalation of drug/gun violence. Merely by chronicling these struggles for the enrichment of future generations and other cultures, Jamaican music functions as a valuable form of antisuobordination praxis.

n63 Gunia explains the Babylon system in his own contribution to this symposium. See Nicolas Gunia, Half the Story Has Never Been Told: Popular Jamaican Music as Anti-Subordination Praxis, 33 U.C. Davis L. Rev. 1333, 1335 (2000).

n64 Gunia E-mail, supra note 59. Gunia wrote:

Furthermore, music provides a critical forum for dialogue, wherein injustice is exposed and power relations are negotiated, within and among various groups in society. In my presentation, I will illustrate these functions, as well as some of the contexts in which they operate, by drawing upon Jamaican music, and more specifically song lyrics, as a primary source. In doing so, I hope to shed light on the unique role of music in Jamaican society and show how music may serve in the actualization of LatCrit Theory.

n65 In La Vellonera Esta Directa, my dad included a study of 50 popular songs in Puerto Rico. See Malavet-Vega, supra note 39, at 393-410. He found 45 of the 50 songs made references to love -- in the context of heterosexual relationships -- and that of those, 82.2% described love as doomed, sad or bitter. See id. at 397. The songs, written almost exclusively by men, described the majority of relations as being terminated by the women. See id. at 498. References to violence were made in six percent of the songs; all of them acts of violence by the man against the woman and/or her new lover. See id.
n66 E-mail from Lillian Manzor to Pedro A. Malavet, Apr. 26, 1999 (on file with author).

n67 Carmelita, when used as a reference to skin tone, means cinnamon brown. See 1 Diccionario de la Lengua Espanola 417 (Real Academia Espanola 1992)

n68 This kind of video product is referred to as a "hard core gonzo."

n69 This theory is not yet articulated. As Professor Parrenas herself explained it to me recently:

The difficult theory of viewing experience that I am currently formulating so as to counter the speaking-for that occurs in these productions. A speaking for that I plan to confront carefully without resorting to it myself! This is crucial in the context of sexual domination in the Southeast Asian sex tourist scene that cannot be underemphasized -- it is a tourist practice that sells the narrative of these women's natural propensity, desire, choice and will for sex -- as precisely the thing that men buy.

E-mail from Celine Salazar Parrenas, to Pedro A. Malavet, Sept. 7, 1999 (on file with author) [hereinafter Parrenas E-mail, Sept. 7, 1999].

n70 For a similar exposé, see Anthony Paul Farley, The Black Body as Fetish Object, 76 Or. L. Rev. 457, 476-80 (1997).

n71 The debate in feminist scholarship over censorship of pornography is too extensive to detail here. However, Andrea Dworkin and Catharine MacKinnon are the two feminist scholars most associated with the procensorship position. See, e.g., Andrea Dworkin, Pornography: Men Possessing Women (1981) (labeling pornography as form of slavery); Catharine A. MacKinnon, Toward a Feminist Theory of the State 214 (1989) ("On the surface, both pornography and the law of obscenity are about sex. But it is the status of women that is at stake"); In Harm's Way -- The Pornography Civil Rights Hearings (Catharine A. MacKinnon & Andrea Dworkin eds., Harvard Univ. Press 1997) (essays and transcripts of hearing in support of antipornography legislation); Catharine MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv. C.R.-C.L. L. Rev. 1, 9-21 (1985) (advocating censorship of pornography). There are also anticensorship feminists. Most visibly, Nadine Strossen, current president of the American Civil Liberties Union, has consistently taken on Dworkin and MacKinnon on this issue. See Nadine Strossen, A Feminist Critique of "The" Feminist Critique of Pornography, 79 Va. L. Rev. 1099, 1140-71 (1993) (asserting that censoring pornography would hurt women's rights); Nadine Strossen, Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality, 46 Case W. Res. L. Rev. 449, 458-77 (1996) (arguing that censoring hate speech, including pornography, would be unconstitutional and counterproductive). Other feminists have done so as well. See, e.g., Judith P. Butler, Excitable Speech 127-63 (1997) (discussing "implicit censorship" and pornography suppression scholarship). Some feminist scholars even defend prostitution. See, e.g., Martha Craven Nussbaum, Sex and Social Justice 27698 (1999) (arguing that all persons sell their bodies for money, in one way or another, and that we should be allowed to do so, including renting our bodies for sex).

The debate over censoring pornography must also be located within the general discussion of hate speech. See Strossen, supra, at 450 (noting that procensorship scholars consider pornography "in essence, hate speech against women, promoting discrimination and violence against us."). Hate speech scholarship necessarily brings to mind groundbreaking work by scholars like Richard Delgado and Mari Matsuda. See, e.g., Richard Delgado et al., Must We Defend Nazis?: Hate Speech, Pornography, and the New First Amendment 3 (1997) (advocating limitations on hate speech and pornography); Mari J. Matsuda et al., Words that Wound: Critical Race Theory, Assultive Speech, and the First Amendment 1-15 (1993) (arguing that First Amendment should not protect racist speech).

Finally, from a gay-legal perspective on the regulation of sexuality, professor David Cole has written that, "those who are critical of the pornographic character of
American sexuality -- whether from an aesthetic, moral, or feminist perspective -- may only reinforce that character if they continue to insist on a strategy of suppression." David Cole, Playing by Pornography's Rules: The Regulation of Sexual Expression, 143 U. Pa. L. Rev. 111, 116 (1994). He concludes that: "In the end, not only the First Amendment, but sexuality itself, demand more speech, not less." Id. at 177.

n72 Recently, feminists of color have added their voices to the discourse over gender issues and have provided a definitely different perspective. See, e.g., Critical Race Feminism (Adrien Wing ed., 1994).

n73 E-mail from Celine Parrenas to Pedro A. Malavet, Apr. 26, 1999 (on file with author).

n74 Parrenas's work was initially a chapter or a larger manuscript entitled Specters of Asian Women: Sexuality On Screen and Scene. "It is research funded by the Social Science Research Council Sexuality Research Fellowship Program." Id. In a follow up message, Parrenas explained that she intended to publish her findings as follows: a book chapter titled Putting MISS SAIGON To Rest: Asian Women as Return of the Repressed, in Asian American Genders and Sexualities Anthology (Thomas Nakayama ed., forthcoming Arizona State Univ. Press 1999), and in Master-Slave Sex Acts: MANDINGO and The Sexual In/Subordination of Race, in UNSCENE FILM (Graeme Harper & Xavier Mendick eds., forthcoming 2000). See Parrenas E-mail, Sept. 7, 1999, supra note 69. The thesis Little Brown Fucking Machines Powered by Rice will also be published at a future date.


n76 Reacting to the presentations was a complicated task, because the commentators did not have drafts of papers that they could examine before the conference.


n79 In the interest of length, I will leave it there and limit the content of this Essay to my own observations. However, I would be remiss if I did not point out that Professor Arriola has written on this subject. In Foreword: March!, she included a series of personal vignettes about her own Latcritical travels and about her experiences in the legal academy. Arriola, Foreword: March!, supra note 75. In LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids, she wrote:

I suspect that LatCrit theorists will also use storytelling to construct the meaning of identity raised by a scholarship focusing on the social justice issues for Latina/o communities in the United States. I begin my discussion today, therefore, with the story of a movie [John Sayle's film Lone Star] which helped me see the complexity of the issues raised for analysis by this emerging commitment to articulate the premises emerging in LatCrit theory.

Arriola, LatCrit Theory, supra note 75, at 248.

Professor Davis also has covered similar themes in her scholarship. For example, in Identity Notes Part II: Redeeming the Body Politic, she discussed how "metaphors of the body dominate the rhetorical legal landscape" and drew
parallels to "charting the . . . body of LatCrit Theory." Davis, supra note 75, at 267, 274.

n80 See Author's translation: "Traveler/Walker, it is your footprints/ that make the road and nothing more/ walker, there is no road/ you must make your own/ as you walk." This poem was made famous for my generation by the song, Cantares, a poem by Joan Manuel Serrat. See Joan Manuel Serrat, Verso a Verso 128 (Alta Fulla 1985). Serrat explained his dedication to the poeta (poet) Antonio Machado in this book. See id. at 31-32.

n81 Recently, historians have used contemporary music to help tell the details of important events. In fact, my own father has written several books about Puerto Rican history in which he uses music, among other things, to describe daily life on the island. For example, he identified products being distributed in Puerto Rico at the end of the nineteenth century, by finding the music that was used to advertise them. The songs were publicly performed in weekly public concerts called retretas. See Malavet-Vega, Historia, supra note 38, at 371-74.

n82 See Malavet-Vega, Navidad, supra note 38, at 133.

n83 In Puerto Rican culture, Christmas gifts are given to children for the celebration of the Epiphany, the visit by the Three Wisemen of Kings, Los Tres Reyes Magos, in Spanish, to the baby Jesus. See generally Malavet-Vega, Navidad, supra note 38, at 27 (describing Puerto Rico's Christmas traditions). Another poignant example of a song carrying a message of economic hardship is El Jibarito, a song that describes the toil involved in a day in the life of a farmer in Puerto Rico at the beginning of the twentieth century.

n84 I found Crucible of Empire, a history of the Spanish-American War, maddening not because of its content, which was outstanding, but rather because of the glaring omission of any substantive reference to the Commonwealth of Puerto Rico, which one hundred years after the war that started our second colonial period is still part of the American empire. See Crucible of Empire (PBS television broadcast, Aug. 23, 1999).

n85 The producers of Crucible of Empire explained their use of music in the film as follows:

During the Spanish-American War era, songwriters played a role somewhat akin to that of the yellow journalists. Just as newspaper stories promoted the war, popular songs celebrated the war by honoring its heroes and victories. Songs like Brave Dewey and His Men and The Charge of the Roosevelt Riders lauded war heroes Commodore Dewey and Theodore Roosevelt. Other songs, like Ma Filipino Babe and The Belle of Manila, sentimentalized the struggles abroad and romanticized the idea of intervention. Even songs like The Black KPs, which are racist and offensive to modern ears, were intended to rally the U.S. public behind the war effort.

By celebrating characters like Teddy Roosevelt and lamenting scenes like the Maine's explosion, 1890s song brought the drama of the war into living rooms, parlors, and dancehalls across the United States. Ultimately, these patriotic songs made being patriotic popular. Like television today, songs of the Spanish-American War era not only entertained and celebrated, but also shaped popular opinion.


n87 See Malavet-Vega, Historia, supra note 38, at 352-357.

n88 See id. at 265, 273.

n89 Also spelled borinqueno, this is a reference to the inhabitants of Boriquen or Borinquen, a bastardization of the native
term for the island today called Puerto Rico.

n90 See Malavet-Vega, Historia, supra note 38, at 266.

n91 See id. The version La Borinquena by Rodriguez the Tio also states in part: Nosotros queremos la libertad/ y nuestro machete nos la dara, We want our liberty / and our machetes will give it to us. See id. at 266-68.

n92 See generally Malavet-Vega, Bolero, supra note 38, at 115-50 (noting theme of protest in Puerto Rican music during 1970's).

n93 Of course, protest can have its costs. In Puerto Rico, pro-independence artists like Lucecita Benitez, Roy Brown, Americo Boschetti, Antonio Caban Vale, Sharon Riley, Andres Jimenez, and others were targeted for surveillance by the police. See Malavet-Vega, Historia, supra note 38, at 21. In Argentina, 1.3% of the desaparecidos were artists. See id. at 22 (citing Nunca Mas, Informe de la Comision Nacional Sobre la Desaparicion de Personas, [en Argentina] 296 (1985)).

n94 For an explanation of the important meaning of the term subversive to me, see infra note 111 and accompanying text.

n95 I must confess that this can be a double-edged sword that turns us into outsiders in every one of our communities. For example, because I am a heterosexual male, I am expected to behave in a particular way in my own community. But I am now much more aware of issues of sex and gender that conflict with those essentialist expectations. That makes sexist and homophobic conduct by my own lifelong, childhood friends back home in Puerto Rico difficult to take. Enlightenment can be costly and very lonely.

n96 This again divides our communities, since "occasional return" is a lot more practical for me than it is for Carmelita Tropicana.

n97 See supra note 71 and accompanying text (discussing of procensorship and anticensorship debate surrounding pornography).

n98 With the benefit of time, I now question my own "observations", and wonder if I was imposing my own agonizing reaction on her.

n99 I did not get a chance to ask how she coped. No, that is not true. I did not dare to ask the question.

n100 The Substantive Program Outline for the Fourth Annual LatCrit Conference described this category as follows:

Why Narrative? Clearly LatCrit scholars feel a need to adopt modalities other than those used in traditional legal scholarship in order to convey otherwise inexpressible truths about the experience of subordination. Why? It could be that narratives speak for themselves or that the key to them for scholars is the writing, rather than the audience's reception. But what does that mean? How can the image of a scholar "writing just to write" be squared with the already articulated commitments of LatCrit theory to the construction of community and the transformation of material realities? On the other hand, how can LatCrit Theory progress if it is always constrained by the dominant canons of the legal academy?

See LatCrit IV Substantive Program Outline, supra note 4.

n101 The Substantive Program Outline for the Fourth Annual LatCrit Conference described this category as follows:

What are "the Stakes" in LatCrit Legal Scholarship. Critics of post-modern theory complain that cultural politics has replaced real politics with "the representation of politics." Rather than engaging in the real material struggles of the times, post-modern theory legitimates the commercialization of politics by offering the oppressed the pseudo alternative of virtual participation in politics through the deployment of symbols rather than the organization of protest. In helping to move legal scholarship toward the narrative, can LatCrit theory effectively distinguish the representation of politics in art from the activation of politics through art? Should it try to make this distinction? Why or why not?

n102 Id.
n103 I realize that this would appear to be the summer of Ricky Martin, Jennifer Lopez and Marc Anthony, two ex-Menudos from Puerto Rico, and one Puerto Rican-American from New York. All in all, pretty good. Two clear signs that we are "in," are references to Ricky Martin in the Evening News with Jim Leher on PBS, in an essay by Ann Taylor-Fleming, and an actual story referring to a Puerto Rican in the New York Times Magazine. See Stephen J. Dubner, Ricky Who?, N.Y. Times Magazine, Aug. 29, 1999, at 42-46. While I find the success of these young artists very gratifying, I will not claim victory over the dominant culture just yet.

n104 There is a culture war going on in Puerto Rico. In the 1930s, the U.S. officially tried to Americanize the island by imposing English only education. That failed. However, now Puerto Ricans who want to become the fifty-first state see it as in their best interest to Americanize Puerto Rican culture. This entire issue is not long enough for me to explore the complexity of this matter, so I will leave it at that for the moment.

n105 The Substantive Program Outline for the Fourth Annual LatCrit Conference described this category as follows:

Capitalist Power and Cultural Production. Finally, no LatCrit analysis of the transformative power of the arts would be complete without attention to the impact of economic power, profit incentives, and market structures on the production of artistic representations. How does law participate in converting art into "the arts and entertainment industry" and how does the structure of that industry restrict the production and dissemination of authentically transformative cultural forms and events?

n106 I would also point out that I also would avoid the other extreme, the assumption that mass media cannot be popular. Classical music may have been popular at some point, but it is not today.

n107 Payola refers to payments, bribes, used illegally to promote certain musical artists. See United States v. Isgro, 974 F.2d 1091, 1092 (9th Cir. 1992) (describing bribes to local radio stations).

n108 See Malavet-Vega, Historia, supra note 38, at 463. Author's translation: "So many people say that they have a past/ and so many believe/ that love they have achieved./ But defining love/ it is difficult this equation./ Each of us has to give/ our very own version."


n110 This use of the term, and the exploration of complexities of the borderlands on which we live, is masterfully explored in Berta Esperanza Hernandez-Truyol's Borderlands piece. See HernandezTruyol, supra note 30.

n111 I tend to use the term "subversive" often. To me, it means members of the persecuted independence movement in Puerto Rico. The designation was thrust into the legal consciousness of all Puerto Ricans by the Puerto Rico Supreme Court decision in Noriega-Rodriguez v. Hernandez-Colon. See 122 P.R. Dec. 650, 654-55 (1988) (finding practice of opening police files to investigate persons for their political views is unconstitutional); see also Noriega-Rodriguez v. Hernandez-Colon, 92 JTS 85 (1992) (finding that files could not be edited to remove names of undercover agents or other informants before being returned to their subjects). Compare Communist Party v. Subversive Activities Control Bd., 351
U.S. 115, 124-25 (1956) (holding that Smith Act activities against communist party were not unconstitutional), with Laird v. Tatum, 408 U.S. 1, 13 (1972) (discussing existence of "data gathering system" in which Pentagon created files on persons it deemed dangerous, and holding it did not unduly chill First Amendment rights subjects of files). Persons were deemed to be "subversive" because they favored the independence of Puerto Rico. I am in the process of collecting many of the so-called carpetas de subversivos (subversive files) that have been returned to their subjects. My father's file number was 31336, and had 60 pages. According to a special form titled Oficina de Inteligencia (Office of Intelligence), the officer put an "x" to indicate that my father was active in a pro-independence movement, but that "no" he was not dangerous. See Carpeta No. 31336, at 55. My godfather's carpeta consists of over 600 pages. My friend Mario Edmundo Velez, showed his carpeta, No. 24844, 247 pages, to a group of friends, myself included, during a luncheon in 1992. All present were pro-independence lawyers. The special form classified him as both active and dangerous. We were horrified to find pictures of our friend with bullet holes on them. The police had used his picture for target practice at the police academy. More disturbingly, they felt empowered to keep a record of such an act in their files. This is why I wear the label "subversive" with pride.

For more on the campaign of repression that produced the files, see Yvonne Acosta, La Ley de la Mordaza. For an excellent collection of the legal documents related to the landmark "subversive" files decision by the Puerto Rico Supreme Court, see Ramon Bosque Perez & Jose Javier Colon Morera, Las Carpetas: Persecucion Politica y Derechos Civiles en Puerto Rico (1997).

n112 I will explore this more fully in an essay tentatively entitled "The Accidental Crit." I have a feeling that it might read like a narrative.

n113 The term primeras familias, first families, is used in Spanish colonial legislation that, for example, prohibited the sale of houses surrounding the Main Square in San German, Puerto Rico, to anyone other than the "first families" of the city. Clearly, this was not an economic prohibition, since the non-first families could afford to purchase the property. In fact, it was racial and religious segregation. See Aida R. Caro Costas, Legislacion Municipal Puertorriquena del Siglo XVIII 47 (1971).

n114 The social and cultural institution of the godfather in Puerto Rico, and among latinas/os more generally, is both very important and complex. Padrinos are referred to by the parents of the child as compadres (godfathers to my child), hence the word compadrazgo, to refer to the parent-compadre relationship. A simple, but telling illustration of the importance of compadrazgo, is the use of the formal "you," in Spanish "usted," when speaking to or about one's padrino/madrina (godfather/godmother) or compadre/comadre (godfather or godmother to my child).

n115 The university was not a Pontifical Institution when my dad taught there. The designation was awarded by the Pope in 1992.

n116 This is a reference to curly or kinky hair, which reflects an essentialist preference for white features. In fact, in Puerto Rico, we used to have the so-called "prueba del abanico" (fan test): if your hair was fanned and it did not move, you could not get into the dance.

n117 These numbers were reported by Professor Michael Olivas during LatCrit III.

n118 See Harris v. Rosario, 446 U.S. 651, 651-52 (1980) (ruling that lower level of reimbursement provided to Puerto Rico under Aid to Families with Dependent Children program did not violate Equal Protection Clause). Congress, pursuant to its authority under the territorial clause of the U.S. Constitution, can make any needful rules that affect the territories. Thus, it may treat Puerto Rico differently from its states if it has a rational basis for its actions. See id.; see also U.S. Const., art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the
Territory or other Property belonging to
the United States; and nothing in this
Constitution shall be so construed as to
Prejudice any claims of the United States,
or of any particular state.

n119 See, e.g., Douglas E. Litowitz,
Postmodern Philosophy and Law (1997);
Dennis Patterson, Law and Truth (1996);
A Companion to Contemporary Political
Philosophy, supra note 6.

n120 It has been pointed out to me that
Cultural Studies can provide an important
scholarly framework for my development
of intersectionalities between popular
culture and Law. Regrettably, or perhaps
excitingly, this must wait for the next
installment from the Accidental Crit. But
see Will Kymlicka, Liberalism,
Community, and Culture (1991); Will
Kymlicka, Multicultural Citizenship: A
Liberal Theory of Minority Rights (1995);
Martha Craven Nussbaum, For Love of
Country: Debating the Limits of Patriotism
(1996); Ethnicity and Group Rights (Ian
Shapiro & Will Kymlicka eds., 1997).

n121 Martinez, supra note 24, at 685.
Martinez wrote:

A scientific revolution occurs when one
paradigm is replaced by another. Paradigm
shifts cause scientists to view the world in
new and different ways. During scientific
revolutions, then, scientists experience
perceptual shifts. According to Kuhn, the
transition from one paradigm to another is
a conversion experience that cannot be
compelled by logical argument.

Id. at 701 (footnotes omitted).

Therefore, Professor Martinez concluded:
"Since racial divisions are founded in
something other than reason -- i.e., deeply
held prejudices and sentiments -- perhaps it
can only be undone by techniques, such as
narrative that do not depend on reason." Id.
at 705 (footnotes omitted).

n123 And in this, Professor Martinez
agreed with me, though perhaps he was not
as sanguine as I:

[Critics claim that] narrative seeks to
change perspectives of the dominant group
through stories instead of reason. Thus the
use of narrative is anti-reason. This
argument is not persuasive. The
storyteller's reliance on something other
than rational argument to change points of
view is consistent with scientific practice.
As discussed above, Kuhn has argued that
scientific revolutions occur when there is a
paradigm shift. During a shift, scientists
begin to look at the world in different
ways. Such a paradigm shift is a
conversion experience which Kuhn
contends cannot be produced by rational
argument or reason. Thus, the position
of the advocates of narrative is at least as
strong as actual scientific practice.

Id. at 704 (emphasis added) (footnotes
omitted).

n124 A leading comparative law textbook
described this as follows:

What is "legal" about a primary legal rule
is that it assumes, or calls into play, the
law machine. It is the law machine that
does the legal work for the society, that
consumes the resources, that determines
how and to what extent the precept stated
in the primary rule shall be translated into
social consequences. The primary legal
rule is basically a statement of a desired
social outcome. The law machine is the
mechanism for bringing it about. When we
study primary legal rules we are studying
what society asks. The mere request will of
course affect social behavior to some
extent (although we know very little about
the nature and intensity of that effect). But
if we are really interested in knowing
something about the legal system in any
society we quickly have to expand our
vision to include the law machine -- the
complex of legal structures, actors, and
processes. We will not get very far in that
effort by studying merely the rules of law.

John Henry Merryman et al., The Civil
Law Tradition 3 (1985). Conservatives
attack this approach for being externalist.
Regarding externalist approaches to the
law, Martinez has written that: "Externalist
approaches to legal decision-making seek
to appraise legal practice on the basis of
criteria or theory external to that practice.
In contrast to this approach are internalist
theorists. They take the position that
judicial decision-making is autonomous
from external standards or disciplines." See
Martinez, supra note 24, at 694-95
(footnotes omitted). Narrative, for
example, is a presumably externalist approach to legal scholarship. See id. at 696.

n125 See Rudolph B. Schlesinger et al., Comparative Law 1 (5th ed. 1988) (footnotes omitted). Schlesinger wrote:

Comparative Law is not a body of rules and principles. Primarily, it is a method, a way of looking at legal problems, legal institutions, and entire legal systems. By the use of that method it becomes possible to make observations, and to gain insights, which would be denied to one who limits his study to the law of a single country.

Neither the comparative method, nor the insights gained through its use, can be said to constitute a body of binding norms, i.e. of "law" in the sense in which we speak of "the law" of Torts or "the law" of Decedents' Estates. Strictly speaking, therefore, the term Comparative Law is a misnomer. It would be more appropriate to speak of Comparison of Laws and Legal Systems.

Id.

n126 CRT has already changed my approach to law teaching, but that discussion will have to wait for another installment in the Accidental Crit series. However, let me give you an example.

At the beginning of my comparative law course I announce to my students that I intend to use the comparison of foreign legal systems to lead them to a better understanding of the underlying assumptions of the American legal system. In my exam, in the Fall of 1997, I asked my students to write a constitutional amendment regulating the constitutionality of judicial review. The question read as follows:

The United States has often been a model of constitutional democracy around the world. However, you are deeply concerned that at least certain aspects of our system of constitutional judicial review are not expressly included in the Constitution, and you are tired of the endless debate regarding the power of the judicial branch in this regard. After carefully studying our own system, you performed comparative research into the constitutional systems of France, Spain and Germany. These studies have convinced you that it is both possible and desirable to draft clear language in which the meaning of constitutional review is clearly and expressly defined. In your current position as a United States Senator, you want to draft a constitutional amendment entitled: "A Clear System for Constitutionality Review in the United States," in which you will spell out rules that answer the following questions:

(1) What type of body will be responsible for giving the final word on the constitutionality of executive, legislative or judicial action? (You are not changing the organization of our ordinary courts at either the state or federal level. You are merely creating an express system for constitutional review in which you will spell out the role of the Supreme Court or create a new, alternative body to perform constitutionality review, e.g., French Constitutional Council, German or Spanish Constitutional Courts.)

(2) What will be the number, qualifications, length of service and method of selection and appointment of members of this body?

(3) Will the state and/or federal courts be allowed to determine the constitutionality of executive, legislative or judicial action? (Yes or No, as to each category.) If so, how? (e.g., the German Reference Procedure, Spanish Court power to determine constitutionality, subject to appeal, as in the U.S. Keep in mind that you are not changing our ordinary court system.)

(4) How and when will matters be submitted to this body? (e.g., appeal from lower courts, reference procedure, citizen complaint, request for advisory opinion by those with special standing -- like the President, the Speaker of the House, President of the Senate, any number of congressmen and senators).

(5) What will be the effect of the decisions of the constitutional review body when interpreting the Constitution of the United States? (Remember to consider three areas: (1) In the same case, as to courts and parties involved; (2) Within the judiciary generally as "precedent"; and (3) As to the
other branches of government (legislative, executive and judiciary).

Pedro A. Malavet
<http://nersp.nerdc.ufl.edu/malavet>
(visited Apr. 9, 2000) (on file with author).
PERFORMING LATCRIT: Half the Story Has Never Been Told: Popular Jamaican Music as Antisubordination Praxis

Nicholas A. Gunia *

BIO:

* Law student, University of Miami School of Law. A.B., Dartmouth College, 1997. This Essay is based on my presentation to the plenary panel on Literature and the Arts as Antisubordination Praxis. I would like to thank the organizers of LatCrit IV for inviting me to participate at the conference. I also would like to particularly thank Elizabeth Iglesias and Frank Valdes for their support and insight in the preparation of my presentation.

SUMMARY: ... Gang violence in Jamaica has its origins in the "rude boy" culture that emerged during the 1960s. This brings us to the rude boy phenomenon, the next context in which music serves as antisubordination praxis. ... The rude boy phenomenon was a product of the socioeconomic conditions facing urban youths during the years following Independence, 1962 to the present. ... Yet, Dreader than Dread shows that Jamaican music does not always serve as antisubordination praxis, for the song glorifies the rude boy and promotes violence, a subordinating force in society. ... To this day, rude boy culture still flourishes as its origins such as high unemployment and feelings of marginalization and hopelessness among Jamaican youths, have yet to be remedied. As a result, the rude boy remains a popular theme in Jamaican music as some musicians continue to condemn rude boys, while others glorify guns and gangster culture in much the same way as the gangster rappers of the United States. ... As Adrienne Davis stressed, scholars should devise a framework for distinguishing between music that functions as antisubordination praxis and the more common form that functions merely as entertainment.

[*1333]

In Jamaica, there is an old Rastafarian adage: "The half has never been told." n1 In the context of Rastafarianism, the "half that has never been told" refers to the uncorrupted history of the African peoples, as opposed to more dominant and accepted European accounts, which, according to Rastafarians, have deliberately obscured the truth. In the context of this Essay, the "half that has never been told" refers to the oral history of the Jamaican people contained in the vast body of their popular music. Unlike most standard versions of Jamaican history, which for the most part have been written by scholars who originate from the upper and middle classes, the history embodied in popular music has emanated from the lower class. As the legendary Toots Hibbert observed with regard to reggae: n2

Reggae means comin' from the people, y'know? Like a everyday thing. Like from the ghetto. From majority. Everyday thing that people use like food, we just put music to it and make a dance [*1334] out of it. Reggae mean regular people who are suffering, and don't have what they want. n3

Because of these lower class origins, popular Jamaican music has been devalued and underrepresented by scholars that privilege the knowledge and views of the establishment over those of the masses. As a result, traditional scholarship leaves us with only half the story. By focusing on the knowledge and views contained in popular music, this Essay will reveal parts of the other, more authentic, half of the story -- the half that has never been told. In doing so, this Essay will illustrate some of the ways in which popular Jamaican music serves as a powerful form of antisubordination praxis.

Jamaica is a small island in the Caribbean with a population of approximately 2.5 million. Before becoming an independent nation in 1962, Jamaica had been a colony of the British Empire. For much of the colonial era, Jamaica was little more than a giant sugar plantation, which had been worked by hundreds of thousands of African slaves and their descendants. As a result, roughly eighty percent of all Jamaicans are black, while an additional fifteen percent are mixed, or brown Jamaicans, and also of African descent. The remaining five percent of the population is comprised of Europeans, Chinese, East Indians, and Arabs.

Despite the national motto, "Out of Many, One People," n4 Jamaican society is sharply divided. These
divisions are not based on race alone, for class differences intensely stratify society. In Jamaica, the issue of race/color is not viewed strictly in terms of black and white, as historically had been the case in the United States. For this reason, many Jamaicans, who identify themselves as white, emigrate to the United States only to find out that they are black. With regard to class, Jamaica is like many developing countries in the sense that there is a tremendous gap in the standard of living between the upper and middle class minorities and the lower class majority. Therefore, in the eyes of most Jamaicans, not to mention most musicians, society is divided into two distinct groups: the rich and the poor.

Although race and class are two separate and distinct issues, the reality in Jamaica is that they almost invariably coincide. In general, the lighter a person's skin color, the more likely it is for that person to be a member of the upper or middle class. By the same token, "black" and "poor" are generally synonymous labels, particularly when used by Jamaican musicians. The remainder of this Essay will focus on some of the contexts in which popular music serves as antisubordination praxis.

The first context deals with popular resistance to the so-called "Babylon System," a Rastafarian term which is derived from the Old Testament story of the Babylonian captivity. In the context of Rastafarianism, Babylon refers to Jamaica, or life under a corrupt and oppressive establishment, while the Babylon System refers to the organs of this establishment, namely the government, the church, the rich elite, and the police force.

Because many may be unfamiliar with Rastafarianism and because it is such a powerful force in Jamaican society and music, it is important to briefly discuss the nature and origins of Rastafarianism. Rastafarianism can be viewed as both a religion and a social movement that originated in Jamaica during the 1930s. After the Jamaican-born Marcus Garvey was deported back to the island from the United States, he spent much of his time promoting the United Negro Improvement Association (which Garvey founded in Jamaica in 1914), as well as his ideas about Black Nationalism. In one of his speeches, Garvey said: "Look to Africa, where a black king shall be crowned, for the day of deliverance is near." To Garvey's followers, these words were a prophesy. Thus, when Ras Tafari, who later became known as Haile Selassie I, was crowned Emperor of Ethiopia on November 2, 1930, Rastafarianism was born as some believed Garvey's prophesy had been fulfilled.

It is interesting to note that the popularity of Rastafarian ideals and beliefs among popular musicians during the 1960s tremendously enhanced the ability of Rastafarianism to shape the mass cultural identity and consciousness of the Jamaican people. Indeed, popular music became the primary vehicle for spreading Rastafarian teachings and beliefs throughout Jamaica and the world.

Although Rastafarianism has never had an official or monolithic doctrine, two generalizations can be made. First, Rastafarians oppose all forms of injustice and oppression, whether imposed by whites or blacks. Second, Rastafarians believe that their redemption will come either in the form of repatriation back to Africa or the fall of the Babylon System. I will now focus on two recent protest songs that illustrate the critique of the Babylon System.

The first song is entitled Fed Up by Rodney Price, a musician popularly known as Bounty Killer. Rodney Price begins the song with the following lines:

Well, dis one is reaching out to all di leaders -
and di media
Dis is Rodney Price, a.k.a. Bounty Killer-
Di leader for Poor People Government

Well poor fed up, to how your system set up... n7

This introduction exemplifies the popular musician's role in Jamaican society. As previously mentioned, Jamaican musicians almost invariably originate from the lower class, a group which is intensely marginalized and, although the vast majority in society, has little or no say. Yet, in music, the artist acquires a voice through which the reality of this group is expressed. As one commentator noted:

There is an unexamined... notion about modernism in art, which is that it is private, subjective, that the artist is some kind of alienated genius working out of his [or her] own ego. And there is a countervailing African-Caribbean tradition that the artist is a man [or woman] anchored in his [or her] society, anchored among his [or her] own people, working out the collective experiences... the collective sensibilities, the collective values of the people, and as a consequence only a medium through which the people's reality is expressed. n8

In many songs, however, the artist goes one step further, becoming a representative or advocate of the poor and oppressed; or, as Rodney Price put it: "Di leader for Poor People Government." Thus, music empowers poor Jamaicans by providing a forum where musicians may expose injustice and confront oppressors. In this way, Jamaican music functions as a
powerful tool for resisting oppression. Yet this is not all, for music also provides an important vehicle for communicating and promoting values, ideas and beliefs. Given relatively high rates of illiteracy, as well as the fact that television and computers are luxuries that few Jamaicans can afford, music may be the most effective vehicle for mass communication and mobilization on the island. As the song progresses, Rodney Price directly confronts the leaders of mainstream society:

Me ask di leader--him a di arranger
Fi make poor people surround by danger:
Fly and di roach and giant mosquito
Sewage water dat fill with pure bacteria
You ever take a look down inna Riverton area
Bactu, and Seaview, Waterhouse, Kentire . . .

In these lines, Rodney Price accuses the island's leaders of arranging the system so as to "make poor people surround by danger." He also notes the squalid conditions (e.g., "sewage water dat fill with pure bacteria") in such oppressed areas as Waterhouse and Riverton, the latter of which happens to be the particular ghetto from where the artist originated. Therefore, when Rodney Price describes the abhorrent conditions that prevail in ghetto communities, he is drawing on his own experiences and speaking out for his own people.

In the next few lines of the song, Rodney Price accuses the MPs (Members of Parliament) of neglecting their constituencies and exacerbating existing problems by plundering scarce resources:

Long time di MP, him nuh come near yah, And di other one dat claim say she a councilor- [*1338] Rob seventy-five percent and give we quarter, Conquer di land and nuh want fi give we an acre . . .

In these lines, Price accuses the MPs not only of neglect, but also of corruption. More specifically, he blames politicians for plundering scarce resources for their own benefit ("Rob seventy-five percent and give we quarter"). In doing so, Price alerts his audience to the unscrupulous behavior of government officials. Aside from heightening the sociopolitical consciousness of the poor, this song also serves as an important vent for societal frustration with a government that is virtually non-responsive to the problems of the majority of its citizens.

Due to the incendiary nature of Rodney Price's Fed Up, it is interesting to note that the Jamaican government banned the song from the airwaves. This ban is reminiscent of the days of slavery, when playing the drum had been outlawed by a white colonial government that viewed black music as a serious threat to the social order. Over two hundred years later, a predominantly black Jamaican government seems to view black music as a similar threat.

The government also banned the next song, entitled Fire Pon Rome, by Anthony B. Although Rodney Price's Fed Up was unusually critical of the government, Fire Pon Rome goes much further and as we shall see, is one of the most revolutionary songs of the past two decades. With regard to the title of the song, Rome is synonymous with the Babylon System. Although the phrase "Fire Upon Rome" may be interpreted as a call for action, Anthony B. has repeatedly asserted that it is only a call for awareness.

In the opening lines of the song, Anthony B. confronts various upper class whites, such as the Issa and Matalon families:

Dis is my question to Issa and di one Matalon How you get fi own so much of black people land? [*1339] After dem slave, achieve nothing inna hand . . .

In the past, musicians have targeted rich elites in general terms, but never before has a Jamaican musician named names in such a manner. In the second verse, Anthony B. levels his attack on politicians, specifically naming the heads of Jamaica's three political parties, including P.J. Patterson, the island's first black Prime Minister:

My Lord, dont talk just listen
Me have to burn fire fi P.J. Patterson

Him make certain move and we nuh too certain
How much black youth behind iron curtain?
Through me nuh go trod inna Babylon order
We have to burn fire fi di one name Seaga

Everyday di cost of living get harder
Have more seller, me say, more than buyer
Oh my Lord what a pressure!
So many things the politicians have stolen
Still dem return with di one Bruce Golding
Saying a brand-new party dem forming

But apart dem a part we with dem politics meeting
Out of politics, poor people get dem beating . . .

Once again, such fearless finger pointing is unprecedented. It should be noted that in the past,
musicians have sided and even campaigned for a particular political party, such as the People's National Party during the 1970s. Yet, in light of repeated disappointments and failures, it seems musicians, not to mention the general public, have lost faith and hope in politics as a vehicle for change. This is evidenced by Anthony B.'s distrust of the leaders of all three political parties, including Bruce Golding, the leader of the newly formed National Democratic Movement. Indeed, Anthony B. criticizes the political system as a whole, concluding that politics divides the island ("apart dem a part we with dem poltics meeting") and that "out of politics, poor people get dem beating."  

Anthony B. subsequently criticizes the corruption within the Jamaican police force:

Look who dem have a turn metropolitan officer
Fi take your hustling outta your hand
When you look pon dem face
Is your own black man . . .

Although Anthony B. initially targeted white elites, his criticism of black politicians and police officers suggests that he is exposing all oppressors, regardless of race. Indeed, subordination in Jamaica continues to occur on both an inter-and intra-racial basis. Rampant gang violence is one of the most disturbing examples of intra-racial subordination and oppression in modern Jamaican society. Gang violence in Jamaica has its origins in the "rude boy" culture that emerged during the 1960s. This brings us to the rude boy phenomenon, the next context in which music serves as antisubordination praxis.

The rude boy phenomenon was a product of the socioeconomic conditions facing urban youths during the years following Independence, 1962 to the present. Many of these youths had recently migrated to the capital from rural areas in search of employment and a brighter future. However, with unemployment rates as high as thirty-five percent, thousands were forced to settle in the swelling slums and shantytowns of West Kingston. Frequently, these disenfranchised youths turned to crime and violence, often terrorizing their own communities. Since the 1960s, popular music has served as an important forum for debate and commentary with regard to these rude boys.

Prince Buster's Judge Dread was one of the first songs of the 1960s to directly confront the rude boys and expose their toll on Jamaican society. The format of the song mimics the proceedings of a court of law, in which the musician is the judge. This format alludes to the government's failure to deal with the threat posed by the rude boys. Hence, the musician must assume the role of the courts, which traditionally have been insensitive to the plight of the masses, and correct injustice on his own. The song begins with Prince Buster calling the "court" to order:

Order!

My court is now in session, Will you please stand
First allow me to introduce myself
My name is Judge hundred years-
Some people call me Judge Dread
Now, I am from Ethiopia

To try all you rude boys for shooting black people . . .

In the remainder of the song, Prince Buster goes on to try some of Jamaica's most notorious rude boys for such crimes as shooting and murder. Prince Buster eventually sentences the rude boys, some for as long as one thousand years, and justifies these sentences by declaring that he is setting an example. This demonstrates the authority Jamaican musicians assume in order to pass judgment on the behavior of certain members of society and, in the words of Prince Buster, "to set an example" for the people.

Prince Buster's Judge Dread prompted many responses by other musicians who were more sympathetic to the rude boys. Honey Boy Martin's Dreader than Dread was one such example.

Now fellow rude boys,
Stand fast and let us unite,
And deal with one hundred or one thousand years
This meeting is now called to order . . .
I introduce myself as the rudest of all rude boys-
Some people call me Dreader than Dread
If anyone tries to stop us rude boys
You'll . . . end up . . . dead . . .

These lines exemplify the intertextuality and dialogue among musicians within the body of Jamaican music. Indeed, Honey Boy Martin, as representative of the rude boys, is challenging Prince Buster, the representative of those opposed to the rude boys, by making references to Judge Dread and even employing a lyrical format similar to Buster's song. On a different note, this song demonstrates the way music serves as a force for unification and mobilization, as Honey Boy Martin urged: "Now fellow rude boys/ Stand fast and let us unite." Yet, Dreader than Dread shows that Jamaican music does not always serve as
antisubordination praxis, for the song glorifies the rude boy and promotes violence, a subordinating force in society.

To this day, rude boy culture still flourishes as its origins such as high unemployment and feelings of marginalization and hopelessness among Jamaican youths, have yet to be remedied. As a result, the rude boy remains a popular theme in Jamaican music as some musicians continue to condemn rude boys, while others glorify guns and gangster culture in much the same way as the gangster rappers of the United States.

The final context to be explored deals with gender inequality and the status of women within Jamaican society. Like many latinas, Jamaican women have been subordinated through a mentality akin to machismo, whereby male dominance is asserted as if it were a Godgiven right. The reference to God-given right is not a figure of speech, for Jamaican men use the Bible, whether interpreted through the lens of Christianity or Rastafarianism, to reinforce male dominance in society. n35 Accordingly, female musicians have played a secondary role in what has traditionally been a male-dominated business. n36

During the 1980s, however, female musicians began to gradually assert themselves and the rights of women. In a song entitled Legal Rights, n37 a duet by Papa San and Lady G, we may witness the first assertion of gender equality by a female musician. In the song, Papa San states, "Me have my legal rights you know." n38 Lady G responds, "Well, Papa San, me have mine too." n39 Papa San then asks: [*1343] "Alright, so we nuh even then?" n40 However, the answer to this question clearly is no. Women and men are not even or equal as illustrated by Pap San later in the song:

Man have a right, woman have a right too.
If you dont hurt me, I wont hurt you.
If you cheat on me .
De amount a lick you get,
You drop down a ground . . . n41

This disturbing warning, whereby Papa San threatens physical reprisals for infidelity, serves to legitimize brutality against women and illustrates the limits of the phrase "woman have a right too." n42 Papa San's warning also illustrates a double standard with regard to infidelity, for in Jamaican society a male may generally do as he pleases.

Yet, much has changed since the 1980s as female musicians have become some of the most outspoken and influential feminists in Jamaican society. In order to illustrate the extent of these changes, it is necessary to introduce Beenie Man's smash hit entitled Old Dog n43:

Old dog like we
We have to have women in twos and threes. . .
From we see a gal dat look good
We have to fool her and get what we want
Dat mean we to have warn dem
We have to get dem
And nuh tell me say we cant . . . n44

This song, which became an anthem among Jamaican men, encouraged male sexual promiscuity and portrayed women as powerless sex objects. In response, however, Queen Paula and Lady Mackeral recorded Hot Girls. n45 The song begins with a warning to Jamaican women: [*1344]

Beware of Old Dog!
Beware of Old Dog!
Hot gal like we
We nuh want no dog come bite we
You nuh see we a hot gal?
We need hot man
We nuh want no Old Dog . . . n46

As these lyrics show, the female musician is explicitly asserting her sexual needs and confronting the Old Dog mentality on its own terms. Thus, music provides an important forum for dialogue in the context of gender and sexuality. As opposed to other forums, music ensures a large and captive audience, thereby maximizing the odds of effecting a change of mindset.

Songs like Hot Girls, coupled with the growing presence of female musicians who have begun to more forcefully assert themselves and the rights of women, have helped to elevate the status of women in Jamaican society. This notion is evidenced by a dramatic increase in the number of songs in honor and praise of women. At the same time, there has been a conspicuous decline in misogynistic songs, such as the one where Papa San legitimized brutality against women. Yet, the struggle for gender equality in Jamaica is far from over as notions of male dominance remain deeply entrenched. Nonetheless, female musicians continue to challenge these notions and advance the rights of women in their music.

In conclusion, there are a few points worth emphasizing. First, this Essay has illustrated some of the ways that literature and the arts in general, and popular music in particular, serve as a potent form of
antisubordination praxis. Indeed, popular Jamaican music has yielded various tangible benefits, ranging from shifts in consciousness to mass mobilization. This success affirms the power and utility of other forms of narrative, including narratives employed in the context of legal scholarship. Second, this Essay has demonstrated how normative or essentialist notions of race/color fail to shed light on the realities of subordination in Jamaican society. Such notions suggest that black Jamaicans are, for the most part, subordinated by whites. Yet, as the music has shown, essentialist notions obscure the reality that, at least in contemporary Jamaican society, blacks are subordinated not only by whites, but also by browns and other blacks.

The third point stems from an insightful suggestion made by one of the panel's commentators. As Adrienne Davis stressed, scholars should devise a framework for distinguishing between music that functions as antisubordination praxis and the more common form that functions merely as entertainment. However, this framework must not hastily discount the values and sensibilities embedded in the latter form of music. Indeed, music for music's sake, no matter how commercialized or problematic, still provides us with pieces to the whole story.

Finally, it should be noted that the foregoing songs were chosen to highlight the critical role music has played in the struggles of the Jamaican people against various subordinating forces. As Edward Brathwaite, the Jamaican poet and scholar, once wrote:

Jamaica: fragment of bomb-blast, catastrophe of geological history, volcano middle passage, slavery, plantation, colony, neo-colony has somehow miraculously -- some would say triumphantly -- survived.

How we did it is still a mystery and perhaps should remain so. But at least we can say this: that the secret and expression of that survival lies glittering and vibrating in our music. n47

At the doorstep of the twenty-first century, Jamaica faces a number of complex challenges that threaten to shatter the fragile social order that has been so tenuously maintained over the years. In light of Brathwaite's comment, let us hope the music continues.

FOOTNOTE-1:

n1 The Wailers, Get Up, Stand Up, on Burnin' (Island Records Ltd. 1973).

n2 Although reggae and Jamaican music are synonymous terms outside of Jamaica, reggae is but one period of the island's popular music. Other notable periods include ska, rocksteady and dancehall.

n3 Stephen Davis & Peter Simon, Reggae Bloodlines: In search of the music of jamaica 17 (1977).

n4 As one historian noted, the national motto is supposed to be "a constant reminder of the fact that the Jamaican nation is composed of people of many races who have long lived and worked together in harmony." Clinton V. Black, History of Jamaica 168 (1983); cf. C.L.R. James, Party Politics in the West Indies 140 (1962) (asserting that racial harmony is one of "greatest lies" of West Indian society).

n5 Roy Augier et al., The Rastafari Movement in Kingston, Jamaica 2 (1960).

n6 Rodney Price (Bounty Killer), Fed Up, on My Xperience (Killa Dogg Music (BMI)/Water House Music 1996).

n7 Id.

n8 Michael Thelwell, Rhynig . . . and now the book, Sunrays, Sunday Sun Magazine, June 29, 1980, at 18 (discussing The Harder They Come).

n9 Price, supra note 6.

n10 Id.

n11 Id.

n12 Id.

n13 See id.

n14 Id.

n15 Id.


n18 See Kenner, supra note 16, at 4.

n19 Anthony B., Fire Pon Rome, on Real Revolutionary (V.P. Records 1996).


n22 Anthony B., supra note 19.
n23 Id.
n24 Id.
n25 "Hustling" refers to an individual's wages or income.
n26 Anthony B., supra note 19.
n27 Prince Buster All Stars, Judge Dread, on Roots of Reggae, vol. 2 (Rhino Records, Inc. 1996).
n28 Id.
n29 See id.
n30 See id.
n31 Id.
n32 Honey Boy Martin, Dreader than Dread, on The Trojan Story, disc 1 (Sparta Florida Music Group Ltd. 1967).
n33 Id.
n34 Id.
n36 See id.
n38 Id.
n39 Id.
n40 Id.
n41 Id.
n42 Id.
n43 Beenie Man, Old Dog, on Best of 2 Badd DJ's (V.P. Records 1996).
n44 Id.
n45 Queen Paula & Lady Mackeral, Hot Girls, on Stone Love Movement Presents Go Go Wine (V.P. Records 1996).
n46 Id.
n47 Davis & Simon, supra note 3, at 9.
LatCrit scholars have sought to develop and implement nontraditional theories and methodologies consistent with the experiences of Latinos and other subordinated communities and to challenge conventional legal theories and scholarship. Narratives have assumed an especially central role in Critical Race Theory as a mechanism for articulating the voices of groups that the law and legal discourse have traditionally excluded. Critical Race Theory [*1348] has also successfully incorporated the use of fables and storytelling into the dialogue on race, racism, and law.

Although much has been written about Critical Race Theory and law and subordination, there have been few attempts to incorporate these theories and methodologies into legal training and legal education. In this paper I attempt to illustrate how narratives and storytelling can be used in teaching. Specifically, I report on a case study using narrative as a pedagogical tool for preparing students to work with subordinated groups.

Gerald P. Lopez has been critical of contemporary legal education, noting that there is a reluctance, or refusal, by many in the mainstream to acknowledge subordination as a pervasive phenomenon worthy of study. n2 Lopez maintained that

Like most progressive and radical projects in this country, the education of those future lawyers who plan to work for social change has been met historically with formidable indifference. We just don't seem to care much and certainly do almost nothing about specially preparing those whose vocation is to work with the subordinated: the poor, women, people of color, the disabled, the elderly, gays and lesbians. We presume that students get what they need at law school about conceptions of practice, about the people with whom they aspire to work, and about the know-how that unites vocation to daily routine, or we presume that they somehow later make do. n3

Over the past two years, in several classes I have required field reports that are intended to be critical reflections on the readings and the class. The first time I required the field reports, after a few weeks I was pleased with the students field reports, but I began to experience a growing and inexplicable sense of frustration. Finally, I considered the possibility that the
frustration might be linked to the fact that, unlike the student, I did not have an outlet for venting or expressing my response to issues that were emerging in the class. I don't know exactly why, but three or four weeks into the class I began to write my own field reports. However, rather than writing directly to the students, I created a fictional character named Fermina Gabriel; an exceptional, highly successful woman.

My goal in writing the field entries was to create an on-going dialogue with the students, and to give them my take on the readings and the class. I am not sure why I created Fermina, except that I was somehow more comfortable writing to a person, albeit a fictional one, than writing to myself, or writing directly to the students. I also found that it was easier to write to someone with a similar background; someone who knew and understood me. But the audience for my field reports remained my students.

Students in the class were required to work in a placement setting with a subordinated group, to read and discuss theoretical readings on law and subordination, and to use the weekly field report to critically evaluate the placement, readings, and class. In this Article I expand on the proposition that field reports can be an effective mechanism for discussing the role of storytelling and for incorporating narratives into law.

While I am certainly not the first person to require student field reports, or journals, I believe that the introduction of a faculty field report proved to be an important innovation. In retrospect, perhaps the greatest value of the field report is that it provided a direct, personal dialogue with the students and the instructor. These field reports, or my "Letters to Fermina," form the core of this paper.

I. Context for the Letters to Fermina

Critical race theorists and the LatCrits believe that narratives are important in incorporating the voices of people who have traditionally been excluded from law and legal discourse. But you don't have to be a LatCrit theorist or postmodernist to understand the importance of narratives for subordinated communities. Storytelling and family folklore were certainly an important part of my experience and, perhaps, the experiences of most immigrants.

Like many members of previous generations, I was raised on popular rancheras (folk songs) and corridos (ballads) sung by Mexican singers like Pedro Infante, Jorge Negrete, Miguel Aceves Mejia; powerful romantic songs and ballads that recounted real or imagined stories of love, war, and included triumphs, tragedies, joys, and sorrows. The music and cultural representations were especially popular during the Golden Age of the Mexican Cinema in the late 1940s and 1950s. While some have dismissed this music as sexist, regressive, and politically incorrect, it was an integral part of my experience and biography and has undoubtedly shaped my conceptions of law, lawyering, and love. My mother was from the village of Sayula in the State of Jalisco, a region rich in this musical tradition, and I was exposed to this music at home. In fact, I have vivid memories of how my mother and her sisters Margara and Maria Luisa, my tias (aunts) would routinely sit around the living room and sing rancheras. My mother and Tia Lichio had good voices, but Tia Margara had an extraordinary voice. Everyone affectionately called them "Las Hermanas Gonzalez" ("The Gonzalez Sisters").

In addition to music, as a child growing up in Mexico City, I learned the importance of letters at a very early age. The song cited at the beginning of this article, "Carta a Eufemia" is a love ballad popularized by the legendary Mexican singer and film idol, Pedro Infante. The lyrics describe a series of unanswered letters that the author has sent to an ex-sweetheart named "Eufemia." In the song, the author pleads with Eufemia to answer his letters which have been returned unopened, and he asks plaintively, "Let's see if you will answer this one Eufemia."

My parents separated when I was six or seven. After the split, my two brothers (Alex and Hector Xavier) and I moved from our house in Tacuba in the northern part of Mexico City South to Tacubaya, a colonia or neighborhood, located near Chapultepec Park. In Tacubaya, we lived with my dad, Xavier, and with his mother, Ana Maria, or as we called her "Abilla," and my grandmother's mother, Carmela, or "Mama Mela."

When I was around eight my parents finally divorced and my father went to the United States as a bracero (temporary laborer). We lived with my grandmother and great grandmother, but were eventually enrolled in a military school in Queretaro, a city north of Mexico City. I will not dwell on the Queretaro experience, except to say that it was a school for orphaned and abandoned children and that my brothers and I were forced to grow up very rapidly. The point is that "letters," or cartas, became very real to me at an early age, and that letters are an integral part of the experiences of migrant or transplanted communities, even immigrants with little schooling. While interned in Queretaro, I would write and receive letters from my mother, grandmother, aunts, and other family members in Mexico City, and from my father. After a year or so in Queretaro, my dad brought us to the United States, and I continued to write letters to my mother,
grandmother, great grandmother and other relatives in Mexico.

I have vivid memories of the cheap airmail envelopes and the white lined paper which we bought at Kresge's Five and Ten. I liked the lined paper because it was hard for me to write in a straight line, and the lined paper made my letters look neater and my handwriting more legible. I recall that my father used to write on this very light and thin unlined, onionskin type of paper. I hated this paper because it was so thin and because it didn't have any lines. Even today it is both challenging and intimidating to face a blank sheet of unlined paper.

Many years later, while attending Stanford Law School and enrolling in what was called the "Lawyering for Social Change" ("LSC") curriculum developed by Gerald Lopez and other Stanford faculty, I came to rediscover, and to appreciate, the importance of narratives, stories, and letters. A basic premise of the LSC, and one which I have adopted, was that if lawyers are going to work with subordinated communities, they should know something about the cultural and societal experiences of subordinated groups. As students in the program we were exposed to a wide range of critical perspectives on race, class, and gender, as well as Law, Ethnic Studies, Feminist Studies, Sociology, Anthropology, Cultural Studies, and Literature. An important goal of the program was to make law less hierarchical, or "regnant" as Jerry Lopez called it, and to expose students to race and ethnic theories that could be used to empower clients and demystify law.

Students in the LSC were required to submit weekly field reports that were sort of like letters, "memos to file," or ethnographic field journals. n7 [*1352]

A. Background: The Class, Group Placements, and Field Reports

Over the past three years, I have been teaching a class at the University of California, Riverside that focuses on advocacy or lawyering with groups that generally do not have access to lawyers or legal services, such as the homeless, day laborers, and "at risk youth." Students in the class are introduced to theoretical readings on subordination, poverty law, and issues surrounding advocacy on behalf of subordinated groups. Students are required to read a wide array of articles and selections about subordinated groups, progressive lawyering, and lay advocacy.

The class is divided into "field groups" with a field supervisor. Each group is required to design a project where they are to serve as lay advocates for their group. For example, students represented at risk youth in suspension or expulsion hearings, put on "know your rights" workshops with homeless persons, and worked with Padres Unidos, a community based group seeking to end gang violence. A third component of the class is a series of videotaped simulation exercises where students present skits and devise "role plays" that address important issues in the class. Finally, students were required to submit a set of weekly "field reports," or "field notes" that was essentially a critical evaluation of the readings, the placement, and the class.

There were four field placements in the class, with each group consisting of three to five students. A recurrent problem in the class, however, is that because the time commitment for the course is incredibly demanding, there are a large number of students that subsequently dropped the class. As a result, one group may be left with only one or two members. The four groups in this particular class were the homeless, day laborers, at-risk youth of color, and an after-school tutoring program for low income, mostly Latina/o children at the Centro de Aztlan.

In the case of the homeless project, we have been very fortunate to have a homeless man, Gary Bilko, n8 serve as the field supervisor. [*1353] Gary is a West Indian, highly educated, organic intellectual who has a master's degree from the London School of Economics. He wears dread locks and does recycling around campus. Gary meets with the students outside of class, takes them into the field, and attends all of the classes. He knows a lot and was well aware of the many complex issues in the homeless community. The mayor is seeking to make Riverside a "worldclass city" and has pushed to clear homeless people out of downtown.

The supervisor for the day laborers group is Sal Tovar, a local community organizer who works for a nonprofit agency in Casa Blanca. n9 He is very knowledgeable about the day laborers and other issues in the community, but he does not go out into the field with the group. Mr. Tovar is an important resource. He is someone that the students can consult with on various issues, although he does not work directly on the projects. Barrio residents complain that the day laborers are a public nuisance because they urinate in public and make inappropriate remarks and gestures to young women as they walk to school or to local stores.

The third group was to work with at risk, largely minority youth at North High School, which is on the East Side and is predominately Black and Latino. Their field supervisor is Enrique Lopez. Mr. Lopez was my student at one point and is now a teacher at Ganesha High School in Pomona. He also teaches Chicano history at several local colleges in the area.
The last group was assigned to work in an after school tutoring program at the Centro de Aztlán in Lincoln Park on Riverside's East Side. The supervisor for this group is Ricardo Gonzalez. He is an ex-Chicano activist from the Chicano movement, and former member of the Brown Berets; a paramilitary group that did a lot to end gang violence and promote inter-and intra-barrio unity in the 1960s. Ricardo recognized the need for youth services in the community such as after school tutoring, nutrition, art, sports and recreation. There was a small abandoned building at Lincoln Park, a park that pushers and drug addicts had essentially taken over. He made a deal with the City promising to clean up the park and provide services for the local youth, if the city would lease the abandoned building for one dollar per year. Ricardo has been very successful in getting the program off the ground, but it has been a financial struggle to keep the Centro going. He has invested a lot of his own money into the program and has only been able to survive with volunteers from local colleges and universities. One problem that we have had in the past is that he essentially wants people to tutor and seems less interested in know your rights workshops and other projects that have been proposed. The basic problem for the Centro is funding. In the past, students in the placement have helped to prepare grants and advocacy for the program.

As in the LSC, I required students in my class to submit field reports on their placement. A significant innovation in this class, however, is that I also wrote a weekly field report which took the form of letters to Fermina Gabriel. Before presenting the field reports, a few caveats are in order. First, the field reports do not conform to the traditional law review format, with the standard structure and organization. Because of space constraints, I have edited and condensed the reports, and have omitted over half of the field reports. However, I have attempted to preserve them in their original form. Because I did not know that I would be writing a law review article at the time that I wrote them, they may appear on the surface to be anecdotal, unfocused, and lacking obvious transitions from one section to the next. However, as the quarter progressed, common themes and issues emerged. I discuss these common themes, issues, and implications for progressive lawyering and advocacy more fully in the conclusion of this article.

In a very real sense, the field reports are ethnographic data because they represent my uncensored response to the class and the readings, as the events transpired. If at times I appear confused, depressed, or frustrated, it is because I probably was confused, r ethnomethodological field notes. 

II. Field Reports

January 27, 1999 Field Report #1 Querida Fermina: n10

I guess it has been around six weeks or so since I wrote to you. Rather than apologizing for not writing, I would like to tell you how much I have missed writing to you. There has been a definite void in my life.

I am teaching Law and Subordination. I have a nice, talented, energetic and diverse group of students, but I would be less than honest if I didn't tell you that the class has frustrated me. I guess what has frustrated me most is the changing membership in the class. It has been sort of a musical chairs game. I showed up the first day and I think there were about thirty-five people in the class and others that wanted to add. The problem stems from the fact that there was no cap on the number of students.

Well, you know how this class is structured. It is like the courses that Jerry Lopez taught at Stanford in the LSC curriculum. You can't teach it effectively if you have more than fifteen to eighteen students. Anyway, after my "no more Mr. nice guy" speech, we had a lot of drops, which is good, but what frustrates the heck out of me is that we are in the third week and I still don't know who is in the class. It seemed like I was on Candid Camera, or part of some experiment in the Psychology Department. Every time I would show up for class, it was a different group and I had to begin to explain to the new people what the class was about. This makes it very difficult to set up the field placements and to develop a rhythm in the class. A second thing that I find frustrating is that I can't seem to get people to read the material. I know that some students will always read and others will probably never read, but I expect most people to read most of the time. There is nothing more frustrating than asking a question, looking into a sea of blank faces, and then answering your own question. I felt that way last week. We just did not have a significant core of people that had done the reading. This week was much better, but there is still something missing and I can't put my finger on it.

I hate it when I have to get punitive in order to get people to do what they are supposed to do. I guess I assume that students are adults and that if you have an assignment, they are going to do it, but that may be naive on my part. The basic problem, I think, is the volume of reading. It is definitely a lot of reading.

Another concern is that I sense that some of the people in the class may be lacking ganas (passion). You know we are reading these great articles and trying to do something that is pretty innovative, and some people seem unfazed by the whole thing. I sometimes feel like
the class is something that is being done to them, rather than something that they are doing. I just wish that there were more enthusiasm, more spark, more fire, more passion. Yes, I want passion! I need it to keep going.

Do you think I am being unfair? Are my expectations unrealistic? Am I expecting them to act like graduate students? They are, after all, undergraduate prelaw students. I thought about it, and I don't think I am expecting too much because I have set the same standard before and people have met it. Let me give you an example. The other day we were talking about the frustration that comes from feeling that you are being exploitative with the various groups because you come in, use the group for your purposes, and then the quarter ends and you are gone. I asked what can you do? One of the students, Sabita, who has not talked much, paused thoughtfully and said, "you get them so that they can do things for themselves," or words to that effect. This was such a simple answer, but the most profound answers are often that simple. n11 I thought it [*1357] really was a great answer that kind of integrated a lot of the stuff that we have been reading about in Jerry Lopez's book Rebellious Lawyering.

Mujer, I apologize for going on like this. I feel a little bit guilty complaining about the class like this. I appreciate your sympathetic ear. Do you think I should share my feelings with the students? Or, should I just keep quiet and pretend that everything is okay? Should I pretend that it doesn't bother me?

In fairness to the class, there have been some very positive things that have occurred. Last Thursday, I felt like we had a great class. A couple of the groups presented skits and it really was wonderful. The education group did a skit where they had one of the students explaining the project to a principal. In the interim, one of the students was acting up and would not take off his beanie so he was sent to the principal's office by the teacher. It was really well thought out and impressive. I guess what was most significant is that the class as a whole seemed to really understand the purpose of the role-play.

I was also impressed with the background work that the day laborer group had done. One student pretended to be a day laborer. He called several agencies, got a very negative response, and learned very quickly that nobody in this area is serving this group. The group finally met with their supervisor, Sal Tovar. I was glad. I also believe that they are just going to have to break the ice and go and talk to the day laborers themselves.

Gary has done an excellent job of orienting the homeless group. The students shared that they had gone out into the field with Gary and talked with some homeless people. I think the hardest thing in anything is getting started. Don't you?

Patti is the last survivor in the Centro de Aztlan. She seems to be very motivated and so I think she will be able to manage by herself. She told me that Ricardo, her supervisor, has asked her to attend some meeting on funding and that she will have to miss class. Funding has always been a problem for the Centro. You know as I write this, I am reflecting and I am thinking that what we are doing is pretty amazing. What we are doing is attempting to integrate theory and practice in working with subordinated communities. Unfortunately, people usually dichotomize theory and practice. Most of the university courses are theoretical and the internships tend to be devoid of theory. I don't believe you can be effective in [*1358] practice without theory, and I don't think that you can have valid theories without relating them to practice.

Querida Vida ["Dear Life"]

We read the piece by Renato Rosaldo about the Ilongots, a group in the Philippines that practices ritualized headhunting as a response to bereavement. n12 I guess we are understanding these pieces intellectually but I wonder whether we are experiencing them emotively. Rosaldo had studied the Ilongots over a period of fifteen years, but he felt like he did not really begin to understand the cultural practice of headhunting until his wife fell down a precipice into a swollen river and drowned. n13 It wasn't until he felt the rage over this inexplicable loss that he could begin to really understand and to write about the Ilongots and bereavement.

My mother died on Christmas Eve. It was very strange, eerie. We were celebrating la Noche Buena at my house. There were about thirty people and we were all having a great time when I got a phone call from my brother, Gustavo, in Mexico. n14 I knew what he was going to say before he said it. He told me very calmly that it was okay because she was not suffering any more, or words to that effect. I hung up. I felt very calm. My only response in the midst of the celebration was to go outside and to walk. Yes, I walked. I never cried. I have yet to cry. I also did not cry when my brother Hector died from an aneurysm several years ago. I think that I fear that if I start crying I will never stop. It would be like opening up an infinite stream of tears.

Anyway, I relate to the headhunter piece in a very personal, visceral way. I can feel the pain and inexplicable rage that emerges in response to bereavement. Yesterday morning as I was driving
toward the University I was overwhelmed by the weather. As I looked over the beautiful snow capped mountains and the stunning beauty of the Inland Valley, I was overwhelmed by feelings of fullness andemptiness. It was like nothing existed except for the snow capped mountains, my mother, and I. The mountains reminded me of the snow capped volcanoes in Mexico, El Popo y La Ixta.

You know the legend about the volcanes. It was kind of a Romeo and Juliette story where the Aztec warrior went off to war and returned to find that his sweetheart had died. She had gotten the news that he had been killed in battle and she died of a broken heart. She now lays in the figure of the sleeping woman; El Popo stands guarding his dead lover (La Ixta). I remember how much my brother, Hector, loved going up to the volcanes and how he always wanted to have his ashes dropped over El Popo. Well, he got his wish. My half-brother, Gustavo, is a pilot and he flew over the volcano and dropped Hector’s ashes from the plane. I now think of my brother as El Popo, but he is mourning my fallen mother, and he is weeping. But he is weeping shouts of joy. He is shouting in celebration of my mother’s life and the passion with which she lived every single minute of her life.

February 8, 1999 Field Report #2 Querida Fermina:

I hope you received my first field report. The student response was interesting but generally indeterminate. I guess I am not sure that my purpose or goal was clear to the students. n15 Perhaps I should have gone into some of the background on Critical Race Theory and how critical race theorists advocate the use of narratives in law. We read one of the pieces from Derrick Bell’s Civil Rights Chronicles, and discussed it in the class. You know how Jerry Lopez used to talk about how law really is all about telling stories and the person that prevails is the one that tells the best or most convincing story? Good lawyers are good storytellers. In fact, the Constitution, The Declaration of Independence, The Bill of Rights, and the American ideals of freedom and equality constitute a story of sorts; un cuento, an American folk tale. I think the most interesting response to the field report was from my daughter, Lucia, but before [*1360] going into her response I wanted to share something that happened to me this weekend. I wanted to share my solitude.

SOLEDAD n16

I am in the Wine Country for the weekend. It has rained all night on Friday and continued raining throughout Saturday. It is Saturday afternoon. I am driving from Napa to an unnamed winery in St. Helena on Highway 29. It is pouring; visibility is poor. The surrounding hills are barely visible through the dark fog. My car is gliding, hydroplaning above the surface of the road. I am at once oblivious to everything around me and, at the same time, aware of everything around me. I guess I am oblivious to the ordinary, and very aware of the extraordinary; aware of the things I would normally miss. It is like I am seeing everything for the first time; the rain as it splatters against the windshield of my car, the road, the grass, the hills. I lose all sense of space, time, and place; all sense of ordinary purpose. It is like the twilight zone. I am driving on the road to nowhere, the road to everywhere. My mother is ever present. I don't see her or touch her. I feel her. It is like an out of body experience. My senses are incredible. I am seeing everything for the first time. Time stands still. I am on automatic. I am on a road with no beginning or end. My car floats above the water and appears to be self-propelled.

You are with me, Soledad. You saturate my every pore. We are one. I love Soledad. She calms me, comforts me, nourishes me. I don't feel alienated, angry, or sad. For me, la soledad is a calm, knowing, separation from the other, a reflective, pensive, separation. It is a separation that is accompanied by a sense of peace and regeneration; a sense of self-cleansing or purification. I love the sense of life as a complex labyrinth of solitude. n17 I am glad that you found me, Soledad. We are together at last. We are alone. [*1361]

LUCIA

Lucia, my twenty-year-old daughter, a student at San Francisco State, is one of the joys in my life. It is incredibly exciting to see her blossom and mature into a strong, independent, courageous woman. Even as a little girl, she always had this knack for asking the hard questions; the unaskable. You know how sometimes the simple questions are the really hard ones to answer. I remember I took her to my class once when she was around seven or eight. I showed a video on gangs and asked for questions after the video. The students sat there and Lucia raised her hand and asked an incredible question.

Anyway, I took the liberty of sharing my first field report with Lucia. She enjoyed reading the field report. Lucia asked me why or how it was that I felt comfortable sharing stuff that is really personal and intimate with a bunch of strangers when I didn't share things openly with people that I was close to, like my family and children. I know that I am biased, but don't you think this is an incredible question? She really liked reading about my mother, and my brother. She said, "you know, I knew that Uncle Hector loved the volcanoes but I never knew that his ashes were dropped over them."
I guess we always assume that we are more willing to share intimate things with people that we are close to, but I am not sure this is always true. There is something liberating and safe about the anonymity and protection that comes from talking to a stranger. People will sit next to a complete stranger on an airplane and reveal their most intimate secrets. There is something very safe and comforting in knowing that you are never going to see this person again. I remember talking to Murray Straus, an expert on domestic violence, who preferred to conduct "telephone interviews" because he felt that people will open up to an interviewer more on the phone than in person. This is true even on something personal like domestic violence.

RELEVANCE

I think this topic is very relevant for the class. One sense in which it is relevant is that in the various placements we have to go into the field, make contact with strangers, and ask them questions [*1362] that may appear intrusive. I think that we empathize with the homeless, with the day laborers, and with at risk youth. But if we view the placements as an opportunity to listen, to really listen, and to try to understand, and to help someone with their daily problems, we might be surprised to learn not only that people will talk but that they want to speak, and to be heard.

A question that we have been dealing with across various readings is how one relates to the "other." This was demonstrated dramatically in the headhunters' selection. How do we come to understand the experiences of the other who is culturally, linguistically, and experientially, very different from us? One of the students working with the homeless, mentioned that a homeless man actually invited, or challenged her to be homeless, if she wanted to "really understand the homeless experience." She declined. Would Rosaldo have to experience headhunting before he could understand the Ilongots? Would you have to kill before you could understand the psyche of a mass murderer? One Mexican sociologist did this with his dissertation. He actually made the journey across the border and pretended to be undocumented. But you know what, he knew that he wasn't undocumented and so I question whether he really ever experienced the same things as those who are undocumented and have no choice about it.

Critical race theorists maintain that literature and fiction are ways that we can transcend ordinary reality and relate and understand the other. If you read someone who wrote in a different time and place, in a different language, and in a different culture, and feel like you understand, you are relating to the other and transcending time, space, and place.

February 19, 1999 Field Report #3 Querida Fermina:

ALFREDO'S JUNGLE CRUISE

I had this strange dream last night. n18 I felt like I was at an amusement, or theme, park. The setting is something like Disney [*1363] land, but it is an amusement park for educated, progressive folks. We are inside one of those open, windowless busses so that the passengers will have a good view of the scenery; more of a tram or jeep than a bus. There is an air of excitement and adventure. Students are getting on the bus, and my compadre, Enrique Lopez is collecting tickets as the passengers board. Enrique is wearing khaki shorts with a lot of pockets and a Hawaiian shirt. The bus driver is Jerry Lopez. I am the tour guide. I am standing at the front of the bus with a microphone. I have a beard and a pith hat. I am wearing white pants and a Hawaiian shirt and sunglasses. Jerry starts the bus and we begin our journey through the jungle. I click on the microphone and begin my customary welcome. I introduce Jerry and Enrique and explain the purpose of the excursion.

I begin by noting that this is a new theme park that opened two years ago. The idea behind the theme park is to combine education and entertainment. It is an opportunity for progressive people who are interested in subordination to have a hands-on experience with subordinated people. The idea is to go beyond traditional academic approaches to subordination. Jerry and I will serve as guides through the theme park and Enrique will provide support.

We begin with some admonitions and rules. First, no eating is permitted on the bus. There are two reasons for this rule. The first is that we don't have time to clean up after everyone and people tend to really mess up the bus; the second, that we have had problems in the past with unauthorized and unsanitary feedings of the various subordinated groups and we want to avoid any possible litigation that might result from improper, unauthorized feedings. We have posted signs throughout, warning people not to feed the underclass. We don't really like this rule, but it is a condition that our insurance carrier and University's Human Subjects Committee has imposed. However, at the various stops along the tour, Enrique will be selling official sanitized subordination tour snacks which have been inspected and certified by the Riverside County Health Department and are guaranteed not to injure the underclass. There will be approved feedings at various locations.

Cameras and video recordings are strictly forbidden. We have found through past experience that the various subordinated groups are often frightened by the cameras and video equipment. [*1364] I admonished
the passengers that talking to the underclass is permitted, but any kind of touching is strictly forbidden! I add: "For those of you who wish to be protected against the flu or other diseases, Enrique will be coming down the aisle with special breathing masks and rubber gloves which we provide at no cost so that you will be able to be exposed to the various subordinated groups without any risk of exposure or contagion."

Our first stop is the homeless compound. The compound is near the Santa Anna River bottom. It was built by donations from various benefactors, and from a grant by the City. It is part of the Mayor's plan to turn Riverside into a world-class city without any homeless people. By putting the homeless in a fenced, and safe facility away from downtown businesses and patrons, the city hopes to attract new business and tourists to the downtown area. The city provides special free trams to the homeless which they can take to the reserve. One clever twist on the idea is that the busses are all one way. In other words, they take the homeless to the reserve but not away from it.

As we approach the Santa Anna River Bottom Homeless Reserve, we begin to see groups of homeless people in the horizon. They stare curiously at us and wave, reluctantly at the bus. I announce that we will be circling the reserve but that it is too dangerous to stop. I also announce that waving to the homeless is allowed. But I also issue a reminder that feeding of the homeless is only permitted at approved feeding stations.

After circling the reserve for several minutes. Jerry Lopez stops the tram. We have arrived at the official feeding station. It is here that we will have our first field experience with the homeless. We will be allowed to talk to them for thirty minutes but only at the official feeding station. Before going into the feeding station, Jerry stands up to stretch his legs and to address the passengers. Jerry gives a brief, animated rap which he calls, I'll Tell You What's Pathological. He talks about the underclass debate and his critique of Bill Wilson. n19 Jerry asks that we observe and that we take careful field notes. At the end of the session, we are to write a field report and [*1365] discuss the implications of the pathological model for the study of the underclass.

We leave the homeless reserve and move down Jurupa Avenue to Magnolia Avenue. The tram heads down Magnolia, turns left on Madison Street and heads toward Casa Blanca. Our next stop is with the day laborer subordination compound in the Casa Blanca barrio. But before encountering the day laborers we make our official lunch stop at the In-N-Out Burger place at the corner of Madison and Indiana. The plan is to park the tram at the Home Depot parking lot, walk across the street to the In-N-Out and then to walk to the day laborer station that has been erected at Madison and Lincoln. With a surplus from the Orange Festival, and with money donated by Home Depot and a redevelopment grant, the City has purchased a larger tract of land and two portable trailers at the corner of Madison and Lincoln. Day workers are permitted to roam freely throughout the facility. State of the art "Porta Potties" have been installed to handle the problem of workers urinating on the sidewalk. A large barbwire fence has been erected around the laborer compound and armed security are posted at the gates. To encourage contact between ordinary citizens and the alien population, the new director of the day laborer compound has organized hourly tours of the facility. The idea is to engender a fun, carnival sort of atmosphere. To promote better understanding of "illegal immigrants," there are weekly showings of a videotape, produced by U.C. Riverside students, on the contributions that undocumented workers have made to the Inland Empire and the American economy. One of the most popular attractions is a dunking booth where local residents who have a lot of pent up anger and hostility toward the "wetbacks" are allowed to "dunk a mojado." Proceeds are used to support the facility. For a dollar each patron gets three baseballs and three chances to hit the designated target. The workers sit on a bench above a water tank, make faces and obscene gestures at the patrons, and dare them to dunk them. Once the patron hits the target the worker is dropped into the water tank . . . .

I wake up!! It was all a bad dream. I drink a cup of Sleepy Time tea and I go back to my warm bed. [*1366]

March 3, 1999 Field Report #4 Querida Fermina:

I feel like I need to open up more with the class and let them know how I am feeling. I also hope that the comments are taken in the way that they are intended, not as criticisms, but as constructive reflections.

LAWYERS, LAKERS, SLACKERS, AND ORGANIZERS

I have ambivalent feelings about our class. Sometimes I have felt really good, but often I have felt like we are falling short of our goal. Okay, at the risk of being unpopular, I am going to lay it out on the line. Lately, I have been feeling like the Dell Harris [ex-Lakers coach] of Law and Subordination. I have been feeling like if this was a basketball team and I was the coach, say of the Lakers, I would have been fired at mid-season.

I know what you're thinking! You're probably thinking, "Dang, Alfredo, relax, wake up and smell the roses, man, it's only a class. It will be over soon. Don't
procrastinated writing concluding comments because I
through me when I'm not. The truth is that I have
some sort of summary or conclusion of my field
the time or space to go much into the move. It will
at Texas Tech Law School. Unfortunately, I don't have
much has happened that I don't know where to begin.
Mujer, it has been so long since I have written and so
September 1, 1999 Field Report #5 Querida Fermina:

Perhaps I am feeling depressed because this is
probably one of the most diverse, exciting, talented,
and likable groups of young people that I have had the
pleasure of working with. I care about them. I really do
care. I may not show it, but I have developed a real
sense of carino (love). n20 I know they have the
talent, and they certainly have the energy and
enthusiasm, but I think that we are short on effort, or
ganas (desire). That's why I feel like I should be fired.
If you have the talent and you are not winning, it's the
coach's fault. Right? Let's get Curt Rambus to teach
Law and Subordination. Maybe we need a team player
who does the things [*1367] that are necessary to get
the job done, like rebounding and passing, without
getting a lot of the glory.

This group is a lively, uninhibited, talkative group.
But what really concerns me is that some of the
students, are not doing the reading. People are also
missing too many classes. It's really a drag to have this
conversation with one or two people in the class. It is
also a drag to have discussions that are not so much
wrong headed as they are uninformed. n21 What I
mean is that people may be making valid points but all
too often they are not drawing on the reading. They are
saying more or less the kinds of things that you would
say if you hadn't been exposed to the material. I don't
expect students to memorize the stuff, or to even agree
with it, but I do expect them to be familiar with it. Is
this expecting too much?

September 1, 1999 Field Report #5 Querida Fermina:
Mujer, it has been so long since I have written and so
much has happened that I don't know where to begin.
As you know, I have moved to Texas and am teaching
at Texas Tech Law School. Unfortunately, I don't have
the time or space to go much into the move. It will
have to wait. My task is more focused. I need to write
some sort of summary or conclusion of my field
reports. I'll be honest, since I know that you can see
through me when I'm not. The truth is that I have
procrastinated writing concluding comments because I
wasn't sure that I should. I think I feared that it might
spoil it for the reader by suggesting that this is what
you "should have gotten" out of the field notes. As you
know, there is no correct interpretation. Each person
will see something different, or as my mother use to
say in wonderment, cada cabeza es un mundo ("each
head is a world onto itself").

On the other hand, I thought it might be important to
share some of the things that struck me about the experience. In the beginning my goal was simple and,
largely, selfish. My goal was simply to provide an
outlet for commenting on the readings, the placements,
and the class as a whole with my students. Often, I
would find myself pondering questions or issues after
class, and I [*1368] would have no outlet for their
expression. I tried the field report once and I liked it.
And the more I wrote the more I began to see themes
across the field notes and to gain insights into the
issues that were being addressed. I decided to continue
because it gave me a sense of continuity and closure
and because the exercise was intellectually stimulating.
In addition, students (and you) have mentioned that my
field reports were creative and funny; that they made
the students think about issues that they had not
considered, and that the field reports generally served
as a stimulus for the class.

FINAL THOUGHTS

One important result of the field reports, and part of
my motivation in writing them, was that they served to
model the behavior that I was seeking to elicit from the
students. When I first introduced the assignment, a
common response from the students was to ask, "What
do you want?" or "What exactly are you looking for?"
I provided examples of past field reports that I had
written or anonymous reports my classmates had
written in the LSC. However, I stressed that while I
was looking for them to critically evaluate the
placements and readings, beyond that requirement, the
field reports were only limited by their imagination. I
also stressed that each one of us was different and that
I did not expect them to emulate my field reports or the
reports of my classmates.

Over time I found that most of the students did get
into the exercise and a number of them produced very
innovative and insightful field reports. Several began
to address issues and conflicts in the placement. Some
of the students in the homeless group, for example, felt
that Gary was a great resource and very helpful, but
they felt that his vision of the various projects was too
ambitious and could not possibly be accomplished
during the class. Gary was interested in things like
taking over abandoned buildings for use by the
homeless.

A constant theme in the field reports, and the class,
was how one relates to the "other," particularly when
one is working with subordinated communities that are
socially, economically, and culturally distinct. How do
middle-class folks who are well fed, clothed, and have
food and shelter relate to the homeless? How does one
come [*1369] to understand and appreciate not
having the things that most of us take for granted like
you next meal, a shower, or having a bed to sleep on? How do middle-class people, including middle-class Latinos, relate to the plight of Central American day laborers who are indigenous, limited English speakers, and exploited by U.S. born residents who think of them as mojados (wetbacks) who are somehow not part of the community? How does one relate to a group that accepts ritualized headhunting as a cultural practice?

Another theme that emerged is bereavement and what Rosaldo terms the "cultural force of emotions." I use the selection by Rosaldo because I believe that he does an excellent job of addressing the difficulties in trying to relate or to understand the other, especially when the other is culturally and linguistically different from us. You will recall that Rosaldo is critical of the tendency of anthropologists to equate insight with social elaboration so that we come to think that explanations are somehow better if they are "thicker"; more complex and elaborate. But Rosaldo found that sometimes the simplest of explanations can be incredibly profound or pithy, and that, at other times, elaborate explanations, like Rosaldo's early theories on headhunting, are simply wrong. I think a lot of my daughter Lucia's insights, and the insights of children in general, stem from their profound simplicity. Rosaldo noted:

If you ask an older Ilongot man of northern Luzon, Philippines, why he cuts off human heads, his answer is brief, and one on which no anthropologist can readily elaborate: He says that rage, born of grief, impels him to kill his fellow human beings. He claims that he needs a place "to carry his anger." The act of severing and tossing away the victim's head enables him, he says, to vent, and, he hopes, throw away the anger of his bereavement . . . . To him, grief, rage, and headhunting go together in a self-evident manner. Either you understand or you don't. n22

The discussion of the Ilongots and the cultural practice of headhunting raises some interesting ethical dilemmas for progressive lawyers and lay advocates. During the discussion of the Rosaldo piece a number of students expressed shock and abhorrence at the practice of headhunting. They recognized that the Ilongots were subordinated by the larger society and victimized by modernization and urbanization, which threatened their traditional way of life. For example, the central government had outlawed the cultural practice of headhunting. On the other hand, students found headhunting to be a primitive, abhorrent, and morally objectionable practice. They also pointed out that the Ilongots were themselves subordinating their victims. This lead to a general discussion of dilemmas faced by progressive lawyers and lay advocates who are morally and ethically at odds with the values or morals of their clients. Another persistent theme in the field notes is the centrality of family and biography in shaping our conceptions of justice, law and subordination. My conceptions of equality, subordination, and social justice were shaped at an early age. My dad was big on promoting family pride. He made us feel connected to him, and to each other, in a carnal, visceral way. He taught us to believe that being a Mirande was a privilege. The Mirandes were like a chosen people that were somehow genetically, morally, and spiritually blessed. Being a Mirande was very special and everything that you did in your life somehow reflected on a long, illustrious, line of Mirandes. But, because we were privileged, we had a moral obligation or responsibility to help people who were less fortunate; to help the poor, the downtrodden, defenseless persons, the meek, the less fortunate, the oppressed.

By the way, I read an article recently, The Facts of Fatherhood by Thomas W. Laqueur which reminded me of my father and the ideology of patriarchy. n23 I don't know if you know the article. It's all about how fatherhood is socially constructed. Men can feel a special link to children because of "work." When Laqueur was asked to be a sperm donor, he was flattered, but he felt linked to the embryo and, potentially, the child socially and, I think, morally. I was raised with the idea that I was linked to my father, and to the line of Mirandes not only socially, culturally, and familiarly, but mostly genetically. n24 In Spanish, we have terms like "astilla del mismo palo," which is like "a chip of the old block." However, in Spanish it is a sexual metaphor with a direct sexual connotation. Laqueur's piece made me think about how fatherhood and patriarchal ideologies, like our conceptions of motherhood, are socially constructed. This is weird, but I feel much more genetically connected or bonded to my father than to my mother, and I don't think it is just because I am a man. Counter to what Julia Chodorow n25 and Sandra Harding n26 suggest, I think under patriarchy, men are socially constructed to feel biologically linked to their fathers, and socially and morally linked to their mothers. How do you feel about this? Do you feel more genetically linked to your mother or to your father? I suspect that the same thing happens to women. I suspect, in other words, that under patriarchy, the socially constructed importance of men transcends, or trumps, sex differences so that daughters are also socialized to feel genetically bonded to their fathers. Perhaps there are cultural differences here, or am I wrong about all this? Let me know, if I'm wrong.

Another issue is the tendency of lawyers, legal scholars, and the public at large to neglect or minimize the internal diversity within subordinated groups.
recent years, for example, the term "Hispanic" has grown in popularity to refer to a racial, cultural, and linguistic collection of persons representing more than thirty countries. n27 The field placement working with the day laborers in Casa Blanca brought to the surface a number of internal differences and conflicts among Hispanics. Because Casa Blanca is composed largely of second, third, and fourth generation United States Mexicans, rather than recent immigrants, and because many of the residents are working-class folks with regular jobs, the Mexican and Central Americans, especially those that are indigenous, are not readily welcomed in the community. Some residents see them as "mojados" or "wetbacks" who give the community a bad name within the larger Riverside community. While many of the [*1372] community leaders, like Mr. Tovar and the CAG leadership, welcomed the students and supported their work with the day laborers, some community residents viewed us as naive and misguided outsiders, if not agents of the city power structure. The students learned very quickly that being Hispanic does not guarantee entry into the community or the day laborer group. In fact, there was a sense that by working with the day laborers, we were perceived as working against the interests of long-term community residents.

We also discovered internal division among the homeless. An important distinction was made between the "recyclers" (working) and the "nonrecyclers" (nonworking) homeless. Recyclers, like Gary, took a lot of pride in the fact they worked for a living and were not dependent on "hand outs" from the city or local churches. They would spend the day collecting cans, and would take the cans to a recycling center on the East Side of Riverside. The money that they earned was then used to buy food and other necessities. In talking to the recyclers, it was clear that they considered themselves more respectable and deserving, because they were self-supporting and working to clean up the environment. They felt that other homeless who did not work, especially those that practiced panhandling, gave all homeless people a bad name. Another distinct group of homeless were those who were drug addicts, released mental patients, and winos. A final distinction was made between the homeless who owned a vehicle and were able to sleep in the vehicle and those who did not. I met one highly educated, homeless person. She confided that because she owned a van, she was at the top of the homeless hierarchy. This person eventually purchased an auto home and, although it needed some mechanical work, she lived comfortably in it.

A final issue that arose in the class that has significant implications for rebellious lawyering and advocacy on behalf of subordinated groups centered around "voice," representation, and authenticity. For some time now, critical race theorists, and more recently LatCrit scholars, have been arguing not only that subordinated groups have been excluded from law and legal discourse but that such groups have a unique voice and perspective that the law needs to incorporate. Narrative is a mechanism for attempting to incorporate the voices of the excluded into law. [*1373]

The book Love and Theft: Blackface Minstrelsy and the American Working Class, n28 examines how during the nineteenth century and well into the twentieth, white minstrels would paint their faces black to play "Black" characters in musicals and theatrical productions throughout the United States. One of the most ironic aspects of this phenomenon is that the Black players were generally played by liberal, abolitionist whites who were opposed to slavery and sought to assume Black masks in order to expose the evils and inhumanity of slavery and to tell the story of the Black experience.

The phenomenon of well meaning and sympathetic whites representing the interests of Blacks continued and was extended to other areas, including law. Judge Wyzanski grasped the incongruity of having whites continuing to speak for nonwhites in his classic opinion that concluded that

To leave non-whites at the mercy of whites in the presentation of non-white claims which are admittedly adverse to the whites would be mockery of democracy. Suppression, intentional or otherwise, of the presentation of non-white claims cannot be tolerated in our society. . . . In presenting non-white issues non-whites cannot, against their will be relegated to white spokesmen, mimicking black men. The day of the minstrel show is over. n29

The more narrow, and difficult, question addressed in this paper is the question of cross-representation, or advocacy on behalf of one subordinated group by liberal and well-meaning members of other subordinated groups. For example, the fictional character, Dan Abrams, in Lopez's book, Rebellious Lawyering appears "sympathetic," liberal, and committed to help, non-whites. However, a careful reading of this piece suggests that he views non-whites in a narrow, subtly condescending, and stereotypical manner. In the beginning, Dan appears to admire and idolize (and stereotype), Etta, the Black lesbian, community activist. The problem is that he thinks so highly of Etta and has expectations of her that are so unrealistic that she is destined to fail. In short, by setting the bar so high, Dan inadvertently sets up a situation where Etta is bound to fall short of the mark. Despite having good intentions and being a progressive lawyer who opted to work with the poor
rather than accepting a more lucrative position in a law firm, Dan is limited in his ability to understand or appreciate the experience of the predominantly low-income Black, Latino, and Asian residents of Rosario. Dan is, in a sense, like Renato Rosaldo who, prior to the untimely death of his wife, also failed to understand or appreciate headhunting from the perspective of the Ilongots, and sought to make their experience fit his preconceived theories.

The point here is simply that one subordinated group is no more capable of speaking for or articulating the voices of other subordinated groups than whites. Don't misunderstand. I am not suggesting that it is not important to develop coalitions between subordinated groups, or that you can never understand the other. It is important for Latinos to work with Blacks, Indians, and Asians, and for people of color to work with gays, lesbians, and white feminists. However, if the day of the minstrel show is indeed over, we must refrain from incorporating the distinct voices of other groups or essentializing their experiences.

Conclusion

This Article addresses an important and neglected area within contemporary legal education, the preparation of students who seek to work for social change with subordinated communities that have historically not had access to lawyers or lay advocates. Specifically, it is a critical tool for preparing students to work with subordinated groups.

One of the unanticipated consequences of doing the field reports is that they emerged not only as an effective and innovative mechanism for interacting with students but as a way of showing how biography and narratives can be incorporated into work with subordinated groups. Through the field reports, the students were able to reflect on the class readings and the field placements, to consider how their background and experiences might affect their work with subordinated groups, to gain a glimpse into my background and family experiences and, hopefully, begin to understand how biography shapes one's conceptions of law, lawyering, and subordination. A recurrent theme that emerged during the [*1375] class was the role of narrative in relating to the "other," especially when the other is someone different socially, culturally, and economically.

FOOTNOTE-1:

n1 See Derrick A. Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987); Richard Delgado, The Chronicles of Rodrigo (1997).


n3 Id. at 305.


n5 I recall, for example, that I started "dating" at age eight, and that I would actually go to the movies by myself with a girl at this age. It seems pretty amazing as I look back on it.


n7 I have to admit that the field reports were incredibly therapeutic. The LSC classes and the field notes became my way of dealing with the alienation and estrangement that I experienced in law school; a way of retaining my sense of self and separation from the psychological stripping process that occurs during professional socialization as one is taught to "think like a lawyer" and to abandon any sense of virtue or commitment to civil rights or to programs for social change on behalf of subordinated groups. For a discussion of this process, see Scott Turow, One L (1977), and Duncan Kennedy, Legal Education as Training for Hierarchy, in David Kairys, The Politics of Law 40-61 (1982).

n8 The names have been changed to preserve the anonymity of the parties.

n9 Casa Blanca and the East Side are the two principle barrios in Riverside. Both are low income communities that have been historically oppressed and subordinated. While Casa Blanca is over ninety percent Latino, the East Side also has a substantial African American population.

n10 I should mention that this person is fictional. She is a composite of a number of very real women that I have known. She is sort of "Super Chicana." Fermina was born in the barrio of South Colton. Her father was an orange picker and later
worked at the cement plant in Colton. After graduating second in her class at Colton High School she attended Valley Community College for two years and then went on a scholarship to the University of California at Santa Cruz. The person who graduated first, Ross Kingsley, is selling insurance in Berkeley and has apparently been very successful at it. After working for the farm workers in Delano she entered the joint J.D. and Ph.D Program in sociology at Stanford. After graduating from Stanford she worked for the MILAGRO Immigration Clinic in Watsonville. She teaches part time at U.C. Santa Cruz in the History of Consciousness Program. Oddly enough, her real passion is literature. She just published her first novel and is working on a collection of poems and short stories. On the weekends, Fermina participates in a folklorico group and she occasionally sings at El Sombrero Restaurant in Watsonville. She looks great in her black Charra outfit. Fermina loves to ride horses and is a charter member of the Lienzo Charro del Norte, and was on the Olympic Equestrian Team in Atlanta.

n11 Renato Rosaldo, for example, is critical of the tendency in anthropology to assume that the deepest cultural explanations are also necessarily the most elaborate, noting: "My effort to show the force of a simple statement taken literally goes against anthropology's classic norms, which prefer to explicate culture through the gradual thickening of symbolic webs of meaning." Renato Rosaldo, Culture and Truth: The Remaking of Social Analysis 2 (1989).

n12 You will recall that the Ilongots are an isolated group that numbers around 3500 and resides in the upland area some 90 miles northeast of Manila. The most salient cultural practice of the Ilongots is that the older members of the group practice head-hunting as a ritualized response to the rage which is experienced during bereavement. See id. at 2-3.

n13 Rosaldo is a Professor of Anthropology at Stanford. His deceased wife, Michelle Rosaldo, was also a very prominent anthropologist at Stanford before her untimely death during an expedition in a remote area of the Phillipines.

n14 My parents divorced and my mother remarried. I am the youngest of the three boys that my parents had. My mom had two children, Gustavo and Sylvia in her second marriage.

n15 I think that some of the students may not have understood that I am writing to a fictional person. Fermina does not exist! But, in a way she does exist because she is a composite of real persons that I have known in my life. I guess by creating Fermina, I am able to do a little bit of role-playing and to use her as a sounding board for some of my ideas.

n16 Soledad means solitude, but it is also a woman's name.

n17 Octavio Paz likened the essence of Mexican national character to a "labyrinth of solitude." See Octavio Paz, Labyrinth of Solitude (Lysander Kemp trans., 1961).

n18 The reader is admonished that the material in these field notes is fictional and that the field notes are a pedagogical device designed to encourage dialogue, discussion, and reflection on issues that have been addressed in the class. The ideas and commentary are not necessarily those of the author or any person living or dead.


n20 Dang, here I go talking about love. I think the problem is that Americans have a very narrow conception of "love." I guess they would think of it more as caring or affection, but for me it is LOVE.

n21 This is scary, but I think I am beginning to sound like Jerry Lopez. He has a distinctive style of writing that is easy to pick up. Jerry writes exactly like he
talks, and it's really good because he speaks simply about really complex things.

n22 Rosaldo, supra note 11, at 1-2.


n24 In fact, you will notice that I am using Mirande Gonzalez in honor of my mother and as a way of acknowledging her contribution to my lineage. But I also wanted to thank my father for instilling such intense pride and sense of dignity in his progeny.

n25 See Nancy Julia Chodorow, Gender, Relation, and Difference in Psychoanalytical Perspectives, in Feminist Social Thought: A Reader 8-20 (Diana Tietjens Meyers ed., 1997). Chodorow proposes that women are more communal or relational because both male and female children are raised by the mother and bond with her. Socialization is more discontinuous for boys, however, because at some point boys have to separate themselves psychologically form their mothers and identify as men.

n26 See S. Harding, The Science Question in Feminism (1986).

n27 This term refers to Mexicans and other Latino Americanos. It is more inclusive than Mexican or Chicano (Mexicans in the United States, and preferable to Hispanic. One of the problems with the word "Hispanic" is it links us to Spain, rather than to our indigenous roots. For critiques of the term Hispanic, see Martha E. Gimenez, The Political Construction of Hispanic, in Estudios Chicanos 66-85 (1983); Manuel Rojas, Social Amnesia and Epistemology in Chicano Studies, in Estudios Chicanos, supra, at 54-65, and Gerald P. Lopez, Cleaning Up Our Own Houses 2 (1991) (unpublished manuscript, on file with author).


PERFORMING LATCRIT: Critical Race Coalitions: Key Movements that Performed the Theory

Sumi Cho * and Robert Westley **

* Associate Professor of Law, DePaul University College of Law. B.A., J.D., Ph.D. (Ethnic Studies), University of California at Berkeley, 1984, 1990, and 1992 respectively.

** Associate Professor, Tulane University School of Law. B.A., Northwestern University, 1984; M.A., M.Phil., Yale University, 1987; J.D., Boalt Hall School of Law, 1992; Ph.D., Yale University, 1993.

The authors would like to thank Gil Gott and Frank Valdes for their meticulous read of many versions of this Article and their invaluable editorial suggestions. We are also grateful to Adrienne Davis and to the participants in our LatCrit IV works-in-progress session. And we are honored by the thoughtful comments by Kevin Johnson, Bob Chang, and Mary Romero in this volume. Finally, we acknowledge our Boalt Coalition for a Diversified Faculty allies, with whom we fought the good fight.

SUMMARY: ... BCDF's local movement to increase law school diversity culminated in 1989 with the BCDF-coordinated Nationwide Law Student Strike for Diversity. ... The stories perpetuate the notion of self-correcting institutional reform, specifically that the struggle over physical space for people of color on law school facilities was primarily a matter of prevailing in the "free marketplace of ideas." ... Furthermore, meetings between CDF members and the law school administration proved fruitless. ... In the fall of 1985, the United Law Students of Color ("ULSC"), the group that reinvigorated the diversity movement at Boalt Hall, benefited from the momentum, experience, leadership and organizational models of both the UPC and the anti-apartheid movement. ULSC formed various subcommittees to address specific law school issues, including a subcommittee on Faculty Diversity. ... The diversity movement grew at Boalt, gaining political and popular support. ... BCDF widely publicized that from 1967 to 1987, there was only one tenured faculty member of color at the law school. ... At the macrolevel, other larger forces contributed to the decline of the diversity movement at Boalt and elsewhere. ... What impact did the diversity movement initiated by BCDF and the Nationwide Law Student Strike have on legal education and critical race theory in particular? In partial answer to this question, we offer the following empirical analysis of material gains attributable to diversity movement politics. ...
theorizing to produce more grounded and effective litigation and scholarship. We extend this analysis by highlighting the importance of political organizing for the critical race theory project, and vice versa. Such an understanding of CRT's roots has significant implications for the mutual obligations between activists in the academy and political communities.

I. Historical Significance of Diversity Movements for Critical Race Theory

A. Linking Antiracist Organizing and Antiracist Theorizing

Most accounts of the development of critical race theory as a movement emphasize the agency of individual scholars who were dissatisfied with both critical legal studies ("CLS") and traditional civil rights paradigms. These scholars happened to find themselves writing on similar themes from similar, critical perspectives at approximately the same time and place. For example, according to one of the leading anthologies on critical race theory, CRT becomes a "self-conscious entity" in 1989 when these scholars convened their first annual workshop. The editor of this anthology acknowledged the intellectual influence that CLS, feminist jurisprudence, continental social and political philosophy, and the political inspiration of the civil rights movements had on CRT. However, the editor failed to mention the role of student of color activism in CRT, despite his own personal nurturance of such movements. The other leading text on CRT describes CRT's development and notes the importance of both the civil rights movement for "inspiration" and "direction," as well as the CLS leftist intervention into legal discourse as "elements in the conditions of [CRT's] possibility." The editors then identify two events central to the development of CRT as a movement -- a student protest at Harvard Law School in 1981 over an alternative course on race and law, and the 1987 Critical Legal Studies National Conference on race and silence.

The emphasis placed on the Harvard protest is suggestive and from our perspective, very useful, but incomplete. Why such protest emerged in 1981 and why there was a six-year gap between the two central events remain unexplained. How the 1981 protest played a developmental or catalytic role in the rise of CRT "as a movement" is unclear. Genesis stories of the CRT movement are generally about the scholarly writings that "formed the movement." This Article strives to complete the story and counter, to an extent, the "super-agency" approach to collective action that is frequently adopted in historical accounts of the CRT movement.

We attempt to ground CRT in actual resistance movements not to proliferate competing genesis stories, but rather to place the birth and growth of critical race theory in a broader political context. By confining the origins of CRT primarily to the scholarly output of "outsider" intellectuals, existing genesis stories serve, ironically, to obfuscate historic and ongoing power relations in legal academe. The stories perpetuate the notion of self-correcting institutional reform, specifically that the struggle over physical space for people of color on law school facilities was primarily a matter of prevailing in the "free marketplace of ideas." The implicit message is that so long as critical race theorists write and speak compellingly, legal academe will welcome them to the table. Instead, this Article retrieves a buried history of heated political contestation for space that forced momentary openings in a confident and purposive power structure. The openings, created by political confrontation, facilitated the entree of a critical mass of outsider scholars into law teaching.

B. Race-Conscious Models of Political Organizing: A Case Study (1964-1986)

There are quite a few students who have attended school at Berkeley who went South to work with the Student Nonviolent Coordination Committee, and who have been active in the civil rights movement in the Bay Area . . . . I was one of these returning students. We were greeted by an order from the Dean of Students' Office that the kind of on-campus political activity which had resulted in our taking part in the Summer Project was to be permitted no longer.

This fight now is ours as much as it is yours. If there had been no students, we would have had no Freedom Rides.

-- Mario Savio, June 1965

This fight now is ours as much as it is yours. If there had been no students, we would have had no Freedom Rides.

-- James Farmer, National Director of CORE, addressing a free speech movement rally of over 1500 students and faculty members at U.C. Berkeley, December 20, 1964.

We begin this genealogical tracing in 1964 with the Free Speech Movement at U.C. Berkeley. The Free Speech Movement, known primarily as a student rebellion against university attempts to restrict student speech, had a definitive but largely unknown racial origin.

Upon their return from the Mississippi Freedom Summer of 1964, the U.C. administration confronted
Berkeley civil rights activist students with a ruling that curtailed the substance and manner of speech on university grounds as well as fund solicitations and recruitment by civil rights and other political organizations. Led by civil rights organizations that understood the importance of northern financial and political support for the struggle in the South, nineteen organizations formed a coalition to challenge the ruling. When a police squad car summoned by the university administration attempted to arrest a member of the Congress of Racial Equality ("CORE") for violating the new regulation, hundreds of students spontaneously surrounded the squad car and prevented it from leaving for the next thirty-two hours. n9

The Free Speech Movement is significant to this inquiry because it is one of the first post-WWII campus movements to originate substantively from antiracist student organizing. n10 Although the movement was comprised largely of white students, its race consciousness roots persisted and laid the political groundwork for the earliest collective U.C. Berkeley student of color organizing effort - the Third World Strike of 1969. n11 [*1382]

The Third World Strike at U.C. Berkeley was the longest, costliest, and arguably the most institutionally significant student strike in U.C. Berkeley's history. Although one of the least known movements of the sixties, the strike was a paradigmatic moment of late-or post-civil rights activism undertaken by multiple communities of color in a historically white educational institution. n12

Berkeley students of color who would comprise the "Third World Liberation Front" ("TWLF") responded to the call by their counterparts at San Francisco State, where the coalition demanded the establishment of Ethnic, Afro-American, Asian American, Chicano, and Native American Studies. In addition, the San Francisco State students made some of the earliest demands for faculty, student, and staff affirmative action programs in California. n13 The [*1383] Third World Strike at U.C. Berkeley led to the creation of the Ethnic Studies departments and affirmative action admissions and recruitment, among other racial reforms. In response to these and similar challenges by students of color nationwide, institutions of higher education across the country underwent dramatic changes in admissions, hiring, and curricular development policies during the next decades.

In form, the strike was also particularly noteworthy for providing a model of student of color organizing. The TWLF, which led the strike, was comprised of a coalition of student organizations representing the Afro-American Student Union, Asian American Political Alliance, Mexican American Student Confederation, and the Native American Students Association. The TWLF's leadership structure featured a steering committee with equal numbers of voting representatives from each of the member groups. Representatives made decisions by consensus whenever possible, and by majority vote when not possible. This approach to coalitional leadership and decisionmaking was often replicated by student movements in the subsequent decades. n14

After the Third World Strike victory in 1969, two issues dominated 1970s campus politics: the anti-apartheid movement and affirmative action. n15 The Soweto uprisings in 1976 brought international [*1384] attention to the human rights violations of the South African racial regime. Student organizers developed coalitions that reflected the connection between antiracist organizing at home and abroad. While predominantly white students organized for divestment of U.C. funds from South Africa, students of color generally organized resistance to racism on issues closer to home, particularly around the United States Supreme Court decision in Regents of University of California v. Bakke and the tenure denial of Harry Edwards, and African American professor and founder of sports sociology. n16 While students of color did score a victory with the award of tenure to Harry Edwards, the 1978 Bakke decision was seen as a setback that demoralized affirmative action organizers. Only later did civil rights organizations discover the "silver lining" of Justice Powell's opinion that would permit race-conscious admissions. n17

From the late seventies to the early eighties, student of color activism subsided, with most of the campus political activity focusing on antinuclear protests, Central American solidarity work, and environmental issues undertaken by predominantly white student organizations. By 1984, however, the anti-apartheid movement regained momentum. Three important factors contributed to its revival: first, the protests at the South African embassy in Washington, D.C. organized by Randall Robinson, Mary Frances Berry, and Walter Fauntroy captured the imagination of student activists across the country. Soon thereafter, students at Columbia University began a vigil outside an administration building, followed by students at U.C. Berkeley, who began a sit-in outside of Sproul Hall on the campus's main plaza. Second, Jesse Jackson's first bid for [*1385] the presidency and the Rainbow Coalition inspired and energized communities of color, including students, because that initiative prioritized the formation of student of color political constituencies on campus. And, third, U.C. Berkeley observed the twenty-year commemoration of the Free Speech Movement ("FSM") in the fall of 1984. Returning veterans of that struggle met
informally with student leaders and highlighted the little-known racial origins of the movement and advocated for the renewed student activism around anti-apartheid efforts. Soon after the FSM Commemoration, an anti-apartheid coalition developed. n18

U.C. Berkeley students of color established two important political structures in 1984. Borrowing from the TWLF, one structure took the form of a "race-plus" coalition model, uniting students of color and les/bi/gay organizations, which had felt marginalized by previous progressive coalitions, interested in slating candidates for student government positions. This electoral coalition remains as the oldest campus political party to this day. We use the term "race-plus" to designate the centrality and historicity of race-based organizing that recognized a network of oppressions and embraces coalition consciousness and solidarity with other outsider groups. Other potential bases for coalition include axes of antisubordination resistance, specifically (but of course, not exclusively) feminist projects, les/bi/gay/transgendered liberation, and progressive white identity formation. The other student structure, an individual member-based organization of progressive students of color, was known as United People of Color ("UPC"). UPC was the leading organization in the anti-apartheid movement until U.C. Regents voted to divest funds in the summer of 1986. n19

Like the early history of critical race theory in dialogue with critical legal studies, the contestation with the white Left was a [1386] formative experience for organizers in UPC. Some of the same debates on "formality" and "informality" occurred in the political as well as the intellectual arena. n20 For example, one key conflict between the predominantly white, anti-apartheid group, Campaign Against Apartheid ("CAA") and UPC was over the decisionmaking process to be followed in coalition meetings. CAA insisted upon an informal, consensus-oriented, decisionmaking process that rejected any hierarchical leadership structure. While reasonable in theory, those who had the most time on their hands could persevere through hours of discussion and effectively exclude or limit participation by those who had competing time pressures. Unfortunately, the impact of such a process worked to the detriment of many students of color, who found they generally had less time on their hands for such open-ended meetings, and less inclination for such an exercise in consensus-by-attrition. As a result, planning meetings and political actions such as the Sproul steps protest became virtually void of student of color participation in the name of radical, consensus-oriented decisionmaking. n21

As the anti-apartheid movement wound down after important victories such as the U.C. Regents' vote to divest U.C. funds from South Africa, there was a clear and open split between CAA and UPC. The former group was relying increasingly on tactics of confrontation and sensationalism to highlight the urgency of the struggle. CAA refused to instill any principles for direct action that would curb individual members' expression of protest, even if such methods included violence. Such a lack of discipline and noncommitment to nonviolence meant that joint activities of CAA and UPC would be unduly hazardous for UPC members. When, for example, anonymous CAA would spit or throw bricks at police from a crowd, those police would invariably seek targets, usually tall men of color from UPC, to exercise their disciplinary wrath. n22

In addition to placing students of color unnecessarily at risk under the guise of radicalism, most UPC members found such activities to be problematic because these protest tactics were not designed to build and grow the movement, but simply to defy authority. Often that authority was rather removed from the stated target of the movement, i.e., the South African apartheid regime. Like CLS's critique of rights as legitimation, the CAA's overriding substantive commitment to defying authority and insisting upon its vision of informal, nonhierarchical process grossly underappreciated and obscured dynamics of racial oppression as a lived experience. In this way, the "radical" stance of both CAA and CLS bespoke white perspectivism and privilege. n23 [1388]


-- 1980s UPC chant

The success of the anti-apartheid movement, measured by the end goal of divestment, validated race-conscious organizing that developed through UPC as well as the race-plus coalition model. This victory also opened up the vista of political possibilities for future student activism and cultural contestation since an organizational infrastructure was largely in place. In addition, the anti-apartheid movement established a student of color organization and a principle of self-determination because of its seasoned members with organizing skills. The linkage, well-established since the 1970s and continued in the 1980s, between apartheid abroad and at home made natural a transition from the focus on divestment to an engagement of racism closer to home. Anti-apartheid veterans focused on two areas of unfinished business from the Third World Strike agenda: curricular reform and the specific demand for an ethnic studies graduation requirement,
and faculty diversity in terms of tenure denial defenses and affirmative action hiring and admissions. n24 These race-conscious movements (in both form and substance) at Berkeley and across the country became known more broadly as "diversity movements."

In this historical context, with a close linkage to the antiracist struggle against apartheid, the diversity movement at U.C. Berkeley's Boalt Hall began. Affirmative action admissions for African American, Asian American, Latino/o, and Native American students began in the fall following the Third World Strike in 1969. The first two years of affirmative action admissions yielded twelve and eighteen percent of students of color in the incoming first year law classes of 1969 and 1970. In the fall of 1971, the percentage of special admissions students increased to thirty-one percent of the entering class due to an unexpectedly high "show up rate" among those admitted. The Boalt admissions committee had clearly underestimated the pent-up demand for low-cost, quality legal education. According to Linda Greene, a Black Students Law Association ("BLSA") student leader at the time, this sudden change of student demographics was experienced as a "traumatic event" by Boalt faculty. The faculty had not expected such a large enrollment because there had been no commensurate increase in financial aid to support minority admittees. In response to this trauma, the faculty proposed eliminating the special admissions program altogether, this prompting the 1972 strike organized by BLSA, and joined by the La Raza Law Students Association ("LRLSA"), Asian American Law Students Association ("AALSA"), and the one Native American enrolled at the school. The strike lasted for two weeks before the faculty proposed to continue the special admissions program, but with a lowered pre-Bakke target goal of twenty-eight percent for "Third World" students. BLSA and AALSA accepted the faculty proposal, effectively ending the strike. n25

While the 1972 strike produced a successful result, its lack of organizational structure fostered disunity among students of color. As a result, groups made decisions seemingly without regard to other allied groups. Chicana/o students, who refused to end the strike after BLSA and AALSA reached agreement, continued to press for "parity" in law school admissions with the state population percentages. LRLSA also organized a separate sit-in at the Boalt admissions office during the strike. Without any coalitional structure from 1972-78, individual groups organized as issues arose with limited success. n26 During the 1970s and early 1980s, student of color input into the Boalt admissions process was significantly curtailed, from full organizational voting rights on the admissions committee, to advisory rights for students of color organizations, to the most limited advisory rights for individual appointees from student of color organizations. n27

1. The Formation of the Coalition for a Diversified Faculty 1978 Boalt Faculty Composition 1 Asian American male 1 African American male 3 white females 37 white males

In terms of hiring, the school's affirmative action record is good. n28 -- Phillip Johnson, Chair of Boalt Hall Faculty Appointment Committee, March 1978

During this time, a significant race-based organization at Boalt emerged in fall of 1977 -- the Coalition for a Diversified Faculty ("CDF"). Like the before them, seven organizations representing the race-plus coalition issued a position paper with a number of proposals to rectify the racial problems students perceived. The faculty neither discussed nor mentioned the proposals at subsequent meetings. Furthermore, meetings between CDF members [*1391] and the law school administration proved fruitless. Dean Sanford Kadish refused to permit CDF members to address a faculty meeting to discuss the issues raised in position paper. After determining that no productive dialogue with faculty was possible, CDF called for an all-day teach-in and strike that seventy-five percent to ninety percent of Boalt students supported on March 21, 1978. n29

The 1970s CDF activity peaked with a Title VI and Title IX complaint filed with the Department of Housing, Education, and Welfare ("HEW") on April 9, 1979, alleging that Boalt's hiring policies resulted in a lack of minority and women faculty. The complaint contended that the faculty composition denied students differing perspectives on important legal issues, especially in the areas of public interest law and poverty law. To CDF's surprise, HEW officials decided to investigate the student complaint. n30 Using the standard of other elite law schools' hiring as a guide, the federal report concluded that Boalt's faculty was less diverse that the nondiverse faculties of top law schools across the country! Like the political activity on the main campus, antiracist organizing at Boalt Hall declined at the close of the 1970s and early 1980s. Perhaps the decline was a result of similar meta-and micro-forces such as the increasing national political and cultural conservatism, internal divisions, student turnover, and political setbacks. n31 [*1392]

2. The Reformation of CDF in the 1980s

In the fall of 1985, the United Law Students of Color ("ULSC"), the group that reinvigorated the diversity movement at Boalt Hall, benefited from the
momentum, experience, leadership and organizational models of both the UPC and the anti-apartheid movement. ULSC formed various subcommittees to address specific law school issues, including a subcommittee on Faculty Diversity. Although ULSC was short-lived as an organization, the Faculty Diversity subcommittee reorganized subsequently under the name Boalt Coalition for a Diversified Faculty ("BCDF"). n32

The diversity movement grew at Boalt, gaining political and popular support. Specifically, Boalt's denial of tenure to both Marjorie Shulz in 1985 and Eleanor Swift in 1987, the two popular, white female law teachers, spurred on BCDF's efforts and propelled BCDF into focal organizational role at the law school. n33

In fall of 1987, BCDF highlighted the lack of progress over the decades in diversifying the law faculty. BCDF widely publicized that from 1967 to 1987, there was only one tenured faculty member of color at the law school. Moreover, there had been an increase over the same time period of the number of tenured (white) female faculty members from one to merely two and one-half. This appalling record graphically symbolized what was clearly a racial and gender caste system at Boalt. The following year, 1988, the school responded to the diversity demands and publicity of its straight, white, male faculty identity with an unprecedented four diversity hires out of five total hires. n34 Adding to the pressure to diversify, Boalt faced the threat of a pending lawsuit from Eleanor Swift's tenure denial. In the fall of 1988, after Swift announced that the Title IX coordinator at U.C. Berkeley had made an unprecedented prima facie finding of sex-based discrimination in her case, the Boalt faculty abruptly voted to reverse its denial of tenure to Marge Schultz. n35

[SEE FIGURE IN ORIGINAL] [*1394]

While organizing the external struggle for diversity against the Boalt administration and faculty, an internal power struggle developed within BCDF. Students of color had generally felt resigned to the margins by the BCDF organizational structure, which was an individual membership organization open to anyone at Boalt. Outnumbered and alienated in the BCDF by a dominant majority of white liberals, who often approached the problem without an understanding of institutionalized forms of racism, student of color participation in BCDF diminished dramatically from the days of ULSC. In recognition of this internal contradiction, remaining active students of color called for a reorganization of the BCDF leadership structure, to a group-based coalitional model that would initially include members of the BLSA, LRLSA, AALSA, and Women's Law Caucus on the steering committee. n36

Critical race theory offered theoretical tools that proved useful to organizers during this time. Critical race theorists had identified twofold challenges shared by UPC and BCDF organizers: (1) to undertake a race intervention into Left (CLS) discourse, and (2) to undertake a left intervention into liberal, civil rights discourse. n37 An early theoretical intervention materialized in a Harvard Civil Rights Civil Liberties Law Review volume devoted to "Minority Critiques of Legal Academe" published in 1987. n38 This classic volume exposed the white paternalism that too often characterized relations between the white Left and communities of color. While the CLS's critique of rights as legitimating existing legal power structures was at times powerful, it could also be experienced as disempowering and condescending. The naming by race crits of this dynamic between the while Left and people of color, even in progressive circles, legitimated the claims of minority organizers in other venues, including Boalt. The emphasis of the TWLF on self-determination, the public split of UPC from CAA, and dominance of race-based political organizing in the 1980s are indicative of the difficulty of the white Left to respect the leadership of people of color and the goal of communal self-empowerment. Having the analytical descriptions of similar dynamics occurring within critical legal academe, students and other organizers of color confidently asserted the necessity of political structures that would account for, and protect against, the importation of deeply ingrained racial patterns of subordination into the antiracist struggle.

Similarly, the second race crit intervention in the civil rights community inserted a more progressive politic into traditional rights-based strategies, and was useful to diversity movements contending with liberal factions for agenda setting and strategizing. White liberals had a different orientation toward the white faculty than more disaffected students of color. Accordingly, white, liberal BCDF members advocated what was essentially a strategy of "constructive engagement" while progressives of color were ready to engage direct action in the spring of 1987. The BCDF agenda in these early days emphasized talking with faculty, surveying what kind of minority faculty they might like to hire, and making rather mild demands, which even when formally granted, could not be enforced. Such strategies and assumptions seemed to endorse the dominant view that the problem lay not with the institution, but with the minuteness and diminished quality of the minority faculty pool. Following the restructuring of BCDF to an "outsider" organization-based coalitional structure, the
participation and leadership of students of color increased dramatically, as did the coalition's successes. Under this new structure, BCDF continued its numerous educational events, often involving critical race, feminist, and critical legal scholars, organizational meetings, and presentations of demands that led eventually to a direct action strategy. Coincidentally, almost ten years to the day of the 1978 UPC strike, on March 22, 1988, BCDF called for a student strike and teach-in that over eighty percent of the Boalt student body participated in. The event culminated in twenty-eight arrests in Dean Jesse Choper's office. The following year, BCDF called for a nationwide strike of law students on April 6, 1989 that was even more successful than the previous year's strike as measured by its impact on legal education nationally. Law schools across the country observed the day of action with various activities, sending a clear message to their faculties ties to diversify. In the summer after the nationwide strike, the campus-wide administration awarded tenure to Eleanor Swift. 

The nationwide strike of 1989 represented the crest of BCDF's resurgence. At the microlevel, tactical missteps, including a shift away from base-building through educational events to an almost exclusive focus on direct action, and the perceived success of the movement and commensurate reforms dissipated the once widespread popular support of BCDF among the student body and community. At the macrolevel, other larger forces contributed to the decline of the diversity movement at Boalt and elsewhere. Specifically, the organized Right's effective strategy to delegitimize diversity movements through its "political correctness" campaign and the United States Supreme Court's retrenchment on race jurisprudence. Every generation of law students experiences a legal development during its time that shapes its disposition toward law and legal practice in a profound, possibly career-altering way. For the BCDF generation, it was City of Richmond v. J.A. Croson Co. Not so much for what it said, but more for what it symbolized, Croson dropped like napalm onto the burgeoning diversity movement at Boalt Hall. By 1989, after years of frustrated efforts to diversify the faculty, the movement began to enjoy successes at home and national recognition of the problem of the lack of diversity in law school faculties. As police arrested students for "trespassing" on law school property in acts of civil disobedience, Croson seared the political imagination, demoralized, and debilitated. The retreat from racial remedies was evident in the Court's application of strict scrutiny for state and local classifications, i.e., affirmative action. The case symbolized retrenchment at a higher level of authority within the legal profession and the system of justice against the principles of diversity that had recently guided the movement to modest success. Not long after Croson came Adarand Constructors, Inc. v. Pena, Podberesky v. Kirwan, Hopwood v. Texas. The U.C. Regents soon voted to end affirmative action, and a majority of California voters passed Proposition 209 with no further possibility of federal judicial review. In light of these events, the Boalt administration's old slogan "our hands are tied," now seemed like a self-fulfilling prophecy. These developments forced faculty who were committed to diversity at Boalt and elsewhere in California, into the difficult position of "managing the resegregation" of public education. Despite its decline and unfulfilled potential, the historic political intervention in one of the top public law schools forced into the open the informal hiring and promotion practices that tended to exclude outsiders from membership within the white, male law faculty club. Law school faculties heard the message sent by race-plus student organizing for diversity at Berkeley and elsewhere, loud and clear across the nation. 

D. Outcomes

Organized political resistance challenged the structure, substance, and culture of U.S. legal education and provided a fertile ground for the proliferation of an institutional-cultural resistance to the reigning analyses of race and law. The vibrant political contestation in law schools across the country in the late 1980s and early 1990s directly impacted critical race scholars' access to top law reviews, their legitimacy and popularity, and subsequently, placement in top law schools. Prior to its spread as a form of legal scholarship, race consciousness had already proven itself as a viable approach to law school organizing, and thus served as an empirical reference point upon which theorists could base a race-conscious jurisprudence.

What impact did the diversity movement initiated by BCDF and the Nationwide Law Student Strike have on legal education and critical race theory in particular? In partial answer to this question, we offer the following empirical analysis of material gains attributable to diversity movement politics. While one objective in this Article is to acknowledge student activism for these changes, we recognize that a multitude of actors including organizations and individuals worked to bring about a law faculty that is more representative of society.
According to a Society of American Law Teachers ("SALT") survey conducted in 1981, thirty percent of the nation's law schools belonged to the "Zero Club" in that they had hired not even one person of color onto their faculties. Another thirty-four percent had made one token hire. In other words, almost two-thirds of law schools responding had zero or just one law faculty of color. The record for hiring women was similarly dismal. Ninety percent of law schools responding to a 1982 SALT survey recorded that they had zero to twenty percent tenured or on the tenure track female faculty. Over onethird of respondents had zero to ten percent women on the tenured or tenure-track faculty. From the mid-1970s throughout the 1980s, faculty of color hovered around four to six percent of the full-time law teachers. As late as 1988-1989, full-time law teachers of color made up only 5.4%, with women comprising only twenty-three percent, of the total number of full-time law professors.

The spurious "pool argument" that there was no diverse pool of qualified law school graduates from which to hire was not credible. At the time, people of color and women represented 11.8% and 42% respectively of all enrolled J.D. students, which were approximately twice the levels reported for faculty members. At some schools such as Boalt Hall (with one tenured faculty of color and 2.5 women in 1986), the disjuncture between student and faculty diversity was particularly appalling where students of color and female law students comprised twenty-five and forty percent of Boalt students respectively.

In the first hiring year following the 1989 Nationwide Law Student Strike, the percentage of full-time law faculty of color shot up to a total of 8.7% in one year. Seemingly overnight, the pool appeared to have become much deeper than previously imagined. Given the low turnover rates of faculty, this dramatic increase in the overall total pool represented a marked change of law school's hiring habits. Within two years of the nationwide strike, the percentage of people of color teaching in law schools increased by eighty-five percent. The percentage continued to increase steadily for the next six years to a 1996-97 high of thirteen percent full-time faculty of color, a 141% increase from the 5.4% of 1988-89.

Evidence of the importance of the diversity movements to law faculty hiring is most compelling when we examine the years of entry of Latinas/os, into law teaching. Between 1966-1987, no more than four Latina/o faculty had entered law teaching in a given year, with an average of 1.27 Latinas/os entering for the period for a total of twenty-eight in twenty-two years. From 1988-97, the average jumped to 8.8 Latinas/os entering law teaching per year, with a high of thirteen in 1990, the first year to reflect the impact of the nationwide strike in its hires. The number of Latina/o faculty hired in law schools in the last ten years of diversity activism, for a total of eighty-eight hires, is more than three times the twenty-eight hired in the preceding twenty-two years of affirmative inaction. The marked increase in the last ten years mirrors the decade of intense politicization by student activists on the diversity issue at Boalt and other law schools across the country.
While the simple correlation does not empirically prove that student activism "caused" the spate of diversity hires, the statistics combined with the history presents more than a striking coincidence. The diversity movements are partly responsible for the opening of a closed hiring and promotion system in law schools that had never before been subject to such sustained public scrutiny. In the face of BCDinstigated turbulence, Boalt's Dean lost his firm grip on the reins of power and had to give way to more liberal or moderate actors who could negotiate between protesting students, and an entrenched old guard momentarily losing its balance.

Concerned about the negative publicity generated by protests at Boalt, many law schools undertook aggressive measures to avoid Boalt's fate by incorporating at least token representation into their ranks. In this political context, critical race theory ("CRT") as a scholarly movement proliferated and achieved more national publicity and acclaim. Furthermore, newly hired law teachers of color and junior race crits supported the work of CRT by canonizing [*1404] the early works of those who are now considered senior race crits. To be sure, the quality of work by early race crits was impressive for its theoretical insight, methodological innovation, and analytical depth and breadth. But the student-catalyzed transformation of the institutional culture of legal education fostered, in part, the popularization and legitimation of the intellectual movement through publication in premier student-operated law journals and installation of leading race crits into top law schools.

To overlook the role of local and national student organizing in bringing about these changes is dangerous to CRT as a long-term project. Such oversight buttresses the liberal myth of self-correcting societal institutions that respond to "better argument." In this narrative, law schools diversified when exceptional candidates of color miraculously presented and proved themselves worthy. Sustained and heated political activism was merely incidental or detrimental to the process. As critical race scholars, we should be wary of histories of our inclusion that perpetuate the myth of institutional openness to racial justice.

The activism at Boalt for faculty diversity in the late 1970s and late 1980s should be understood not as episodic, but as part of a tradition of race-conscious resistance at U.C. Berkeley. This Berkeley tradition, beginning with the Free Speech Movement of 1964, valorized political self-historicization and, thereby, promoted a positive culture of coalitional activism among its student body. At Boalt Hall, the student diversity movement constituted itself as a membership organization committed to diversity in three primary spheres: faculty, student body, and curriculum. In part that focus reflected a practical strategy, which we might call "continuous diversity mobilization." To achieve this goal, a coalition model developed among student groups that required us as students to bridge lines of difference through self-education, cooperation, risk-taking, and solidarity.

The group of scholars of color and women that emerged during and out of the new era of student activism on law school campuses and racial retrenchment in the courts confronted a rapidly shifting set of political and intellectual assumptions about the significance of race. On the Left, white radicals associated with the critical legal studies movement provided practically no critique of institutional racism. Theoretically, they were oriented towards trashing the formalism dominant within the liberal legal academy. In terms of [*1405] praxis, however, this position opened up relatively little institutional space for identity politics and instead led to a politics of anarchic resistance reminiscent to our mind of white, CAA-led, anti-apartheid actions. In the middle, white liberals associated with the critical legal studies movement provided practically no critique of institutional racism. Theoretically, they were oriented towards trashing the formalism dominant within the liberal legal academy. In terms of [*1405] praxis, however, this position opened up relatively little institutional space for identity politics and instead led to a politics of anarchic resistance reminiscent to our mind of white, CAA-led, anti-apartheid actions. In the middle, white liberals remained wedded to an integrationist paradigm that could afford to be indulgent of marginal demands for greater inclusion of people of color and women, so long as the basic structure of opportunity remained the same and praxis did not involve confrontation. And on the Right, white conservatives, sensing that any serious reflection upon the legitimacy of the structure of opportunity within legal or university education might signal the "fall of civilization," trumpeted the virtue of meritocracy and colorblind jurisprudence and denounced the vices of political correctness and multiculturalism. n59 Through these means, they attacked affirmative action, academic support programs, campus speech codes, and ethnic studies.
In retrospect, part of the decline of BCDF in the nineties can be traced to historical amnesia and the failure to heed the centrality of raceconsciousness forwarded by critical race theorists. The race-plus model rooted in the Third World Strike responds to the pervasive problems of racism, white privilege, and white pa(ma)ternalism in progressive coalitions historically, by affirmatively designing a coalitional structure that does not permit marginalization of racial minority groups. This form of "affirmative action" in coalitional structures could also be applied to other subgroups that have historically faced similar marginalization. [*1406]

II. Movements and Critical Theory

This Article first considered the development of a raceconscious infrastructure for political resistance in higher education, and points of articulation with the development of CRT. In Part II, we offer some thoughts on the need to understand movement history as part of valuable subjugated knowledge, discuss possible synergism between movement politics and theory, and finally, register a warning against the dangers of sublimating movements.

A. Movement History as Subjugated Knowledge and Movement Histories

The new student [African American, other minority, women's and radical white] groups changed the atmosphere at Boalt Hall, not only because many of them tended to be militant and distrustful, but because they often did not respond to traditional law school teaching methods. . . .

The strained relationships of the 1980s were confirmed in faculty interviews.

. . . Whatever the contrasts in motivation or approach, it was generally agreed that the dozens of confrontations that had occurred over the previous twenty years had taken a heavy toll on the environment at Boalt Hall and that the warm, collegial atmosphere of earlier days had been replaced with formality, distrust and hostility.

-- Sandra Epstein, author of Law at Berkeley: The History of Boalt Hall n60

Since its foundation in 1882, the School of Law (Boalt Hall) has demonstrated through progressive admissions policies its commitment to diversity in legal education.

-- Cecilia V. Estolano et al., New Directions for Diversity: Charting Law School Admissions Policy in a Post-Affirmative Action Era n61 [*1407]

Instead of shutting down the school or protesting at the dean's office, we are doing heavy duty lifting of policy analysis.

-- Chicago Tribune article quoting New Directions for Diversity co-author, September 29, 1997 n62

The work of student diversity activists constitutes a form of subjugated knowledge defined by Foucault as "a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: naive knowledges, located low down on the hierarchy, beneath the required level of cognition. . . ." n63 The task of critical opposition is to disinter such knowledge in order to "establish a historical knowledge of struggles and to make use of this knowledge tactically today." Subjugated knowledge challenges unitary theories, from both the Right and the Left, that purport to offer a totalizing picture of how societies are ordered.

A recent work on "the history of Boalt Hall" shows the process by which a dominant discourse absorbs and invisibilizes the illicit knowledge produced by a movement of resistance. Sandra Epstein writes about the 1980s movements only briefly in her lengthy celebration of Boalt's past and without citing to a single member of BCDF. Instead, the story is told through the eyes of the faculty and administrators who resisted the student challenge to white, straight, male supremacy. Epstein describes "angry students" for whom "confrontation became a way of life" crafting "manifestos" and "disrupting classes." Remember that this broad-based movement garnered eighty to ninety percent student support for its nonviolent boycotts of Boalt classes and changed, at least for a time, faculty hiring policies. Epstein characterizes negatively the U.C. Berkeley central administration's close scrutiny of Boalt's hire and tenure policies. Epstein "blames" not the law school's concerted intransigence in the face of student demands for a modicum of diversity on the Boalt faculty, nor the faculty's denials of . . . tenure to two women that later had to be reversed, but student protesters, who "seemed to be setting the law school agenda." n64

Perhaps a more disappointing example of the erasure and disparagement of student activism in service of the self-correcting institution narrative appears in a Boalt student-authored report, New Directions for Diversity. n65 In this otherwise ground-breaking, critical report on the Boalt admissions process in the wake of Proposition 209, the authors imagine an institution that they claim has demonstrated its "commitment to diversity in legal education" by virtue of the forty percent student of color enrollment in pre-Proposition 209 California. n66 The report presents a history of admissions at Boalt that fails to note the 1972 admissions strike, the 1977-79 HEW investigation, or the BCDF struggles of the 1980s and, not surprisingly, concludes by extolling Boalt's prodiversity tradition.
n67 While extremely useful for its policy analysis and concrete recommendations, the report plays a dangerous game by stipulating to a sanitized institutional history, presumably in exchange for greater currency with the administration and faculty. Such a "policy not protest" approach may produce short-term gains, but at the cost of debilitating the very movement politics that make possible meaningful student input toward progressive reform policies. In other words, a "good cop/bad cop" strategy can only work if the good cop does not begin to believe that the bad cop is truly bad and expendable.

Generally, critical race theory scholarship seeks transformation through recovery of, and placing emphasis on, excluded and marginalized elements of the body politic. CRT participates in the production of knowledge through the creation of a counter-discourse. n69 The counter-discourse of CRT stands opposed to the erfully entrenched systems of totalizing knowledge that function through selection and exclusion of data. The system of domination that CRT opposes cannot bear having its history told. History is such dangerous territory because it cannot sustain the shopworn alibis of existing power arrangements: steady progress from barbarism to civilization, principled application of neutral rules, participatory democratic decision making, meritocratic reward systems, making the victim whole, the dignity of the individual, etc. Each alibi is contradicted by U.S. society's treatment of women, people of color, and other historically disparaged groups. These narrative alibis legitimate existing power arrangements through the purgation of history and the subjugation of illicit knowledge produced in resistance experiences.

To engage in relevant and effective oppositional theorizing, critical theorizing must be geared toward combating dangers to, and helping create the conditions of solidarity necessary for, progressive political community formation. The antagonisms and alliances lived by movements should become both the site of critical intervention and the place from which we speak as counter-discursive subjects. CRT has taken seriously the power/knowledge coupling recognized by critical theory and remembered that movements have long been a primary effect and constituent of power/knowledge configurations.

B. Between Synergism and Sublimation

We have tried to establish closer developmental linkages in this Article between contemporary race-conscious political struggles and critical race theory, suggesting how the former have been foundational to the latter. In this final section, we explore two models for relating movement histories to CRT -- "synergism" and "sublimation." CRT's next decade should adopt more synergistic modes of interacting with movements and movement histories because synergism, unlike sublimation, is congruent with CRT's commitments to community formation and social transformation.

1. The Benefits of Synergism: Weaving Theory, Praxis, and Politics

Synergism refers generally to an interaction of agents or conditions that produces a combined effect that is greater than the sum of the individual effects. In this Article, we use the term as a metaphor. Here, the term signifies a conscious commitment to linking subjugated forms of knowledge with the scholarly practices of CRT. We envision a mode of synergistic movement theorizing that contains both substantive and methodological commitments. Synergism represents the contestation with power by racially conscious political movements by "doing" race conscious theory whose "scientism" -- data, logic, and verifiability grows organically from political context. As outsider intellectuals, our goal and strategy articulation should become an open process, a dialogue, intersubjective and genealogically wed to the resistant discourses and practices that perform the movement.

Synergism is a vitally important possibility for a project, such as CRT, that attempts to impact the political world through discursive intervention. Such a project is necessarily collaborative, requiring information and insights gleaned from movements in order to formulate discursive strategies that must ultimately be tested in the context of actual struggle. The intersubjective nature of the CRT project reveals its political-theoretical essence. The moment that critical race theorizing loses its grounding in the political and the communal is the moment that it ceases to be an antisubordinationist project. Subjugated knowledge preserves the history and the meaning of struggle and the context of movement politics so vital to the synergistic approach to critical theorizing. Such an ahistorical pursuit of the "theoretical" represents an abdication of political engagement and the relinquishment of the full promise of antisubordinationist intellectual production.

The imperatives of synergism operate on two levels. First, we must be accountable in our work to the people, goals, and ideas of movements in a concrete and direct way. As academics, we must acknowledge the difficulty of maintaining the immediate connection to "movement politics." To the extent that we are to perform as "disenchanted intellectuals," it should be mainly through dis enchantment with ourselves! Furthermore, we should remain audacious in our demands to power and in speaking simple truths
to power. However, we should not have the arrogance to tell communities in struggle how to dream, imagine their empowerment, or narrate their political identity, especially insofar as we remain in the gilded cage of academe. We cannot presume that their voices speak through us. We have to achieve a certain humility and accountability vis-a-vis those who live the struggle outside of academe.

Second, and concomitantly, we must strive to overcome the tendency to construct with our work an intertextual universe that is, at best, in a "virtual" relation to struggle. The intersubjectivity, not intertextuality of the synergistic approach, insures that our work will grow under more congenial "relations of production." The utter alienation of purely intertextual scholarship from political struggle is an outgrowth of the legitimating function played by professionalized intellectuals working within academe's "social structures of accumulation." n71

Much of the first wave of CRT scholarship represents the synergistic approach in its relationship to antiracist organizing. In fact, many CRT founders wrote about movements or with movements in mind, intervening through their writings to produce new understandings of old problems in order to generate better theory. To name just a few examples, Derrick Bell directly confronted civil rights lawyers' conflict of interest in representing their clients in the movement for school desegregation. Mari Matsuda grounded her call for a jurisprudential methodology that would "look to the bottom" by analyzing the Japanese American redress and reparations movement. Matsuda, Charles Lawrence, Richard Delgado, and Kimberle Crenshaw addressed the problem of "balancing" hate speech against First Amendment rights. n72 Based on his years of organizing, especially in the Chicano community, Gerald Lopez developed a new orientation toward "rebellious" community lawyering that emphasized collaboration and empowerment, rather than the paternalistic, noblesse oblige model of civil rights lawyers. n73 As a final example, Angela Harris recounts how African American women too often were absorbed, invisibilized and marginalized within predominating white, straight, middle-class feminist movements. n76

Recent degeneration of equality jurisprudence and long-standing political rhetorical attacks on the diversity ethic cry out for a close, critical association between antisubordination theory and practice. Rightwing political rhetorical strategies, such as the political correctness attack on diversity activists, underscore the need for oppositionalist intellectuals to thematize and make tactical use of movement history to sustain and nurture progressive change. Movements are forged against both structural and material limitations with which legal scholars typically do not contend. But scholars must remain cognizant of these "little histories" of resistance, and so themselves resist essentializing the "History" of social change.

2. The Dangers of Sublimation: Before and After Postmodernism

To sublimate is to divert the expression of an instinctual or impulsive desire in its primitive form to one that is considered more socially or culturally acceptable. Sublimation in its psychoanalytic use has a structural form in which a primary realm (primitive desire) is subordinated to a secondary realm (socially acceptable behavior). By analogy, sublimation may characterize a particular structuring of the relationship between CRT and movement history. Knowledge and retellings of activist histories in one's work are often viewed within critical intellectual circles as the crude expression of desire, a faux pas to be suppressed or forgiven. n75 We offer the current fascination with anti-essentialist theorizing as an example of sublimation and the resulting danger of progressives politically capitulating to conservative agendas.

Sublimation took shape in CRT through the "postmodern turn" and the adoption of anti-essentialism as a primary intellectual stance and dominant cultural norm. Scholars hoped that this postmodern turn would lead to empowerment of people of color by restoring an autonomy of self-definition, which had been historically denied. For example, Angela Harris recounts how African American women too often were absorbed, invisibilized and marginalized within predominating white, straight, middle-class feminist movements. n76 One of the most significant outcomes of the postmodern turn for race crits was that "race," as it had been understood historically had been put under erasure. Critics on the Right and Left questioned the coherence of the race concept, the assumption of its mutability, and the fiction of its transparency. Scholars retooled race variously as a social construction, a dangerous trope, a performance, in contrast to outdated and discredited notions of race as a biological fact of difference among groups. The retooling resulted in overturned essentialisms and unmasked incoherent group classifications as a stratagem of oppressive power. Implicit in this turn was a deconstructive and restorative promise; it would reveal the discursive and actual violence of modernist racial practices and open up genuine space for the flourishing of the diverse, the multicultural, and coalitional possibilities for autonomously defined identities.

We understand the rise of anti-essentialism as a dominant theory and culture within CRT in a particular
political context. At about the same time that the
diversity movement peaked around 1990, a substantial
segment of the academic Left was in the midst of the
postmodern turn. This turn took place across
disciplines, including, but by no means primarily,
within the legal academy. While the turn seemed
mainly to affect the scholarly and methodological
approaches of left-leaning academics, its anti-
essentialism resonated as well with certain aspects of
the Right's attack on race consciousness. n78

In response to the effectiveness and rapid growth of
diversity movements on college campuses in the late
1980s, right-wing publicity machines and the media at
large seized upon highly sensationalized, often
fabricated or misrepresented, incidents of alleged
abuses by diversity activists. Following what would be
the peak of the diversity movements in the spring of
1990, the New York Times published a pivotal article
entitled, The Rising Hegemony of the Politically
Correct in fall of 1990. This article made using the
term "political correctness" ("PC") popular and the
articulation of sexuality, gender, and racial justice
demands taboo. n79 The recasting of diversity
activism as PC Undermined the moral claims of such
movements and allowed conservatives and institutions
to rebut the ample data and the obviousness of race and
gender exclusion. $ [*1415] TP The charge of PC
repression was incendiary, unfair, and utterly effective
with no semblance of "equal time" given to student
activists to respond to the slander through the mass
media. Conservative intellectuals, not critical theorists,
practiced synergistic theorizing at this time by assisting
the right-wing movements' recapture of the moral high
ground on race politics. Aided by the crusading
disparagement of "identity politics" by academics on
the Left, conservatives generally made it difficult and
unpopular, worse yet "un-chic," to respond to charges
of "political correctness" with a forthright defense of
raceconscious politics and law. n80

In this political context, the postmodern turn in
academe did not help diversity movement politics that
faced formidable administrative aggression, targeting
student leaders for arrest and prosecution, and
political/judicial retrenchment on race and rights. n81
A more intersubjective relationship between theorists
and movements may have provided insights into the
diversity movement's actual strengths and weaknesses.
Such insights, presumably, would have preempted
CRT's internalization of myths and caricatures
generated by the white Left and Right about student of
color orga [*1416] nizing. A synergistic approach to
critical race theorizing might have avoided two key
misunderstandings embedded in the anti-essentialist
ethic.

a. Underestimating Structures of Power and the Power
of Structure in Movement Politics

Anti-essentialist theorists have based their conclusions
in part on the experiences of the marginalized. n82 As
stated previously, Angela Harris has critiqued
mainstream feminist movements for their
invisibilization and marginalization of African
American women. In this sense, insights drawn from
movement experiences are consistent with our
synergistic approach as well as our experiences within
and antiessentialist critiques of leftist, women's, and
GLBT organizations. But what starts as a bold critique
of racism or other forms of exclusion within a larger
progressive movement ends in Harris' troubling call to
reject "shared victimization" in favor of more
"positive," relational, contingent identities. n83

Thus, anti-essentialism calls for the deconstruction of
falsely universalistic group identities that obscure
minority group particularities. Yet once set in motion,
anti-essentialism unmodified has no limiting principles
to prevent minority groups from being deconstructed
until all that remains are disunited and atomized
individuals themselves. These individuals are
understood as unstable constructs, who attain identities
only through a process of perpetual reperformance.
The anti-essentialist critique has placed in question the
viability of communities, valorizing instead
"coalitions" of individuals. The theoretical anti-
essentialist grounding of such a coalition of individuals
purports to offer a more advanced and more accurate
account of both the political subject and politics.
However, in light of our study, this proposition
deserves to be [*1417] approached with skepticism.
n84 For example, we cannot figure out what political
organizing structures anti-essentialists propose as the
alternative to group based political formations. How
are they to be built under the formulation of a
contingent, temporary, and relational identity? Upon
what foundation can difference and creativity will
political formations? How will such a program be
effective in challenging established structures of
subordination that are powerful and organizationally
structured -- the reality of Euroheteropatriarchy?

Many critical anti-essentialist theorists tend to
underestimate the power and force of racism and other
forms of supremacy as formidable political structures.
Focusing primarily on the realms of ideologies and
cultures of racism, these anti-essentialists seek to
combat racial oppression with conceptual reframings,
counter-discourses, paradigmatic shifts, creative
performances, and cultural contestations. Unmodified
anti-essentialists tend to ignore the entrenched political
institutions and structures of racism that require more
strategic confrontation, disciplined organization, and
coordinated follow-through. Accordingly, such theorists also generally underestimate the need for political unity and particular group-based, "essentialist" structures of political organization to respond to such structures of oppression. Sublimationist approaches miss an important insight that is well understood by activist intellectuals: successful multiracial coalitions and movements that respond to daunting forces of oppression are as fragile and fleeting as they are effective and deeply satisfying.

Had critical race theorists challenged, rather than embraced the "identity politics" critique, perhaps their lively public defense of "identity" or race-based politics might have sustained the movement. Critical theorists needed to do more to study, understand, promote and nurture successful movements and coalitions. Unfortunately, some race crits lost their transgressive voice. Movement [*1418] politics fell victim to sublimation through the rush to unmodified anti-essentialist theorizing.

To avoid political quietism, a theory of anti-essentialism must paradoxically combine with a provisionally universalistic structure for political organizing that unites contingent, transitory, and relationally defined individuals on the basis of interests rather than putative fixed group identities. But the proposed alternative of "getting beyond identity politics" and moving toward "radical and plural democracies" based on "interests," as a step up in the evolution of political group formations, begs the question of an historic and ongoing dynamic of racism within progressive political movements. This movement form of racism often expresses itself in the inability of white activists to respect or accept the autonomy of people of color, even when organizing around issues of racism, such as agenda setting, political strategizing, or leadership development.

We suggest that the essentialism/anti-essentialism debate represents a false dichotomy that reflects not so much a theoretical problem, but a political one. This problem is correctly identified by Angela Harris in her critique of feminist jurisprudence: "In feminist legal theory, as in the dominant culture, it is mostly white, straight, and socio-economically privileged people who claim to speak for all of us." Rather than championing creative individualism and attacking group-based political formations that have produced some relief from hegemony, we should insist on political accountability from the unrepresentative group that is speaking for all of us. Such an approach would have challenged, rather than capitulated to the attack on group identities through the Right's political correctness campaign and the Left's critique of identity. n85 [*1419]

The anti-essentialist critique misdiagnoses the classic tension within progressive movements -- solidarity v. accountability. The sublimation of the political problem of accountability into the more socially acceptable theoretical expression of anti-essentialism within legal academe does a disservice to solidarity. Unmodified antiessentialists remain wary of political solidarity by equating it with the flattening of difference. Because a movement's political survival is not the immediate concern of theorists, even to critical race theorists, the importance of solidarity falls by the conceptual wayside.

In demanding accountability we should not lose sight of movement ethics and the long-term goals of antisuondominating and community formation. What this may mean, in light of the long history of factionalism within radical movements, is that scholars must adopt protocols for debate and disagreement to help avoid the spiral of sectarianism that led to the decline of many of the promising movements of the 1960s and 1970s. The importance of both solidarity and accountability demands that the racial critique of feminism be communicated, but in a way that makes greater political unity more, rather than less likely. We believe that closer work with movements will heighten our appreciation for both the dialectical advantages of the accountability/solidarity tension as well as the formidable structures of power we confront.

b. Overestimating Regression in Race-Based Movements

Another danger of the sublimationist treatment of movements is the overestimation of both the extent and scope of regressiveness within race-plus organizational models. By virtue of its distantiation, the antiessentialist focus of CRT tended, ironically, to essentialize racial political formations as crudely nationalistic, sexist, and homophobic. Detachment from such movements prevented theorists from appreciating the wide range of race-based political organizing, from progressivecoalitional to chauvinist-nationalist forms.

Anti-essentialist rhetoric is a useful critique when the categories within which progressive politics takes place have become too rigid to ground useful coalitions. But anti-essentialist rhetoric represents a platitude already evident to and internalized by conscientious [*1420] essentialists. For only by recognizing, addressing, and transforming differences into political solidarities could one hope to go forward with a successful movement. In light of the twin hazards of the political correctness charge and the identity politics critique, the fascination with anti-essentialism was a luxury available only to those who did not have to deal with the increasing difficulties of
race-plus political organizing and coalition building in the face of 1990s backlash. Race-plus organizers, operating under the principle of "conscientious essentialism," already learned and applied the lessons of anti-essentialism and "strategic essentialism" as suggested by the movement slogan, "unified, but not uniform."

As we have seen, the coalitions that formed within the Boalt student diversity movement were based upon autonomously chosen racial or gender affiliations that nevertheless represented essentialist notions of community. To take one example, not every Black law student identified with or belonged to the BLSA, but every member was Black. Although BLSA students may have seen themselves as a coalition rather than as a community, it was an essentialist coalition. Moreover, this conscientious essentialism was not a deficit in the contest of the diversity struggle. On the contrary, conscientious race and gender essentialisms were indispensable to the credibility of the diversity movement and its demands. A diversity movement in which principles and practice are not structurally bound together would either fail to mobilize change or bring change that disserves the interests of the diverse communities it purports to represent.

Critical race anti-essentialists could have learned from movements to distinguish between those conscientiously (or strategically) essentialist political groupings that formed precisely as a response to anti-essentialist critiques of existing movements and those crudely essentialist political groupings whose narrow nationalism or (hetero)sexisms subverted progressive political formations. Through greater interaction, CRT scholars would have known that diversity movements at the time were largely led by students of color, and women's and gay/lesbian/bisexual groups that performed qualified antiessentialism out of political necessity. This knowledge through interaction might have curbed scholarly skeptical tendencies to overestimate regression in race-based movements.

C. Some Demographic Musings on the Synergism/Sublimation Divide

We recognize that neat categorizations of first and second wave CRT do not give a complete picture, yet there are analytical distinctions of value to be explored by dichotomizing between recent and established race crits. What follows is an impressionistically drawn and somewhat superficial set of hypotheses regarding a possible generational/demographic explanation of the synergism/sublimation divide identified above. We undertake a generous reading of the first wave CRT scholars and a critical reading of the second wave because we belong to the second wave and feel it is important, as method, to start with self-critique in the hopes of reconciling tensions between the two generations of CRT.

Much of the first wave of CRT scholarship adopted a synergistic approach that incorporated and reflected movement sensibilities into the analysis of legal issues and problems. The second wave of CRT scholarship by contrast, is marked, to an extent, by a dominant ethic of anti-essentialism. This ethic seeks to break apart the whole for closer inspection of the constituent parts. While many second wave race crits draw from movement dynamics, they may favor their role as "disenchanted intellectuals" with the more mediated relationship to political engagement that such a metier implies.

Does the synergism/sublimation divide correlate with generational and demographic differences? Racial demographics of second wave race crits differ markedly from those of the predominantly African American first wave of CRT, which reflects the broad pattern of law school hiring. In 1986-87, for example, faculty of color comprised but 5.4% of total law school faculty nationwide, of which African Americans constituted approximately seventy percent. n86 Up until the decade from 1987-97, law schools employed mostly white men, with only token hires of white females and African Americans. n87 Latina/o and Asian Pacific American ("APA") percentages during this era averaged less than one percent each of the overall law faculty. n88 Native American hiring was and continues to be infinitesimal. n89

To illustrate these changes using the Michael Olivas's data on Latina/o hiring in the last three decades, law schools hired eighty percent of all Latinas/os (88 out 110 total) in the last ten years (19881997). n90 According to another study, approximately seventy percent (11 out of 16 total) of American Indian law faculty entered in the last decade. n91 And roughly half of the current APA law professors entered law teaching since 1986. n92 Women of color increased even more dramatically of late. For one striking example, ninety-four percent of all APA women law faculty started teaching since 1980. As a result of changing demographics and politics, second wave race crits were significantly more diverse along the lines of race, gender, and sexuality. Unsurprisingly, this second wave is interested in exploring the subcomponents in the category of race, a category that had been constructed by liberal whites as almost exclusively "Black and white," and as default male and heterosexual. The clash of demographics with the extremely narrow historic construction of race by the legal academy was an important condition of
possibility for the postmodern/antiessentialist endeavors of second wave race crits.

In addition, CRT’s founders and first wave for the most part fall within the "baby boomer" generation, born roughly between 1945 and 1962. The second wave race crits, mostly born after 1962, largely entered legal academe after 1990. The intellectual "coming of age" for these two generations differs significantly. The second wave was schooled at the height of the postmodern turn and viewed political skepticism as a progressive intervention. To this [*1423] second wave, group identity took the mantle of cultural performance in order to avoid irrelevance as passe "modernist" form. By contrast, the first wave's instruction was taken in structurally-oriented, race, class, or gender-based theorizing that was much more receptive to community organizing in addressing institutions and systems of power.

Moreover, important changes in the social environment affected junior race crits as scholars. For the early founders, CRT was a dangerous activity, one that could result in further marginalization and outright exclusion, based on the experience of their CLS counterparts who were being denied or fighting bitter battles to gain tenure. Only after an impressive initial body of scholarship emerged did critical race theorizing achieve a measure of safety and success for its practitioners. Second wave race crits benefited from the elevated status and newfound theoretical ascendance of CRT. Accordingly, they faced pressures and rewards when entering the "race for theory," not necessarily a race that is conducive to the synergistic ethos we described above. n93

As a final consideration, the founders and first wave scholars came of age during an era of social protest and race-based contestation/resistance, with the civil rights movement, the Black Power movement, the Black Panther Party, La Raza Unida Party, the Brown Berets, the American Indian Movement, I Wor Kuen, Line of March, and other radical, nation-based political organizations. Many of CRT’s first wave participated in these or other race-based formations, internalizing the various positive lessons and ethics of the movement, such as unity, solidarity, audaciousness, self-determination, critique and self-critique, and coalition. n94 However, they also experienced the movement’s negative excesses and weaknesses: sexism, ethnocentrism, homophobia, fratricide, sectarianism, [*1424] vanguardism. The power of institutions such as the media, entertainment industry, and universities to disparage, invisibilize, and defame such movements combined with movement instilled traits of modesty and self-critique to result in a one-sided, negative characterization that even its participants are hesitant to rebut publicly. In order to balance these possible generational differences, greater interaction between early and later race crits is needed. Senior race crits who have engaged newer arrivals to the CRT project, are supportive as well as gracious in the face of various explicit and implicit criticisms of first wave CRT’s "Black-white" paradigmaticism, heterosexism, and elitism. And in fact, many of these criticisms do not apply with the same force to those engaging with the second generation of CRT. Two unfortunate consequences should be noted: first, there has been a lack of open engagement with some that could benefit from the second wave demands for accountability. Second, junior crits, who could learn important lessons from those whose struggles paved the way, pass over the political histories and wisdom of those who allowed themselves to be critiqued. The alienation and distance between much of the first and subsequent waves of CRT has produced a regrettable chasm and loss of historical memory so vital to the regeneration of community race-based resistance.

Race crits should reclaim not only the fragilities of our movements, but also their magical and sublime qualities. Black freedom struggles should be not be seen primarily as examples of outdated "Black-white" dichotomization, or chauvinist nationalism that epitomizes all that is wrong with traditional race theorizing. Rather, the commitment, courage, sacrifice, and strategic brilliance of its many participants should be unromantically retrieved to inspire and inform contemporary resistance movements and oppositional theorizing. At the same time, we should continue to strengthen the movement, in academic sites and beyond, by ensuring that our priority of solidarity among oppressed communities does not obscure the necessity of accountability for greater intergroup justice. First wave race crits can disabuse junior race crits of hegemonic notions that radical, race-based movements were somehow more sexist, classist, and homophobic, than society-at-large. Moreover, through the sharing of subjugated knowledge and repressed [*1425] movement histories, we should understand how even imperfect movements have forwarded the struggle we inherit today, just as our flawed efforts will nevertheless provide a basis for future resistance. Through such an understanding of our fragility and ability to prevail against overwhelming odds, CRT might inculcate a greater appreciation for an intersubjective method that will promote greater expression of the "political" in our search for the "theoretical."

Conclusion

The goal in this Article is to ground CRT in the history of resistance movements in order both to reveal
the political context of CRT's emergence and to raise for further reflection the strengths and weaknesses of the historical cross-pollination between praxis and theory. We sought to do so not simply to add one more legend to the genesis stories that are told about a successful and powerful institutional innovation. Rather, we suggest ways in which CRT-identified scholars might act collectively to contend with the continuing and coming storm of backlash and retrenchment against racial and social justice in which we are already significantly engulfed.

Antiracist organizing shares some of the same frustrations of antiracist theorizing, but the strengths and weaknesses of the former are different from those of the latter. One of the great strengths of antiracist organizing within the student diversity movement at Boalt was its adoption of organizational methods forged in the practical, everyday concerns of political struggle. In particular, the approaches of prior successful student of color movements led to an organizational coalition model linked to membership organizations made up of individuals from a range of people of color and women's groups. This structure of raceplus organizing enabled students of color to contend with the entrenched power structure of legal education for significant institutional changes.

The strength of antiracist theorizing is in its ability to fulfill its critical discursive function. As we have argued, when oriented toward movements, that function should entail looking for the main dangers places the critical race theorist in the paternalistic position as a judge, issuing [*1426] verdicts on formations, agendas, and strategies that reflect a one-way gaze. Instead, we propose a more intersubjective methodology for CRT’s interaction with movements in the third wave of scholarship -- one that seeks to provide a research/theory arm to contest and open up structures of power for communities in struggle, and to acknowledge a two-way relationship between intellectual activists and activist intellectuals.

Looking forward to the second decade of CRT, our synergistic approach to CRT work links theory with the lived experience of the subordinated and political resistance. Concretely, this approach may entail replacing the dominant culture of anti-essentialism in CRT, reclaiming the moral high ground for identity-based political organizing, and reaffirming the centrality of collective agency in the creation of political and counter-epistemic space. This approach may require rejecting the primacy of postmodernism's radical antifoundationalism in favor of a theorizing perspective rooted in the history of community-based antisubordination struggles. Finally, this approach may necessitate rethinking and reworking the norms of access to administrative and legal interpretive power, while possibly revaluing, in light of developments, prior discursive interventions or noninterventions. In the context of student diversity struggles, the practical turn for CRT scholars could mean continuous diversity mobilization through shared power and strategies for developing race-plus coalitions.

In closing, we raise some questions for the future of CRT as an organization. We see CRT in its current form of workshops and conferences as an individual membership organization of progressives of color, not a coalition. In the future, this political formation may be supplemented in favor of other forms of organization. Hopefully, the historical movement lessons of the significance of political structure, as well as the ongoing salience of racial paternalism in progressive movements is heeded. If so, CRT should approach the call to open itself up to become a membership organization of progressives with caution. Under such a model, how will members respect leadership development, agenda setting, and strategic decisionmaking of people of color -especially women of color, gay/lesbian/bisexual/transgendered people of color, among other multiply identified peoples? Is a race-plus coalitional structure in order? To further develop CRT, we might encourage the establishment of LatCrit, APA Crit, and other racial subgroupings [*1427] that will interact on a egalitarian basis with other established law crits, i.e., fem crits, CLS, and New Approaches to International Law ("NAIL"), to name a few? Should we take seriously the challenge of collective political engagement, synergistic theorizing and intersubjective methodology? CRT in its next decade may very well need to address these organizational-structural questions.

FOOTNOTE-1:

n1 See Eric Yamamoto, Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America, 95 Mich. L. Rev. 821, 869, 874 (1997) (observing that disjunction between "high theory" generated by critical race theorists and "frontline practice" exercised by progressive lawyers tends to result in abstracted theories that are untested and untestable through either practical experience or material gain for those who are racially subordinated). While Yamamoto does integrate the role of community activists into his formulation of critical race praxis, throughout the article, in the title, he emphasizes the
interaction between legal race theory and political lawyering. See id. at 830-39.

n2 Richard Delgado, editor of one of the first two leading anthologies on Critical Race Theory ("CRT"), begins his genesis story in the mid-1970s with an acknowledgment of the "early work of Derrick Bell and Alan Freeman" -- both legal scholars writing on race. Professor Delgado notably identifies the American civil rights movement and other nationalist movements as providing "inspiration" to CRT. He further acknowledges CRT's intellectual debt to Critical Legal Studies ("CLS"), feminism and continental social and political philosophy. See Critical Race Theory: The Cutting Edge at xiii-xiv (Richard Delgado ed., 1995) [hereinafter Cutting Edge]; see also Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 Cal. L. Rev. 741, 741 (1994) (identifying July 1989, at first annual CRT Workshop, as the birth date and birthplace of CRT).

Indeed, Richard Delgado was one of a handful of early faculty supporters of the 1980s-1990s student movement for diversity. He supported the Boalt Coalition for a Diversified Faculty by speaking at our educational events and rejecting forcefully the standard rationalizations offered by the administration for its failure to diversify. Most recently, he performed the same function for a national group of students organizing to maintain diversity in legal education in the wake of Hopwood and Proposition 209.

n3 See Critical Race Theory: The Key Writings that Formed the Movement xiv, xix (Kimberle Crenshaw et al. eds., 1995) [hereinafter Key Writings].

n4 One first wave race crit provided a useful counterpoint to other versions by acknowledging that the material gains won by student-led diversity movements directly affected CRT's existence. Professor Matsuda identified as part of the CRT genesis the "resurgence of student activism," including "sit-ins, rallies, and guerrilla actions" at Boalt, Stanford, Harvard and Columbia that resulted in "affirmative action hiring" and race-themed conferences. See Mari Matsuda, Where Is Your Body? 50 (1996).

n5 We are also concerned that the Crenshaw et al. version overemphasizes the Harvard-centricity of CRT with the foundational attention focused upon Harvard's 1981 Alternative Course protest, and the Harvard-based CLS movement generally. See generally Key Writings, supra note 3, at xx-xii.


n7 Id. at 7.

n8 One could go back even further to the House on UnAmerican Activities Committee ("HUAC") hearings conducted in San Francisco in 1960 that were protested by U.C. Berkeley students. However the racial origins of that protest were more nebulous. While there was chronological overlap between the HUAC protest and civil rights struggles in the South, the linkages between participants were much more tenuous. See Raya Dunayevskaya, FSM and the Negro Revolution, in The Free Speech Movement, supra note 6, at 21, 22. We start with the Free Speech Movement as one of the earliest, defining moments of mass antiracist student protest.

n9 The 19 organizations spanned a wide range of the political spectrum, and included Student Nonviolent Coordinating Committee, Congress of Racial Equality, Young Socialists of America, Students for a Democratic Society, the DuBois Clubs, the Young Democrats, the Young Republicans, and Students for Goldwater. These organizations were among the first warned by the administration of their violations of the new regulations, followed by suspensions of eight students from coalition groups. See id. at 23-24.

n10 Only later was the movement abstracted from its origins to become the signifier of a contested and redeemed freedom of expression.

n11 See Eugene Walker, Mississippi Freedom Summer, in The Free Speech Movement, supra note 6, at 12 (noting that leadership of Free Speech Movement
"were those who had been part of the Mississippi Freedom Summer Project"). It is interesting to note that the abstraction of the racial focus of the FSM was foreseen and resisted by its leaders, who, like later critical race theorists, had a power-based critique of liberals' understanding of free speech:

The liberal University of California administration would have relished the opportunity to show off in the national academic community a public university enjoying complete political and academic freedom and academic excellence. And if student politics had been restricted either to precinct work for the Democrats and Republicans, or to advocacy (by public meetings and distribution of literature) of various forms of wholesale societal change, then I don't believe there would have been the crisis there was. . . . The corporations represented on the Board of Regents welcomed Young Democrats and Young Republicans as eager apprentices, and sectarian "revolutionary" can be tolerated because it is harmless. The radical student activists, however, are a mean threat to privilege. Because the students were advocating consequential actions (because their advocacy was consequential): the changing of hiring practices of particular establishments, the ending of certain forms of discrimination by concrete acts -because of these radical acts, the administration's restrictive ruling was necessary.

The Free Speech Movement, supra note 6, at 16; see also id. at 18 (observing that Free Speech Movement "gained its initial impetus from the very different involvements of what are mostly middle-class students in the struggles of Negro people").

n12 The San Francisco State Third World Strike triggered other similar protests across the country. See Campus Protests Rock California, Nation, Daily Californian, Jan. 10, 1969, at 1 (reporting on Black/Third World student unrest at Brandeis University in Massachusetts, and San Jose State College and San Fernando Valley State College in California); Unresolved Demands Spark U.S. Protests: One Week of Student Strike, Daily Californian, Jan. 13, 1969, at 1, 4 [hereinafter Unresolved Demands Spark U.S. Protests] (updating reports on Brandeis and San Fernando Valley student strikes, and reporting on further actions taken by students of color at Swarthmore College, Queens College in New York and Northwestern University in Illinois).

n13 The San Francisco State Third World Strike began in the fall of 1968, prompted in part by the firing of an African American professor and Black Panther, George Murray. A coalition of African American, Asian American, Chicano, and Native American student organizations comprised the Third World Liberation Front that organized the strike. San Francisco State strikers challenged their Berkeley counterparts to demand similar changes in higher education. Prior to the strike, a 1966 survey of the racial composition of the undergraduate student body at U.C. Berkeley revealed that African Americans, Chicanos and Native Americans together comprised a mere 1.5% of the student population, while constituting 24% of the California State population. See Matthew Dennis, Defeat in Victory, Victory in Defeat: The Third World Liberation Front Strike of 1969, at 1-2 (June 1987) (unpublished manuscript, on file with authors) (noting that of over 26,000 students, 1% or 226 were Black, 0.36% or 76 were Chicano, and 0.28% or 61 were Native American); see also Phil Semas, San Francisco State Strike Dies: White Strikers Return to Class, Daily Californian, Mar. 14, 1969, at 1, 8 (reporting on partial victories of strike, including establishment of Black Studies department and school of ethnic Studies, and increased minority student admissions); Unresolved Demands Spark U.S. Protests, supra note 12 (covering agreement by San Fernando Valley State College to establish two ethnic studies departments and to make greater efforts to hire faculty of color).

n14 See, e.g., infra notes 18-19 and accompanying text.

n15 These two issues were linked in student protests by organizers from each movement. For example, one May 18,
1977 Daily Californian newspaper ad for an anti-apartheid rally read:
Victory to the People of South Africa!
US, UC Out Now
Defeat the Bakke Decision

Similarly, in a 1977 sit-in at which 56 members of Campuses United Against Apartheid were arrested, the two demands of protesters were: (1) U.C. and U.S. out of South Africa, and (2) defeat Bakke. See Cops Arrest 56 at Sproul Sit-In, Daily Californian, June 3, 1977.

n16 The 1970s anti-apartheid coalition included primarily the white student Left (i.e., Campuses United Against Apartheid, Students for Economic and Racial Justice, the Revolutionary Student Brigade, the Council for Economic Democracy, and the Young Socialists Alliance), and secondarily organizations of students of color (United Students Against the Bakke Decision, the Third World Coalition, the Pan Africanist Student Board, and the Ethnic Studies Fee Committee). See Sumi Cho, A History and Analysis of the Anti-Apartheid Movement at U.C. Berkeley 4-11 (Dec. 1986) (unpublished manuscript, on file with authors); see also Blacks Lack Campus Unity, Daily Californian, May 3, 1978 (quoting Erica Huggins of Black Panther Party stating, "I am ashamed white students are organizing a movement which should be full of blacks."). The article later quotes the president of the Black Law Students Association who explained that Black students had to combat the paternalistic assumption that they were at U.C. Berkeley simply out the generosity of liberals, thus they had to work harder to "prove" themselves and consequently did not have extra time to invest in outside activities.

n17 However, the upside of Bakke would be quietly enacted not by activists, but by administrators in admissions offices.


n19 The race-plus electoral coalition known as Cal Students for Equal Rights and Valid Education ("Cal-SERVE") included African Students Association, Asian Student Union, Inter-Tribal Council, Lesbian Gay Bisexual Alliance, and Movements Estudeaptil Chicanos de Aztlen ("MECha"). UPC organized the key events in the anti-apartheid movement of the 1980s, including a ten-hour sit-in and the "largest number of students arrested at any one protest since the 'early 1970s,'" the student-faculty meetings with the U.C. Regents, and the Bishop Tutu visit to the Greek Theater. See Chris Krueger, UC Police Make 138 Arrests at Sproul Divestment Protest, Daily Californian, Nov. 7, 1985, at 1, 5.

n20 See Key Writings, supra note 3, at xxii-xvii (providing thorough summary of CRT's contestation with CLS). The formality/informality debate is perhaps best captured by the mini-story told by race crit Patricia Williams recounting the experience of looking for a New York apartment with Peter Gabel, a CLS scholar. Gabel quickly located an apartment and sealed the deal with a "$ 900 dollar deposit, in cash, with no lease, no exchange of keys, and no receipt." Patricia Williams, Reconstructing Ideals from Deconstructed Rights, in Cutting Edge, supra note 2, at 86-87. In contrast, Williams signed a "detailed, lengthily negotiated, finely printed lease." See id. Commenting on their vastly differing approaches to apartment-hunting, Williams observed:

Peter, I speculate, would say that a lease or any other formal mechanism would introduce distrust into his relationships and that he would suffer alienation, leading to the commodification of his being and the degradation of his person to property. In contrast, the lack of a formal relation to the other would leave me estranged. . . .

. . .

Peter's language of . . . informality, of solidarity, of overcoming distance -- sounded dangerously like the language of oppression to someone like me who was
looking for freedom through the establishment of identity, the formation of an autonomous social self. To Peter, I am sure, my insistence on the protective distance which rights provide seemed abstract and alienated.

Id. at 87-88.

n21 See Melissa Crabbe, Anti-Apartheid Forces Join but Cultures Differ, Daily Californian, Apr. 29, 1986, at 11 (chronicling different decisionmaking processes between UPC and CAA).

n22 See id. at 1, 6, 11 (detailing open split on tactics between UPC and CAA). One U.C. official stated his opinion that CAA believes that "they have to create a situation where confrontation will occur so they can get media attention . . . . The feeling is that legitimate protest, which does not disrupt, will not get sufficient attention, therefore it is not effective." Id. at 11. CAA leader, Andrea Pritchett, commenting on CAA's lack of direct action principles, stated, "the fact that we don't have a rigid program is good because it allows us to be influenced by other political views, but it's also a problem because in dealing with a situation like a riot, we don't have a unified position." Id.

Organizational leaders agreed that there was an increased vulnerability for men of color during protests. See id. ("Third World students receive the brunt of police violence in any demonstration.").

n23 In rebuttal to the CAA charge of conservatism, UPC member Patricia Vattuone commented on the differing agendas and perspectives of the two groups: "We've been labeled less militant, and that's a problem . . . . We're not about rebelling against our parents and the institutions -- those aren't the issues." Id.; see also Pedro Noguera, Fighting Racism Doesn't End with Your Diplomas, Daily Californian, May 15, 1986, at 4-5."We're trying to win our people over not just to struggle for divestment. We're trying to win them over for life, because we want them to be in this struggle after they graduate from school. . . . For those of you who would say that we are conservative for taking this on as our task, I challenge you. I ask what will you be doing in 10 years?"); Statement of Purpose by UPC, Daily Californian, Apr. 29, 1986, at 6 ("We do not view this movement as a struggle against authority. For us, the anti-apartheid movement, like the . . . tutorial program run by students in the Berkeley elementary schools or our efforts to improve affirmative action on the campus, are all related to the overall purpose of our organization: to work for and support the liberation of our people and all people.").

n24 See Crabbe, supra note 21, at 6, 11 (noting that UPC agenda items and demands for improved graduate affirmative action and institution of Ethnic Studies graduation requirement were adopted by other anti-apartheid groups for the sake of unity); Keith Palchikoff, Celebration and Rally: Activists Laud Divestment, Call for Action, Daily Californian, Sept. 4, 1986 (observing that "besides celebrating the July divestment vote, the [anti-apartheid] activists also called upon the crowd to support the institution of a required ethnic studies course"); After Divestment, What's Next? Ethnic Studies!!!!, UPC Flyer (undated) (on file with authors); see also infra note 32 (discussing flyer which describes linkage of U.C. support of apartheid in South Africa and United States).

n25 A 1969 Daily Californian article reported on an illegal rally staged by Boalt students to protest the administration's ban on rallies during the Third World Strike, and observed that "law students are becoming actively involved in campus politics for the first time." Mathis Chazanov, Boalt Students Stage Rally, Protest Administration Ban, Daily Californian, Feb. 29, 1969, at 1, 16; see also Telephone Interview with Linda Greene, Professor of Law, University of Wisconsin (Nov. 1997) (transcript on file with authors) (supplementing information on 1972 Boalt strike with first-hand knowledge gained as strike participant and former BLSA President and founding CRT workshop member); Interview with Gerald Horne, in Flushing, N.Y. (Oct. 11, 1997) (notes on file with authors) (providing supplemental information on 1972 Boalt strike from personal experience as strike participant). The 1972 Boalt strike received a great deal of coverage. See, e.g., Black Students OK Boalt Offer, Daily
In 1975, for example, Asian American students protested the admissions committee recommendation of full elimination for Japanese Americans and the 50% cutback for Chinese Americans in special admissions policy absent any study. Despite AALSA's impressive organizing efforts, the policy was implemented.

Several authorities discuss the HEW probe. See Epstein, supra note 27, at 282-83; Sue Feldman, Agent Secretly Attends Boalt, Daily Californian, Jan. 25, 1980, at 1, 22; Sue Feldman, Boalt Hiring to Be Probed by HEW, Daily Californian, Sept. 26, 1979, at 1; and Sue Feldman, Groups Seek to Unify Berkeley Left, Daily Californian, Dec. 4, 1979, at 1 (discussing internal divisions within Berkeley Left).

The seven organizations comprising the coalition included the Asian American Law Students Association, the Black American Law Students Association, the Boalt Hall Students Association, La Raza Law Students Association, the National Lawyers Guild, the Native American Law Students Association, and the Women's Association. See Diversified Faculty Issue Intensifies, Suspended Sentence, Apr. 1979, at 1, 3 [hereinafter Diversified Faculty Issue] (on file with authors); see also Tom Pecoraro, Boalt's Minority Recruitment Effort Lagging, Daily Californian, Feb. 28, 1978, at 3. The 1978 strike received much coverage. See, e.g., Diversified Faculty Issue, supra, at 1, 3; Barbara Franklin & Grant Mercer, Boalt Hall Hit by Sit-In, Strike, Daily Californian, Mar. 22, 1978, at 1, 12; Mercer, supra note 28, at 1. Dean Kadish refused to begin the "official" February 1978 faculty meeting before Coalition for a Diversified Faculty ("CDF") members spoke in order to avoid "setting a precedent" for student participation and input. See Diversified Faculty Issue, supra, at 1. For a record of CDF's activities for 1977-1978, closing the year with the March 21, 1978 strike, see id. at 3, 8.

But the investigation was discredited when the Boalt administration discovered that a Department of Labor investigator had monitored three law classes without their knowledge or permission. Seriously undermined by the controversy, the investigation failed to confirm the students' charges.

Several authorities discuss the HEW probe. See Epstein, supra note 27, at 282-83; Sue Feldman, Agent Secretly Attends Boalt, Daily Californian, Jan. 25, 1980, at 1, 22; Sue Feldman, Boalt Hiring to Be Probed by HEW, Daily Californian, Sept. 26, 1979, at 1; and Sue Feldman, Groups Seek to Unify Berkeley Left, Daily Californian, Dec. 4, 1979, at 1 (discussing internal divisions within Berkeley Left).
in U.C. investments in South Africa, exactly 2 tenured Boalt minority faculty, and only 9.7% graduate students of color at U.C. Berkeley.” See Boalt Strike Flyer (Apr. 7, 1986) (on file with authors). Neither of the co-authors recalls any consciousness of a previous CDF at the reformation of BCDF in the 1980s.


n34 The fall 1988 hiring included Boalt's first critical race theorist, Angela Harris, as well as feminist scholar Reva Siegel, outspoken BCDF ally, Bryan Ford, and the first Latino male hired at Boalt, Dan Rodriguez. This set of hires represented the most heterogeneous in Boalt's history.

n35 The information for the 1967 and 1987 faculty data was provided by the Boalt administration. For information on the Swift press conference, see Ashby, Marjorie Shultz, supra note 34, at 18-19, and Letter from Marjorie Shultz to Sumi Cho (Sept. 1989) (on file with authors).

n36 As two of the few students of color still involved with BCDF, the authors intervened to propose a race-plus coalitional structure to BCDF that was passed by the membership. Cho and Westley served as two of the four original steering committee members of the newlystructured BCDF as members of the Asian American Law Students Association and the Black Law Students Association, along with Renee Saucedo of La Raza Law Students Association, and Juliet Davison of the Boalt Hall Women's Association.

n37 See Key Writings, supra note 3, at xix.


n39 See Sandy Louey, Boalt Professor Wins Discrimination Fight, Daily Californian, Aug. 28, 1989 (reporting on independent panel's unanimous finding of sex discrimination and U.C. Berkeley Chancellor Heyman's subsequent offer of tenure to Professor Swift); see also Ashby, Eleanor Swift, supra note 34, at 14. In exchange for the chance to have her case reviewed by an independent committee outside of the law school, Professor Swift agreed to drop her gender discrimination lawsuit against the university.

The 1988 strike received much local media coverage. See Roland De Wolk, Students Protest Shortage of Minorities and Women on Boalt Hall Faculty; 28 Arrests, Oakland Trib., Mar. 23, 1988, at B1; Ellen Goodwin, 28 Cited in Six-Hour Sit-In Protesting Bias in Hiring, San Jose Mercury News, Mar. 23, 1988, at 1B. The authors credit BCDF co chair Renee Saucedo for conceiving of and coordinating the Nationwide Law Student Strike of 1989. There was some concern among the BCDF leadership that expanding the movement to a national level was premature and threatened to destabilize the local movement. Sumi Cho, one of the authors, felt that BCDF should solidify its base and ally more closely with the campus wide movement for diversity before "going national.” In retrospect, both positions seemed legitimate. The nationwide strike forced a sea change in law school hiring culture, discussed below. On the other hand, the very next year, the second nationwide strike threatened to be a failure at Boalt were it not for the strength of the campus wide diversity movement through the United Front. Whether BCDF could have withstood the conservative onslaught of the early 1990s through a more focused local campaign is unclear.

n40 One of these missteps involved a letter from BCDF leaders to an academic couple being hastily recruited by the Boalt faculty for tenure track positions. BCDF charged that the waiver of standard search procedures was designed to eliminate student input in the name of affirmative action recruitment (of a white female candidate and her white husband). Further, students felt that the "target of opportunity" (“TOP”) affirmative action positions, used to convey additional funds to departments fielding diversity
candidates, were being misused, as the female candidate was being hired in the "regular" position, with her spouse being hired through TOP funds. In light of this history, BCDF and other student leaders wrote to the candidates who were extended offers and asked them not to accept based on the need for greater racial diversity and for the process-based failures in their hiring. The letter to the candidates created an uproar from Boalt faculty and from a considerable segment of the student body. BCDF strategy seemed to emphasize increasingly ill-conceived direct actions with no clear link to attainable demands, and commensurate defense of those arrested. Ironically, BCDF's major successes (in reversing two tenure denials and winning four of five diversity hires in one year) led to a perception among many students that the administration was now in good faith willing to diversify the faculty, or that the faculty had been adequately diversified.

n41 The conservative "political correctness" campaign proliferated rapidly after a New York Times magazine article in the winter of 199091. See Richard Bernstein, The Rising Hegemony of the Politically Correct, N.Y. Times, Oct. 28, 1990. NEXIS citations in "arcnews/curnews" reveal only 70 total citations in articles to "political correctness" for all of 1990. One year later, after the Bernstein article, NEXIS records over 1500 citations, with a steady increase to over 7000 citations by 1994. See Sumi Cho, Essential Politics, 2 Harv. Latino L. Rev. 433, 450 nn.33 & 36 (1997).


n43 Prior to 1989, it could be said by diversity activists that no controlling legal authority had determined that publicly sponsored raceconscious remedies were illegal in an educational or academic setting. In 1989, Croson held that local racial set-asides in public construction contracts were subject to strict scrutiny. See Croson, 488 U.S. at 490-91. The narrative of Croson which viewed the case as one about a majority minority black-white coalition seeking to ensure relatively modest but meaningful minority participation in a lucrative publicly funded enterprise only saw the light of day in Justice Marshall's exasperated dissenting opinion. See id. at 528-61 (Marshall, J. dissenting). The majority, by contrast, only saw "reverse discrimination." See id. at 491. What Croson seemed to say to diversity activists in particular was that our generation could not rely on the high Court to support our politics in the way that a previous generation of civil rights activists could. In the language of Justice O'Connor's opinion, our politics would be viewed as "racial politics," and that was a bad thing as well as constitutionally forbidden to the state. See id. at 493-95.

For BCDF members, the message of Croson was even clearer: time had run out on judicial tolerance of result-oriented diversity politics.

n44 515 U.S. 200, 227 (1995) (holding that all racial classifications imposed by government actors are subject to strict scrutiny analysis).

n45 38 F.3d 147, 160 (4th Cir. 1994), amended and reh'g denied, 46 F.3d 5 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995) (holding that Black-only scholarship program was not narrowly tailored to asserted goal of remedying present effects of past discrimination).

n46 78 F.3d 932, 944 (5th Cir. 1996), reh'g denied, 84 F.3d 720 (5th Cir. 1996), cert. denied sub nom. Texas v. Hopwood, 518 U.S. 1033 (1996) (holding racial preferences in state university law school's admission program violates equal protection).

n47 On June 26, 1997, it was revealed that not one of the 14 Black students admitted to Boalt Hall under the new policies adopted after passage of the anti-affirmative action measure had decided to enroll. See Amy Wallace, UC Law School Class May Have Only 1 Black, L.A. Times, June 27, 1997, at A1 (discussing resegregation); see also Derrick A. Bell, Jr., Race, Racism and American Law 381-389 (2d ed. 1980) (chronicling varieties of massive resistance pursued by southerners opposed to desegregation facilitated by Supreme Court's "all deliberate speed" order in Brown v. Board of Education II).
We use the term "institutional-cultural" to draw on "new institutionalist" forms of analyses from the social sciences. These approaches emphasize the importance of social institutions as both constraining action and constituting actors and interests. "Institution-cultural" struggle by CRT and student activists was thus at once struggle against the institutional constraints of deracialized modes of pedagogy and legal analysis and struggle for a constituting culture wherein radical subjects of color could flourish. See generally The New Institutionalism in Organizational Analysis (Paul J. Dimaggio & Walter L. Powell eds., 1991); Institutional Structure: Constituting State, Society, and the Individual (George M. Thomas et al. eds., 1987). The authors thank Gil Gott for bringing this body of literature to their attention.

See, e.g., Matsuda, supra note 4, at 74 ("In April 1988, law students across the country held a national day of protest. They sat in to demand changes in hiring practices . . . . That same year, I got a call inviting me to teach as a visitor at Stanford Law School.") Although Professor Matsuda had the wrong year for the first nationwide strike, which was 1989 instead of 1988, the first (Boalt-only) law student strike called by the Boalt Coalition for a Diversified Faculty did occur in April of 1988 and received considerable local, regional, and national publicity.

As merely a partial listing, some of these actors include the Society of American Law Teachers and their members' surveys and reports that provided a wealth of information on the exclusionary effects of the closed system of hiring. In particular, the work of David Chambers, Charles Lawrence, and Richard Chused deserve special mention. Michael Olivas's "dirty dozen" list, an annual data compilation and resource base, and patient prodding/scolding, prompted Latina/o hiring at many schools. The AALS Minority section, formed in the early 1970s, turned its attention early and often to the issue of minority hiring, issuing reports and sponsoring recruitment conferences for prospective candidates. We believe a serious study of these diversity efforts by faculty and other constituencies would complement our study of student diversity activism.


See Chambers, Women in Law, supra note 51, at 6.

See Telephone Interview with Richard White, Statistician, AALS (Nov. 14, 1997) (transcript on file with authors).


To illustrate, there were 273 full-time law faculty of color in 1988-1989 out of
The following year, there were 451 out of 5202—a total increase of 178 additional faculty of color. See id. The 65% increase in the number of law faculty of color occurred in a year of nominal increase in overall faculty size, which grew at a rate of only 2.5%. See id. In 1990-1991, the percentage of full-time faculty of color increased to 10% or 662 of 6538 total law faculty. See id.

n57 See id.

n58 See Michael Olivas, The Education of Latino Lawyers: An Essay on Crop Cultivation, 14 Chicano-Latino L. Rev. 117, 130 (1994). This information was updated in a handout for a panel discussion at the LatCrit III conference, May 7, 1998. This set of data is not kept by any organization such as the American Bar Association of the Association of American law School. Rather the labor-intensive statistical research is conducted each year by Michael Olivas, a senior Latino law professor, an early and ongoing advocate for Latina/o hiring in law teaching.

n59 At least since publication of the influential work on racial formation by Michael Omi & Howard Winant, race has increasingly been viewed in intellectual academic circles as a social construction that is neither biological nor static, but rather in the process of change over time and subject to certain hegemonic paradigms of analysis. See Michael Omi & Howard Winant, Racial Formation in the United States (1986); see also Anthony Appiah, The Uncompleted Argument: Du Bois and the Illusion of Race, in "Race," Writing, and Difference 21 (Henry Louis Gates, Jr. ed., 1985); Mark Tushnet, An Essay on Rights, 62 Tex. L. Rev. 1363, 1394-1402 (1984) (providing example of "trashing"); Robert Westley, White Normativity and the Racial Rhetoric of Equal Protection, in Existence in Black: An Anthology of Black Existential Philosophy 91 (Lewis R. Gordon ed., 1997) (exploring usurpation of social construction thesis to serve ends of white supremacy through color-blind jurisprudence). But cf. Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimization in Antidiscrimination Law, in Key Writings, supra note 3, at 110 (critiquing CLS trashing of ideology "as the only path that might lead to a liberated future" for those who are racially oppressed). In the early 1990s, there was a media frenzy over political correctness. See Cho, supra note 41; see also Dinesh D'Souza, Illiberal Education (1991) (lamenting rise of campus movements in late 1980s that urged affirmative action faculty hiring and student admission, ethnic studies requirements, hate speech codes, and gay and lesbian studies).

n60 Epstein, supra note 27, at 276, 322. Epstein's sources on this period of heated contestation never cite to a student, but are confirmed by "faculty interviews," "one emeritus professor," as well as various deans. See id. at 322.


n63 Michel Foucault, Two Lectures, in Power/Knowledge: Selected Interviews and Other Writings 1972-1977, at 82-83 (Colin Gordon ed., 1980).

n64 See Epstein, supra note 27, at 283, 322-23 (discussing "angry students" and "law school agenda"). Epstein does note that the class boycott strategy was developed at Boalt and followed elsewhere, but the context is not one of ringing endorsement of the movement.

n65 See generally Estolano et al., supra note 61.

n66 See id. at 7.

n67 See id. at 6-17.

n68 See supra notes 61, 65-67 and accompanying text (discussing New Directions for Diversity authors' erasure and disparagement of Boalt student activism). We acknowledge our own role in this historical movement amnesia and
seek to correct it in part through this Article.

n69 We use the term "counter-discourse" in the sense suggested by Nancy Fraser: "members of subordinated social groups have found it advantageous to constitute alternative publics . . . parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses." Nancy Fraser, Politics, Culture, and the Public Sphere: Toward a Postmodern Conception, in Social Postmodernism: Beyond Identity politics 287, 291 (Linda Nicholson & Steven Seidman eds., 1995). A counter-discourse, then, interprets social reality in a manner opposed to subordination. See id.

n70 Angela Harris coined the term "disenchanted intellectual" to refer to the contemporary critical theorist. See Harris, supra note 2, at 778.

n71 Radical economists refer to the set of mutually reinforcing social and economic institutions as the "social structure of accumulation" ("SSA"). See John Miller & Chris Tilly, The U.S. Economy: Post-Prosperity Capitalism? 23 Crossroads 1, 2 (July/Aug. 1992) ("Successful accumulation requires a set of mutually reinforcing . . . institutions -- rules of the economic game, implicit and explicit agreements, and the organizations that carry them out, including government agencies, business groupings, and popular organizations."). Such structures are fluid, have a limited lifetime, and are constantly being disassembled and reconstructed. For example, the post-World War II SSA involved three main components: (1) a "capital-labor accord" which offered labor stability to key economic sectors by offering "productivity plus" pay formulas in exchange for "no-strike" provisions in bargaining agreements; (2) a "capital-citizen" accord that provided the safety net of New Deal programs in exchange for social stability, and; (3) a Pax Americana accord which relegated the U.S. to the dominant role in the world (capitalist) economy with its attendant role as global policeman. These three "pillars" permitting smooth accumulation of capital remained solidly in place until the early 1970s. Each pillar began to "crack" at this time, leading to the disruption in the social structures of accumulation and economic instability. See id. at 2-3; see also David M. Gordon et al., Power, Accumulation, and Crisis: The Rise and Demise of the Postwar Social Structure of Accumulation, in Radical Political Economy: Explorations in Alternative Economic Analysis 226 (Victor D. Lippit ed., 1996).

The professional intelligentsia, especially in a field like law, may have their own particular labor-capital/capital-citizen accords. Because of their generous remuneration (relative to other academics) and elevated social status, law professors -- even antisubordinationist law professors -- may feel obliged to honor the implicit agreement of "collegial discourse," at times a euphemism for the normalization of nonresistance to oppressive forces. The corporate academic institution, in exchange for its inclusion of the subaltern, can head off attacks of exclusionary practices from outside critics, and thus guarantee its smooth accumulation process.


n74 We believe Harris's critical insights in Race and Essentialism were based on contestation of racism within the women's movement and certainly had potential to be synergistic, but ultimately ignored the larger political dynamic and danger of the Right and segments of the Left essentializing race-based movements as we shall discuss below. See generally Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990). We view much of the later Harris work as
an eloquent corrective to her earlier sublimationist work. See generally Harris, supra note 2. Although somewhere between the first and second generations, Eric Yamamoto's work deserves mention here. See generally Yamamoto, supra note 1 (discussing critical race praxis).

n75 See Webster's Ninth New Collegiate Dictionary 1174 (9th ed. 1988) (defining sublimation). On sublimation in its psychoanalytic use, Freud developed the controversial sublimation thesis, and we should point out that our appropriation of the term in no way is an endorsement of its application in psychoanalytic theory. Rather, as the text states, our use is a kind of structural analogy. See Sigmund Freud, Introductory Lectures on Psychoanalysis 23, 345-46 (James Strachey ed. & trans., 1966).

n76 Harris, supra note 74, at 585-90.

n77 See Ian F. Haney Lopez, White by Law: The Legal Construction of Race (1996) (explaining race as sociological construction); Robert Chang, The End of Innocence or Politics After the Fall of the Essentialist Subject, 45 Am. U. L. Rev. 687 (1996) (advocating for shift away from identity politics to political identities); Diana Fuss, "Race" Under Erasure? Poststructuralist Afro-American Literary Theory, in Essentially Speaking 73 (1989) (discussing erasure); Harris, supra note 2, at 745-58 (elaborating on deconstructive and restorative promise of postmodernism); Cheryl I. Harris, Whiteness as Property, in Key Writings, supra note 3, at 276 (discussing essentialism's pitfalls).


n79 See Cho, supra note 42, at 450-51 nn.33-37 and accompanying text (discussing rapid proliferation of discourse of political correctness).

n80 See generally Richard Delgado & Jean Stefancic, No Mercy (1996) (discussing rise of right-wing think tanks and their role in constructing regressive civil rights discourse); see also Cho, supra note 42, at 443-53 (analyzing simultaneous rise and popularization of attacks on "identity politics" and "political correctness" by academic Left and political Right).

n81 To be sure, the postmodern turn opened up progressive space, at least within the academy, for alternative approaches to analysis beyond dualistic paradigms. In particular, the postmodern turn has opened up racial discourses within the white-over-Black dichotomy, with the establishment of "LatCrit" theory, and the proliferation of Asian Pacific American and Native American scholarship. See, e.g., Symposium, Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory, 19 Chicano-Latino L. Rev. 1 (1997); Colloquium, International Law, Human Rights, and LatCrit Theory, 28 U. Miami Inter-Am. L. Rev. 177 (1997); Symposium, LatCrit Theory: Latinas/os and the Law, 85 Cal. L. Rev. 1087 (1997); Symposium, LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship, 2 Harv. Latino L. Rev. 1 (1997); Colloquium, Representing Latina/o Communities: Critical Race Theory and Practice, 9 La Raza L.J. 1 (1996). Race and gender antiessentialism, supported by the radical antifoundationalism of the postmodern turn, has had the welcome effect of disarming those on the Left that believed that coalition or movement politics necessarily took account of race and gender identity. Indeed, the failure to take account of identity had fatally flawed earlier student diversity movements.

It is more than ironic that at the historical moment that people of color began entering the halls of higher learning in appreciable numbers, and making demands for greater inclusion, we are asked to check our identities at the door, when our identities were the excuse for denying us entrance in the first place. Up until this moment, it was the almost exclusive prerogative of white power both to subordinate and exclude people of color and women, and then tell us in a basically white communication how it was done. See, e.g., Richard Delgado, The Imperial Scholar: Reflections on a Review of Civil Rights Literature, in Key Writings, supra note 3, at 46 (decryring dominance of white male authors in leading law reviews.
writing about civil rights and only citing one another).


n83 See Harris, supra note 75, at 612 (asserting black women can help feminist movement "move beyond its fascination with essentialism" through "creative action," not "shared victimization").

n84 This thought is counterintuitive for some feminists who have found the basis of a political community built around women to be the common situation of women. See Kate Soper, Feminism, Humanism and Postmodernism, in 55 Radical Philosphy 11 (1990) (asserting that feminist politics implies movement based on solidarity and sisterhood of women and doubting whether there can be specifically feminist politics under antifoundationalist assumptions of postmodernism). Also left nonplussed are racialized group members that experience race as belonging to a racially defined community with common interests and perspectives.

n85 One of the main dangers to theory and movements posed by anti-essentialism is its potential to promote an abstract and endless expedition into the misrecognition of individual particularity. We believe that an autonomous theory of anti-essentialism with no limiting principles plays too easily into the hands of the enemies of progressive politics. Such rhetoric is simply beside the point in a political arena where those opposed to inclusive change are themselves virulently essentialist. Even if such insights of difference are true, or are truisms, i.e., "we are all unique individuals," such a theoretical stance places a normative priority on radical and skeptical antifoundationalism that emphasizes individual prerogative at the expense of community political empowerment and group solidarity. In the highly essentialized world of contestatory diversity politics, the misplaced priority of escaping such group confinement reveals itself to be a scramble in a cage. It is not that conscious interventions are incapable of changing the meaning-content of categories in order to respond to new circumstances and create new opportunities. But what the elasticity of meaning-content cannot do is alter fundamentally the referential force of the categories themselves or normalize passage out of one category into another. The recruitment to essentialized racial and gender categories continues apace in spite of antifoundationalist longings.

n86 See Chused, supra note 51, at 538.

n87 See id.

n88 See id.

n89 See id.

n90 See Olivas, supra note 58 (providing data on Latina/o law faculty).

n91 See G. William Rice, There and Back Again -- An Indian Hobbit's Holiday "Indians Teaching Indian Law," 26 N.M. L. Rev. 169, 182 (1996). Professor Rice's data covers through the 1994-95 academic year. One tenured respondent to his survey did not provide the number of years in law teaching, so we excluded that response to the data reported in this paragraph. We updated the Rice study using AALS data on hiring for 1995-96 and 1996-97. This was a rather easy task as there were no successful American Indian/Alaska Native law teaching candidates reported in those two years.

n92 See Pat K. Chew, Asian Americans in the Legal Academy: An Empirical and Narrative Profile, 3 Asian L.J. 7, 18, 32
(1996) reporting that 40% of all APA law professors entered since 1986, and that 94% of APA women entered legal academy since 1980. Since Professor Chew's data covered up to the 1992-93 academic year, we again supplemented her data with more recent AALS data. If 40% of the 61 identifiably APA law faculty between 1986-92 were recent entries, that would be about 24 faculty. In the years 1993-97, there have been 23 additional APA hires, bringing the current ratio of recent entries to 47 (24 from 1986-92 plus 23 from 1992-97) out of 84 (61 total in 1992 plus 23 additional since), which is about 56%. However, because we do not have the number of APAs leaving the academy between 1992-97, our 50% updated figure is a rough, though somewhat reliable estimate.

n93 While there have been high profile attacks on CRT scholarship of late, those criticisms in major media outlets may actually testify to the institutionalization of CRT as a significant force in legal scholarship.

n94 As a result, we believe first wave race crits are more likely than the second to have a greater appreciation for the 1980s diversity movements that brought about vast changes in legal academe. Second wave CRT scholars who would benefit most from these movements may be least aware of the sea change in law school culture under which the first wave was hired, tenured, or not tenured. The sharply increased success rates of people of color seeking teaching positions since the Nationwide Strike for Diversity in 1989 represent a clear break in the business as usual approach to pre-1989 hiring. But this clear break is invisible to recent hires, who may attribute their entry to the magnanimity of the legal academy, their own racial exceptionalism and/or unexplainable luck. Under any of these attributions, the significance of the political is obscured.
The fifth and final cluster of this LatCrit IV Symposium, International Linkages and Domestic Engagement, includes five important contributions to LatCrit IV's focus on global issues by Professors Timothy Canova, Gil Gott, Tayyab Mahmud, Ediberto Roman, and Chantal Thomas. Since the inception of the LatCrit movement, LatCrit scholars have been conscious not to confine their analytical gaze to domestic issues. In LatCrit, this commitment to international linkages is just not an "add-on," or a footnote to the LatCrit enterprise. LatCrit has learned from prior movements not to adopt a "stop-at-the-water's-edge," procapitalist understanding of racial justice in the United States. Instead, LatCrit focused on the international almost immediately, publishing in 1996-97 a colloquium on International Law, Human Rights, and LatCrit Theory, thus making explicit that the linkages between globalization and the domestic, and the domestic to global are integral to LatCrit. As Professor Kevin Johnson's Foreword to this symposium emphasizes, leadership has been important in developing the LatCrit intellectual enterprise. In the effort to ensure that LatCrit resist parochial tendencies, Professors Lisa Iglesias, Berta Hernandez-Truyol, and Francisco Valdes have been not only instrumental, but also motivational, as a glance at footnotes of the five essays in this cluster testify. The oral history of LatCrit IV also reflects LatCrit's now traditional focus on the global. Professor Celina Romany's keynote remarks, Global Capitalism, Transnational Social Justice and LatCrit Theory as Antisubordination Praxis, admonished LatCrit theorists, or as she jokingly termed, "LatCritters," not to lose sight of the important class, worker, and nation state political implications of the modern push towards "globalization." Such an "outsider" focus, claims Roman, has the potential to transform the whole structure of international law because it questions the legitimacy of the nation-state, which is at the very foundation of international law. Does a nation-state that subordinates large segments of its population, the Taliban's subordination of women, for example, have any legitimacy in the international law regime? Roman notes that traditional law approaches have sought to minimize these troublesome issues and, therefore, have no ready response to such a question. For example, the United Nations regime of nation-state trusteeship brings in the disquieting notion that some nations are not yet ready to take on the burdens of democratic self-government. Liberal scholars with a more humanistic emphasis, like Rawls and Dworkin, have configured the nation state in radically different ways. As scholars like Rogers Smith points out, and Posner himself admits, liberalism does not delineate the nature of the nation state. Rather, constructing the link between the liberal classical individual aspirations and the construction of the nation state is part of the larger debate, not only in liberal thought, but within democratic politics.
ongoing racial subordination. Legal scholars traditionally have treated these two spheres as dichotomous, independent areas of study; the former as the domain of critical race theory and the latter international law. However, that false division falls apart in LatCrit theory, as well as its sister movement Asian Pacific American Critical Legal Scholarship ("APA.Crits"). n7 As Professor Francisco Valdes's earlier essay, Piercing Webs of Power, underscores, the LatCrit enterprise, like much second generation of critical race theory and feminism work, emphasizes multidimensional analysis. n8 The dynamics of subordination -- the interaction between race, gender, class, culture, history, and social group formation -- are too complex to be captured in one or two dimensions, what Critical Race Theory has identified as "intersectionalities." n9 Valdes uses the metaphor "web," and urges "multidimensional critique . . . as another step toward helping the LatCrit community better visualize and understand the nature of . . . critical legal theory and praxis." n10 This methodology enables LatCrit to "take a stance against all forms of subordination," as Professor Lisa Iglesias declared in her essay linking APA Crits and LatCrit. n11

Multidimensional methodology enables LatCrit to break through the artificial dichotomy of the global and the local. The results are remarkably creative scholarship. All of the works in this symposium illustrate, to greater or lesser extent, this linkage. Some, in [*1432] particular, resist the taxonomy that the symposium's participants necessarily have imposed on themselves in presenting such rich and varied research. n12 Part I below sketches out, by way of illustration only, how some of the work already presented in this symposium cultivates the linkage between local racial formation and global market dynamics. Part II then explores LatCrit's contribution to the critique of globalization.

I. To Understand the Local We Must Look to the Global

The minority communities, or stated in today's political terminology, the "identity groups," on which LatCrit is most likely to focus, either directly or indirectly -- Latinas/os, Asian Americans, Blacks, indigenous peoples, women workers -- are groups that as a class are very much affected by the ongoing dynamics of globalization. n13

Let us take first the plight of immigrants and undocumented workers California. The influx of these workers is a tangible result of the processes of globalization, n14 the ongoing "development," Westernstyle, of "underdeveloped" Latin American countries. The unleashing of global market forces and a historically based value hierarchy, which because of turn of the century imperialism established the West (or North) at the apex, triggered displacement of unskilled low-wage workers. In the specific case of Mexico-U.S. relations, the hemispheric push towards globalization under the "free trade" forces of NAFTA pressured Mexico to liberalize previously protected sectors of the economy. n15 The post-NAFTA de [*1433] valuation of the Mexican peso and the subsequent governmental program of fiscal austerity, which even reached food subsidies, has fueled an increased labor flow from rural and poor Mexico into California and other border states. n16

Both Dean Christopher David Ruiz Cameron and Professor Maria Ontiveros's contributions to this symposium center on how these immigrant undocumented workers, many from Mexico but others from nearby Latin American countries, become subject to exploitation and subordination once they cross the border, lose their status as Mexican citizens, and become undocumented workers -- noncitizen low-wage workers. n17 As Dean Ruiz Cameron notes, these workers have been indispensable to building the infrastructure of much of the Southwest and maintaining America's supply of cheap fruits and vegetables. n18 They provide many comforts to residents of Los Angeles and the large cities close to the borders, as nannies, maids, lawn care workers, and ethnic restaurant workers. Yet, as noncitizens and "illegal" workers, the law has denied them labor rights, property rights, and human rights. n19 Perceived by low wage American workers as potential competitors [*1434] and seen by many Americans as foreign usurpers, immigrants have been and remain the object of hostility and prejudice. n20

In her essay, Professor Ontiveros describes the interrelationship between the market forces that demand unskilled labor and the US national policies that deny these workers citizenship:

With respect to Latina/o farm workers, in particular, the United States has set up regimes at the intersection of immigration and labor law which allow immigrants to work in agriculture under very strict requirements. These requirements are designed to oppress workers because they guarantee an oversupply of labor while providing little or no legal recourse for the workers to have their grievances addressed. Most importantly, they are designed to deter settlement or empowerment because they provide for only temporary legal residence. n21

Professor Ontiveros describes a global system of labor exploitation. Industries, like agriculture, depend on plentiful supplies of unskilled labor. For that purpose, the nation state must be lax in the enforcement of
immigration laws, but restrictive in extending labor protections given to domestic to undocumented workers: while the nation state does not succeed in keeping workers from crossing its borders, it permits micro conditions of extreme exploitation. Professor Ontiveros argues that workers can fight back this web of global and local oppression by organizing locally. She uses the case study of the United Farm Workers to show how other national unions could benefit from organizing undocumented low-skilled workers. n22

Dean Ruiz Cameron's contribution would be amusing if it weren't such a sad and telling commentary on American's overenchantment with the unearned benefits of globalization. Ruiz Cameron tells how unskilled workers, many undocumented, are organized by "capitanes" to perform lawn work for the rich and famous in Beverly Hills. n23 In yet another example of how the global enables local consumerism, the rich and famous, as well as middle class homeowners, enjoy manicured lawns at bargain rates. There [*1435] is one catch, however: the lawn workers' power blowers make too much noise. n24 The rich and famous of Beverly Hills "solved" this "noise pollution" problem in much the same manner that other middle class citizens infected with "Not in My Back Yard" syndrome solve such unpleasantness. They paraded before the city council and lobbied for an ordinance banning power blowers, n25 and exercised their influence and prestige to ensure that the benefits from global labor would not be too visible in Beverly Hills. The rich and famous did not offer to pay more for lawn work to ensure that this work, now more time consuming, was done quietly. The ordinance made the jobs of the lawn workers more physically taxing and compressed the margins of the capitanes. It remains to be seen whether the capitanes will have the negotiating power and will to adjust prices of lawn care upwards to avoid exploiting these workers.

Past LatCrit work has linked the global to the local in another way. LatCrit has centered on the "immigrant," and how this identity has been racialized. Dean Kevin Johnson has linked California's Proposition 187, the initiative that barred immigrants from schooling, medical care, and welfare benefits, to the past and current racialization of these workers. n26 In an intriguing illustration of how group identity is formed, Professor Yxta Murray described how Mexican Americans and Mexicans experience the majority's hostility towards them as a rejection of their membership in the community. n27 This, in turn, triggers these minorities' ambivalence at describing themselves as belonging to the American polity. n28

In this symposium, Professor Chantal Thomas explicitly links the global to the local in her contribution entitled, Globalization and the Reproduction of Hierarchy. n29 Professor Thomas makes a very important argument. Globalization accentuates preexisting structural [*1436] inequalities in the United States, which disproportionately affect minorities, low-skilled workers, and those trapped in the inner cities in a cycle of unemployment, inadequate housing, substandard education, and welfare. n30 Thomas points out that the International Monetary Fund and Western leaders view "deindustrialization" -- the process of industrial jobs being relocated overseas to cheap labor markets and new high skill service jobs sprouting up in advanced Western economies -- as a "natural feature" of globalization. n31 The IMF cautions that for those workers and nonworkers, the "effects of globalization may . . . be significant." n32 However, drawing on the work of other critical race theorists, Professor Thomas makes the case that politicians have failed to address government policies and the resulting market forces that have relegated to the lowest strata of our economy low skill manufacturing sector workers and those who live in inner cities, which are disproportionately minorities. Thomas argues, not against globalization, but rather that "justice requires that the government . . . take steps to correct this structural disadvantage." n33

As Part I illustrates, LatCrit provides a "look from the ground up" in understanding how the various forces that drive global -markets, labor force flows, national identity formation -- influence local communities. This more complex methodology enables LatCrit to move significantly beyond the Black/White traditional civil rights paradigm, and center on fundamental core issues affecting Latina/o communities.

II. Globalization or Global Subordination?

The four remaining rich and challenging essays by Professors Gott, Roman, Canova, and Mahmud attack the phenomenon of globalization. Each issues a challenge, and each deserves responses and engagement in future LatCrit work, as detailed below.

Both politicians and academics have peddled globalization as an absolute good. Globalism has been portrayed as a beneficent extension of technology, providing, among other things, the "global [*1437] information highway." It is also a consumerist windfall that provides cheap finished goods at the local Walmart to the middle class. Both Democrats and Republicans have urged the liberalization of world trade as a way to raise the standard of living of the poor worldwide, and to stabilize emerging democracies. n34

This seamless rhetoric of "globalization," "liberalization," and the push to "world democracy" is
another example of the "strategic manipulation of democratic rhetoric," which LatCrit III Symposium investigated. n35 The unrest in Seattle during this Fall's World Trade Organization talks and this April's protests of the International Monetary Fund and World Bank's meetings in Washington D.C. signaled that the debate over globalism cannot be repressed any longer. Labor, environmentalists, and white, middle-class socially progressive youths -- important sectors of the American pluralist polity -- were willing to fight, civil rights style, what they perceived to be global social injustice. n36 Bipartisan U.S. congressional resistance to Clinton's request to "fast tracking" trade treaties also underscores increasing uneasiness with the unconsidered domestic effects of further trade liberalization. n37 Thus, the inertia that plagues pluralist politics when difficult issues come to the fore is slowing down the push towards globalization.

LatCrit IV's essays grouped under this heading of International Linkages and Domestic Engagement mark another important step in investigating how globalization can be a force that continues class, race, nation state and cultural subordination.

In the first essay, Professor Gil Gott aptly maps out four distinct ways in which race and globalization intersect. First, he describes "critical race globalism," as "the current conjuncture of globalization." n38 [^1438] This introductory cluster Essay has already described this conjuncture as the mainstay of globalization, the free market push towards the breaking down traditional nation state borders to facilitate the flow of commerce. Second, Gott distinguishes "critical race internationalism," that could also be called international critical race theory praxis. This is the conscious activism by civil rights activists and critical race theorists to link political activism at home with international movements resisting racial, social and political subordination. n39 LatCrit, even though a young movement, has already begun to practice critical race internationalism by sponsoring conferences joining Spanish and Caribbean academics with LatCrit theorists. n40 Third, Gott calls for continued analysis of race and imperialism and their relationship to domestic and international politics. n41 This is the work, carried on by historians and political scientists, as well as by LatCrit theorists, that investigates both past and current linkages between colonialism/imperialism and various forms of hierarchy, racial formation, market exploitation under colonial rule, nation state building, and cultural imperialism. n42 Finally, Gott calls attention to the formation of "global racial space," the phenomenon that "racial space is becoming globalized" and is now constantly subject to global currents and cross currents.

[33 U.C. Davis L. Rev. 1429]

n43 Part I of this Essay sketches how LatCrit takes on this task. n44

Professor Gott's taxonomy is useful in understanding how LatCrit takes on the global and the local. Much ongoing and past LatCrit work can be grouped in one of these four categories. Thus, Gott's taxonomy is not just academic, it can serve as useful guideposts to LatCrit's continued critique of race and globalization.

Critical Race Globalism?: Global Political Economy, and the Intersections of Race, Nation, and Class, as Gott's title indicates, is mostly preoccupied with the first area of investigation, critical race globalism. In this work, Gott echoes Valdes's call for "weblike" LatCrit analysis, and warns of pitfalls to be warded off in deconstructing the dynamics of globalization and race. [^1439]

What are these pitfalls? First, rhetoric has changed, but substance has not. Nation-states, like modern democratic actors, have accepted the rhetoric of formal equality and abandoned manifest global white supremacy. n45 Yet practices and policies continue "the basic structure of differentiation that marked earlier imperial domination." n46 Thus, Gott echoes Iglesias's admonition in LatCrit III's Forward that the "disjuncture between rhetoric and reality is a crucial political space for LatCrit theory to occupy." n47

Second, Gott admonishes his readers that "critical race globalization" analysis involves carefully navigating between the proverbial rock and hard place. LatCrit theorists must not "sign on to a facile kind of one-worldism," n48 without questioning how a specific kind of globalization might further forms of subordination. Uncritical and careless parroting of conventional wisdom of the benefits of globalism can unwittingly lead to LatCrit theorists contributing to cultural imperialism (devaluing nonwestern cultural approaches), "the race to the bottom of distributive justice," global labor exploitation (such as the examples provided by Professor Ontiveros and Dean Ruiz Cameron discussed in Part I), and "bad nationalisms" (read, neonativism). n49 Thus, Gott warns, LatCrit theorists must be wary of "thinking locally and acting globally . . . and thinking globally and acting locally." n50 If LatCrit theorists "think local" to understand the global, they can misapprehend the global forces that are interacting with a local problem.

Gott concludes by urging LatCrit theorists not to stop at the "water's edge," n51 because the problems that LatCrit theorists analyze locally inevitably have an international dimension. Analysis on only a local level may seem more manageable, but just as LatCrit's move from critical race theory has resulted in more
complexity yielding surprising richness, so the move towards a focus on the global can enrich the reconstructive aspect of LatCrit scholarship. As an example, Gott suggests that LatCrit theorists could provide "justice informed leadership" in efforts to craft solutions for saving the Amazonian rainforest, building on the lessons learned from the environmental justice movement. n52

The next contribution is Professor Ediberto Roman's A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?. This work parallels Gott's study of how imperialism continues to dominate relationships between North and South/developed economies and emerging economies, and the global construction of race. Taking inspiration from Professor Tayyab Mahmud's whimsical comment at LatCrit IV, Roman proposes that scholars begin thinking about race-centered approaches to international law, or RAIL. n53 RAIL's foremost attribute is that it would not footnote, but rather place at the center, the troublesome issues that race, culture, ethnicity, religion, gender, and native peoples bring to the study of international law. Such an "outsider" focus, claims Roman, has the potential to transform the whole structure of international law because it questions the legitimacy of the nation-state, which is at the very foundation of international law. n54 Does a nation-state that subordinates large segments of its population, the Taliban's subordination of women, for example, have any legitimacy in the international law regime? Roman notes that traditional law approaches have sought to minimize these troublesome issues and, therefore, have no ready response to such a question. n55 "Race," notes Roman, "does not neatly fall within the paradigm of the sovereign." n56

Roman explores what a race centered approach to the study of international law would look like. To focus on race at the level of international law means uncovering the relationship between present relations between nation states, the developed world and the developing countries, and how these relations are linked to a not-so-recent global system of colonialism. In the international law regime, Roman sees continuing vestiges of colonial paternalism. For example, the United Nations regime of nation-state trusteeship brings in the disquieting notion that some nations are not yet ready to take on the burdens of democratic self-government. n57 This is the same argument that the U.S. initially used to deny Puerto Rico the right of self-government. n58 Similarly, the right of self-determination has been selectively applied to European countries, but made "essentially unavailable for the lessadvanced people of the Third World." n59

As set forth by Roman, RAIL raises new challenges for the LatCrit theorist who wishes to engage public international law. His is a challenging critique to the mainstream notions of international law, and an avenue that is well worth pursuing in future work.

The next work, Professor Canova's essay, Global Finance and the International Monetary Fund's Neoliberal Agenda: The Threat to the Employment, Ethnic Identity, and Cultural Pluralism of Latina/o Communities, falls into the category that Gott calls critical race globalization. Canova is concerned with how the International Monetary Fund ("IMF") might have furthered the "subordination of entire nations of color." n60 The IMF, a post-World War II global market institution created by the Allied victors, implements principles of free market globalization by being the lender of last resort to nation states that find their currencies to be suffering the harsh discipline of currency markets and bond markets. n61 Accordingly, a critique of the IMF is a critique of global market economics; the state of international relations between nation states and supra global institutions; and the structural inequalities between North and South, First versus Third World, or developed countries versus emerging market economies (pick your preferred nomenclature).

As part of Canova's indictment of the IMF, he cites the dramatic increase in the last decade of worldwide poverty. n62 The World Bank reports that over one-third of the world's labor force are employed in low wage jobs or unemployed. n63 Unemployment, he notes, has "spiritual costs," progressively "undermines a person's identity formation," and "leads to potentially destructive behavior." n64

In addition to these costs on individuals, the hardship remedies that the IMF has imposed on Asian, African, and Latin American debtor nation states has also weakened them. First, there is the simple matter of a net transfer of wealth, both in the form of net debt payments (Canova reports over $200 billion in six years) and in the flight of investment capital. n65 Canova muses that "the rentier has not just refused to disappear, but has come to once again predominate over enterprise." n66 There is also the destabilization of these countries' sovereignty, which Canova speculates might be key in stemming the tide of global cultural assimilation into Western-style materialism. n67

This critique of the IMF is not unique. For various reasons, the IMF has increasingly come under attack form a variety of quarters, including such stalwarts of Western-style "neoliberal" market policies as The Economist n68 and Joseph Stiglitz, a world-known economics professor and one-time World Bank chief economist. n69 What is LatCrit's contribution to this
ongoing critique? Canova calls for LatCrit to take a hard look at "the foundations of the IMF's neoliberal agenda," to derail "the neoliberal pretense that the market objectively determines merit." n70 He argues that LatCrit theorists must question the universal application of IMF's guidelines for a "high quality" economy. These are guideposts based on post-World War II economic wisdom, "economic growth, macroeconomic stability [read, low inflation, low unemployment, low trade deficits, healthy inventory margins], good governance, more equitable income distribution, social safety nets for the poor, and increased employment." n71 Canova implies that these IMF factors may in fact be formulaic staid measures of "merit," which may no longer be appropriate given the continued failure of IMF policies to better the standard of living of the vast majority of the world's labor force (in fact, it has worsened), and stave off what Canova calls the [*1443] "asymmetrical burdens of adjustment," n72 the continued suffering of people of color, the decimation of indigenous peoples, and the gradual erosion of nonwestern cultural values. Instead, Canova, calls for questioning "what makes a successful economy and reconstructing what criteria should be used to label an economy as successful and deserving of merit and credit." n73

Canova's argument also critiques the work by another LatCrit symposium contributor, Professor Gilbert Carrasco. In a 1996 LatCrit colloquium, Carrasco called for "LatCrites with an interest in law and development to cautiously support the neo-liberal policies of IMF and World Bank." n74 Canova rejects Carrasco's entreaty, and argues instead that LatCrit theorists must actively "seek alternatives" to the IMF's "neoliberal project." n75

Are Carrasco and Canova that far apart? It appears not, based on their bottom line recommendations. Canova recommends that the IMF's criteria be more attuned to "equitable distributions of income and economic opportunity." n76 Canova argues that the IMF has overly focused on macroeconomics and not given sufficient attention to microeconomics -- how macro programs affect the poor, the culturally distinctive indigenous and other minorities, or continue non-democratic practices such as engraining an elite that too often has proven corrupt. Carrasco calls for monitoring the IMF to ensure that the IMF builds distributive justice concerns into its programs. n77 The authors essentially differ only as a matter of degree in their distrust of the IMF as an institution, and whether the IMF's credit worthiness standards are legitimate.

This is a difference over which reasonable people may disagree; but it also reflects a difference in temperament. Canova and Carrasco differ most fundamentally in what each means by the term LatCrit. While Carrasco is concerned that LatCrit theorists [*1444] "be taken seriously" by policy makers, n78 Canova is concerned that LatCrit remain critical. Canova asks "Can . . . scholars . . . maintain their critical distance after they have entered the IMF's orbit of neoliberal assumptions?" n79 Canova appears to capture the conundrum of scholars who choose to be "outsiders" or "crits": must the critics be part of the legitimation of practices that further subordination to "be taken seriously"? n80 Or can a critical theorist engage, or even adopt, the assumptions of "neo liberalism" and still remain critical?

Both Canova and Carrasco are on to important points. As Canova argues, LatCrit's critique of "neoliberalism" must be critical. At the same time, as Carrasco advocates, LatCrit critique must be specific and contextual, n81 and heed the call for multi-dimensional "thick" analysis that Professor Francisco Valdes identifies as the LatCrit methodology. LatCrit is broad enough to encompass both Canova's and Carrasco's voices; as Dean Kevin Johnson has noted in his Forward, LatCrit is now sufficiently robust to encourage the critique and counter critique of two energetic and engaged scholars. n82

In such future dialogue, Canova and Carrasco, as well as other LatCrit theorists, should be mindful of Professors Gott's warning that LatCrit must be wary of "thinking local" on global issues. Countries like Mexico, Chile and Brazil have complained that some Western voices now want to "protect" these countries from the "evils" of development. n83 In other words, critique, whether from a LatCrit or neoliberal perspective, could mask Western style paternalism. Arguably, IMF and WTO-style economic policies have bettered conditions of the middle class in countries like Mexico, [*1445] and Brazil. n84 Admittedly, the plight of indigenous peoples and the poor continues to be severe, n85 and these developing countries' industrial policies continue to jeopardize the environment. However, these democracies are in the process of forming their own policies and compromises concerning development, industrialization, market forces, distributive justice, and the rights of cultural and racial minorities. The results may not always be what LatCrit theorists and other Western observers believe to be most desirable outcome. But, LatCrit theorists should ask themselves, who should determine what kind of development is best for these countries: the popular masses, who like voters in every democracy, are subject to rhetorical manipulations by the elite, or the theorist that claims to
avoid "false consciousness" n86? This question is at the heart of every critical project and can only be navigated with the critical bent that Canova urges.

All the provocative essays discussed thus far point to yet another important issue. LatCrit theorists need to be more specific and theoretically complete when they make reference to, or attack, the "neoliberal project." Does the LatCrit critique of neoliberalism consist of unmasking what Professor Iglesias, in her LatCrit III Forward, called the "strategic manipulations of democratic rhetoric"? n87 Or alternatively, is this project one of challenging Western inspired "foreign interventions" that "continue the scourge of corruption, dictatorship and underdevelopment"? n88 Does the "neo-liberal" critique consist of deconstructing the "dominant neoliberal narrative that marries capitalism to democracy in a happy embrace of economic abundance and political freedom"? n89 Gott's depiction of the neoliberal agenda echoes Professor Iglesias's comprehensive list of concerns with structural inequalities, global economics, cultural imperialism and the plight of the nation state. n90 For Roman, [*1446] the neoliberal project is a traditional international law regime based on an imperialist legacy. n91 Canova's critique of the "neoliberal agenda" takes aim at economic policies that do not sufficiently focus on employment, distribution of wealth, and the potential for destabilization of nation states. n92 Professor Chantal Thomas's critique of globalization takes aim at the distributive issues that are too easily ignored by liberals and neoliberals. n93

On this issue, the next contribution by Professor Tayyab Mahmud makes some headway. Professor Mahmud reviews Uday Singh Mehta's study of classic liberal philosophy, Liberalism and Empire: A Study in Nineteenth Century British Liberal Thought. n94 Mehta's oeuvre attempts to link the philosophy of John Locke and John Stuart Mill, two early stalwarts of classic liberal thought, to colonialism as an economic practice, a racial construction, and a philosophic ideology.

This is a tall order, and Mehta's argument, ably presented by Professor Mahmud, is highly nuanced and complex. Mehta's focal point is classic liberals' enchantment with reason and rationality. Thus, Mehta picks up on the feminist n95 and communitarian n96 critique of liberalism based on the "anthropological characteristics posited as being common to all human beings . . . that everyone is naturally free, that all are . . . equal . . . and rational." n97 Mehta explores yet another facet of how the conceptualization of reason can be culture bound. In classic liberal philosophy, consensual politics needed to fashion the hypothetical social contract plays a crucial role. n98 Locke, for example, fashioned a hierarchy of maturity and development that distinguished those communities that were ready [*1447] to enter into a social contract from those that were not. n99 This hierarchy invited, but did not require, England and subsequently the U.S., to develop notions that some civilizations, like the Indians, Asians, Latin Americans, and indigenous, were too archaic, exotic, and unfamiliar to be considered capable of selfgovernance. n100 Reason, as practiced by early English liberals, was a practice in conceit, setting up the familiar as civilized and superior, and the unfamiliar as backward and inferior. n101

As Mahmud points out, such a link is "ironic given the foundations of liberal thought [as an] abiding commitment to securing individual liberty and human dignity." n102 Mehta shows that the link between the conceit of rationality and the subordination of the foreign is avoidable by discussing the views of Burke, a republican thinker, as an alternative example. Burke eschewed the discourse of racial and civilizational superiority through which the British justified their empire. n103 Burke had a more realistic anthropology and believed that rationality could not be divorced from "sentiments, feelings, and attachments through which people are, and aspire to be." n104 Instead of seeking to impose rationality on the unfamiliar, Burke accepted that two civilizations as inapposite as were England and India were like "two strangers." n105 Strangers should agree to "the messiness of communication" and accept the premise that their discourse would not necessarily yield an "immanent truth on which words can fix." n106

It is intriguing to think that Burkean thought foreshadowed today's ongoing work by a wide-ranging group of postmodernists, liberal philosophers, feminists, and critical theorists as to how to carry on a "rational" discourse that is inclusive in a modern cultural pluralist democracy. n107 All of these theorists converge on the idea [*1448] that an attitude of humility (nonsuperiority) is key, and that participants must be able to accept the idea that communication may be "messy" n108 and incapable of yielding universal truths. n109 With what can only be characterized as understatement, Mahmud advises "this posture of imaginative humility may come in very handy" n110 in future LatCrit and post-colonial work.

Mahmud also recommends that future LatCrit work explore to what extent the "colonial encounter" is not a "thing of the past" but part of "the colonial lineage of many a hegemonic legal idea and practice of today." n111 This fits into Gott's third category, the study of the linkage between imperialistic and colonial practice and the current construction of race. n112 Several
LatCrit theorists, Guadalupe Luna, Mary Romero, Efren Rivera Ramos, Ediberto Roman, Carlos Venator Santiago, Juan Perea, and I have taken on this challenge. But as Mahmud rightly challenges, more remains to be done in turning a LatCrit eye to colonial encounters and constructing thick analyses of race.

Finally, Mahmud's contribution intimates that the contours of liberalism are malleable. The search to accommodate normative principles of early classical liberalism -- individual dignity and freedom -- within the modern cultural pluralist state is one in which modern liberal philosophers, such as John Rawls, Ronald Dworkin, and Will Kymlicka engage. This is a normative position that LatCrit as an antisubordination critique shares with classical individual liberalism. I have argued that a critical perspective can coexist with classic individual liberal normative ideals; indeed, a critical perspective can apply liberal frameworks to rethink what sorts of democratic practices encourage inclusion of subordinated minorities. This is a contestable position, and one that invites further discussion and critique within LatCrit.

My view is that LatCrit should dispute the linkage that some liberals make between normative individual liberalism and markets, and what this means to the construction of the state. Judge Posner, most notably, argues that "liberalism . . . has an intimate practical relation to economics," namely, to promote "voluntary" market transactions. The role of the state is to "create a large sphere of inviolate private activity and facilitate the operations of the markets." This construction of a liberal state "creates conditions that experience teaches are necessary for personal liberty and economic prosperity." Posner's tie of the normative aspirations of classic liberal thought to market capitalism is highly contestable, as is his premise that free markets promote individual liberty. Liberal scholars with a more humanistic emphasis, like Rawls and Dworkin, have configured the nation state in radically different ways. As scholars like Rogers Smith points out, and Posner himself admits, liberalism does not delineate the nature of the nation state.

LatCrit is positioned to make important contributions to this important debate. The work in prior LatCrit symposia and Celina Romany's keynote address indicates that LatCrit has already embarked on this project.

To conclude, all of the authors in this cluster have outlined important work that lies ahead. At the same time, the work in this final cluster underscores how far LatCrit has come in only four years. Each of these authors develops important guideposts in LatCrit work in the international arena, and has successfully outlined what LatCrit can and does contribute to the critique of globalization. Clearly, however, LatCrit has much more to do in order to ensure that globalization does not become coda for globalized subordination.

FOOTNOTE-1:


n2 Gott, supra note 1, at 1512.

n3 I define "globalization" as the free market push towards the breaking down of traditional nation state borders to facilitate the flow of commerce in the form of goods, services and human labor. At times, that flow of goods and human labor is legal, as under the liberalization of trade and open immigration regimes. Such flows can also be illegal, as in the flow of undocumented workers and refugees and drug contraband. In addition, globalization, with its emphasis on free markets, has had the observable effect of assimilating nonwestern cultures into the Western. This
has meant that nonwestern countries, which had full employment, nature-friendly economies, are now under pressure to "develop" into consumer-oriented, primary-goods-consuming and environment depleting economies. See generally The Case Against the Global Economy and For a Turn Toward the Local (Jerry Nader and Edward Goldsmith eds., 1996); Ulf Hannerz, Transnational Connections: Culture, People, Places (1996); Canova, supra note 1, at 1554-55 ("The neo-liberal agenda . . . promises greater liberty, but only of a certain kind, greater freedom to the owners of financial capital, but less freedom for those who must rely on wages and salaries, rather than interest on capital holdings, for their means of livelihood."); Gott, supra note 1, at 1503 n.3 (defining globalization as "a context in which state centric actors have lost control to, for example, complex economic and cultural structures that transcend erstwhile determinative relations between nation-states.").


n6 Celina Romany, Global Capitalism, Transnational Social Justice and LatCrit Theory as Antisubordination Praxis, May 1, 1999 (keynote remarks to the Fourth Annual LatCrit Conference) (notes on file with author).


n10 Valdes, supra note 8, at 899.


n12 See, e.g., infra Part I.

n13 LatCrit's stated purpose is to focus on Latinas/os. However, LatCrit is also concerned with the subordination of all peoples of color, how these various forms of subordination relate to one another, and the potential that such interrelationships offer for coalition building. See Iglesias, supra note 4, at 623-26; Elizabeth M.

n14 See supra note 3 (defining globalism).


n18 See Cameron, The Labyrinth of Solidarity, supra note 17; see also Bill Ong Hing, To be an American: Cultural Pluralism and the Rhetoric of Assimilation (1997).


n21 Ontiveros, Forging Our Identity, supra note 17, at 1063.

n22 Id. at 1059-62.

n23 Cameron, The Rakes of Wrath, supra note 17.

n24 See id. at 1092.

n25 See id. at 1094-97.

n26 See Tanya Kateri Hernandez, The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws, 76 Or. L. Rev. 731 (1997); Kevin R. Johnson, Race, the Immigration Laws, and Domestic Race Relations: A Magic Mirror into the Heart of Darkness, 73 Ind. L.J.


n29 Thomas, supra note 1.

n30 See id. at 1455-76.

n31 See id. at 1497 (citing International Monetary Fund, World Economic Outlook 1997: Globalization, Opportunities and Challenges (1997)).

n32 Id. at 1498 (citing International Monetary Fund, World Economic Outlook 1997: Globalization, Opportunities and Challenges (1997)).

n33 Id. at 1455 n.15.

n34 Canova, supra note 1, at nn.30-36 and accompanying text; Gott, supra note 1, at 1508-09. Current presidential campaign politics underscores how much consensus there is on this point between Republicans and Democrats. In a PBS News Hour interview, George W. Bush proclaimed his support for continued trade liberalization and expansion of NAFTA. When asked how his policies differed from President Clinton's, Bush answered that as a Republican, voters could be more confident in his continuing these policies, as opposed to trusting Democrats who had only recently found the free trade religion. See McNeil News-Hour (PBS television broadcast, Feb. 16, 2000).

n35 Iglesias, supra note 4, at 631.


n38 Gott, supra note 1, at 1503 n.3; see also supra note 3 (describing globalization).

n39 Gott, supra note 1, at 1503 n.3, 1510-11.

n40 See Johnson, supra note 5, at 764, 783.

n41 Gott, supra note 3, at 1504 n.4 (citing Penny M. Von Eschen, Race Against Empire: Black Americans and antiColonialism, 1937-1957 (1997)).

n42 See infra notes 107, 110-12 and accompanying text.

n43 See Gott, supra note 3, at 1504 n.5.

n44 See supra Part I.

n45 Gott, supra note 1, at 1507.

n46 Id.

n47 Iglesias, supra note 4, at 631.

n48 Gott, supra note 1, at 1509.

n49 Id.

n50 Id. at 1510.

n51 Id. at 1512.

n52 Id. at 1515.

n53 See Roman, supra note 1, at 1530.

n54 Id. at 1536.

n55 Id. at 1521-24.

n56 Id. at 1536.

n57 Id. at 1537.

n58 Id. at 1538-39.

n59 Id. at 1541.

n60 Canova, supra note 1, at 1549.


n62 Canova, supra note 1, at 1565.
following this view that individuals can and should monitor global institutions, Carrasco has just finished assembling the E-Book on International Finance and Development, which he views as an educational and empowerment tool to help citizens understand international finance and development. See Symposium, The E-Book on International Finance and Development, 9 Transnat'l L. & Contemp. Probs. 1 (1999) [http://www.uiowa.edu/ifdebook/E-Book.htm] (on file with author).
n93 See Thomas, supra note 1, at 1499-1501.

n94 Mahmud, supra note 1.


n96 See, e.g., Michael Sandel, Democracy's Discontent 1416 (1996) ("The liberal conception of the person is too thin to account for the full range of moral and political obligations we commonly recognize, such as obligation. This counts against its plausibility generally.").

N97 Mahmud, supra note 1, at 1587.

n98 Id. at 1588 & n.19 (citing John Stuart Mill, Considerations on Representative Government, in John Stuart Mill, Three Essays 402 (1875) (1861)).

n99 Id. at 1588-90.

n100 Id.

n101 Id. at 1586.

n102 Id. at 1583.

n103 Id. at 1593.

n104 Id. at 1586.

n105 Id. (citing Uday Singh Mehta, Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought 22 (1999)).

n106 Id. at 1596 (citing Uday Singh Mehta, Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought 216 (1999)).

n107 See, e.g., Seyla Benhabib, Critique of Norms and Utopia: A Study of the Foundations of Critical Theory 340 (1986) (advocating that we address the "concrete other" with a concrete history, identity and affective constitution); Renato Rosaldo, Culture and Truth: The Remaking of Social Analysis 168-95 (2d ed. 1993) ("Culture and their 'positioned subjects' are laced with power and power in turn is shaped by cultural forms. Like form and feeling culture and power are inextricably intertwined. In discussing forms of social knowledge, both of analysts and of human actors, one must consider their social positions. What are the complexities of the speakers' social identity? What life experiences have shaped it? Does the person speak from a position of relative dominance or relative subordination?"); Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 884 (1990) ("If truth is understood as partial and contingent, each individual or group can approach its own truth with a more honest, self-critical attitude about the value and potential relevance of other truths."); Robert L. Hayman, Jr., The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism, 30 Harv. C.R.-C.L. L. Rev. 57, 106 (1995) ("Undeniably, pluralization, or postmodernization, comes at a certain . . . price, . . . the comfortable, self-assured determinacy afforded by homogeneity. But this determinacy was always illusory . . . "); Introduction to Postmodernism and Law xiii-xv (Dennis Patterson ed., 1994) (arguing that truth or falsity of any statement cannot be assessed in isolation from everything else we take to be true); Martha Minow, The Supreme Court, 1986 Term Foreword: Justice Engendered, 101 Harv. L. Rev. 10, 31-38, 76 (1987) ("I conclude that I must acknowledge and struggle against my partiality by making an effort to understand your reality and what it means for my own. . . . The solution is not to adopt and cling to some new standpoint but instead to strive to become and remaining open to perspectives and claims that challenge our own.").

n108 See supra note 106 and accompanying text (citing Burke).

n109 See supra note 107.

n110 Mahmud, supra note 1, at 1596.

n111 Id.

n112 See supra note 43 and accompanying text.

n113 See Juan Perea et al., Race and Races: Cases and Resources for a Multiracial America 260-304 (1999); Juan Perea, Fulfilling Manifest Destiny: Conquest, Race, and the Insular Cases, in

n114 See John Rawls, Political Liberalism 220-24 (1996) (providing framework for moral disagreement between free and equal participants in polity, without destabilizing or disunifying well-ordered society).


n119 Id.

n120 Id.

n121 See Rogers M. Smith, Liberalism and American Constitutional Law 14-15 (1985) (stating that liberals did not fill in the blanks on legal and constitutional procedures); see also Posner, supra note 118, at 25 ("Liberalism is not a complete philosophy of government and law.").


n123 See supra note 4 and accompanying text.

n124 See supra note 6 and accompanying text.
GLOBALIZATION OR GLOBAL SUBORDINATION?: HOW LATCRIT LINKS THE LOCAL TO GLOBAL AND THE GLOBAL TO THE LOCAL: Globalization and the Reproduction of Hierarchy

Chantal Thomas *

BIO:

* Associate Professor of Law, Fordham University School of Law. Thanks to Keith Aoki, Rich Ford, and Audrey McFarlane for their comments on earlier drafts.

SUMMARY: ... A second inquiry of LatCrit IV looks beyond conventional boundaries of civil rights discourse, as does this Article by looking at contemporary economic realities for racial minority groups. ... Part I of this Article will show how federal, state, and local law and policy created preexisting conditions of vulnerability among racial minority groups, segregating them disproportionately into impoverished inner cities. ... A considerable body of legislation, regulation and case law has developed to combat discrimination in lending and housing, both of which critically affect the concentration of racial minority groups in the inner city. ... Before continuing, it may be useful to provide some description of the racial minority groups that disproportionately inhabit the inner city. ... Before continuing, it may be useful to provide some description of the racial minority groups that disproportionately inhabit the inner city. ... First, the decline of manufacturing employment has had a significant impact on the urban poor, and therefore on many racial minority groups. ... This labor is provided primarily by immigrants who are also members of racial minority groups in the United States. ... Low-skill industries are not more inherently valuable than any other sort; nor did urban poor racial minority groups enjoy even remotely ideal conditions prior to globalization. ... [1451]

Over the past decade, the federal government has increasingly taken steps to lift barriers to trade and financial flows into and out of the United States. This liberalization of U.S. economic barriers has been mirrored by similar efforts of governments around the world. These steps, together with gains in technology, have ushered in an era of "globalization." n1 The global liberalization of economic flows, according to classical economic theory, should maximize the efficient allocation of world resources and generate benefits for all. Even if globalization brings increased aggregate gains, however, it is not clear that the distribution of those gains accords with social justice. Without intervention, globalization may instead lead to increased socioeconomic inequality and economic volatility. n2

One troubling aspect of globalization is that it may tend to concentrate costs on populations that are already socioeconomically disadvantaged. Globalization is reorganizing industrialized economies into hierarchies in which income is increasingly related to skill level. At the same time, long-existing barriers to entry into high-skill occupations have not subsided, and arguably continue to strengthen. Racial minorities disproportionately occupy the low-skilled ranks of the workforce. Consequently, their impoverishment may be disproportionately likely to remain entrenched, even as the globalization-driven economy booms. This disproportionate vulnerability arises from socioeconomic dynamics not just of race [1452] but also of income and geographical space. Together, these dynamics disproportionately relegate racial minorities to impoverished neighborhoods in inner cities. n3

This Article warns against the temptation among policymakers to view the costs of adjustment to the new globalized economy as natural and inevitable. Many of these costs, particularly in the case of inner-city racial minorities, derive from a socioeconomic hierarchy that lawmakers have helped to create and maintain. Thus, this Article looks at the impact of globalization on racial minorities. In doing so, it responds to two central inquiries of the LatCrit IV Conference. The first inquiry searches for connections that link Latina/o communities to other racial minorities. While the particular dynamics described in this Article differ across groups, the general dynamic of disproportionate vulnerability affects African Americans, Latina/os, and other racial minorities. A second inquiry of LatCrit IV looks beyond conventional boundaries of civil rights discourse, as does this Article by looking at contemporary economic realities for racial minority groups.

If "laissez-faire" policy accompanied and justified the harsher results of the early Industrial Age, n4 it may well reemerge to accompany and justify those brought...
on by the rise of the Information Age. n5 The policy implications of such latter-day laissez-faireism would be that government should not "intervene" to prevent the casualties of globalization, even if those casualties occur disproportionately within certain socioeconomic groups, because such casualties are the result of an economic "evolution" that is both natural and necessary. n6 Classical and neoclassical proponents of the market tend to portray certain economic processes -- industrialization in the old days, globalization in the new -- as independent of government. President Clinton's statement that the "technology revolution and globalization are not policy choices, they are facts" is a good example of the view of globalization as an autonomous phenomenon. n7 From this perspective, such economic processes are also said to be "necessary" aspects of economic progress despite the costs they impose. According to this view, the best course for government is to allow these costs because of the long-term benefits of the process. n8 Contrary to this perspective, in his famous dissent to Lochner v. New York, Oliver Wendell Holmes criticized the Supreme Court's attempts to portray an "unregulated" market and its outcomes as natural and inevitable. n9 After a century of realist and critical legal theory following from Holmes' early insights, n10 [*1454] such a portrayal should not be revived.

This Article demonstrates that legal rules, and therefore legal decisionmakers, are deeply and directly implicated both in economic globalization and in the distribution of benefits and costs that globalization creates. The premises of the argument are straightforward. First, legal rules have facilitated economic globalization. n11 Second, legal rules have helped to construct the socioeconomic hierarchy that is the field on which economic globalization occurs. The lower rungs of this hierarchy are disproportionately occupied by poor urban minorities. n12 Third, economic globalization may exacerbate this hierarchy. n13 If legal rules helped to produce economic globalization, and legal rules helped to produce a socioeconomic hierarchy, and economic globalization exacerbates this hierarchy, then legal rules, and legal decisionmakers, are partially accountable for this result and the harms it imposes on poor urban minorities.

This Article mounts evidence supporting each of the premises leading to this conclusion. Part I of this Article will show how federal, state, and local laws have entrenched social inequality between whites and minority populations in the United States. Such laws have rendered minorities as a whole worse equipped than whites to benefit from the particular gains brought about by globalization. Part I.A describes the law and policy of suburbanization -- arguably the key factor in the deterioration of inner cities. Part I.B. describes law and policy that more directly created or facilitated racial segregation. Part I.C. briefly lists other areas of law and policy that played a role in the [*1456] deterioration of the inner cities into separate and unequal communities.

A. Suburbanization: "Incidental" Racial and Economic Segregation

"Starting in 1945, one of the Great Migrations of American history took place": this was the migration of the middle classes away from city centers after World War II. n16 From 1950 to 1980, the United States national population grew by fifty percent, but the populations of the northeastern and midwestern city centers declined, by percentages from ten to over
In her exhaustive analysis of the modern city, Saskia Sassen observes that, on one hand, suburbanization signaled progress because it was "associated with the expansion of a middle class and understood as an increase in the quality of life associated with economic development." If the suburbs signaled prosperity, however, "the inner city became an increasingly powerful image . . . to describe central areas where low-income residents, unable to afford a house in the suburbs, were left behind." \[^{19}\]

Whites were disproportionately large participants in the exodus from the city. During the same era that New York City's overall population declined by eleven percent, for example, its racial composition went from ninety-four percent white in 1940 to forty-nine percent white in 1985. \[^{20}\] Similar transformations occurred in cities all across the nation. \[^{21}\] Left behind were racial minorities \[^{[*1457]}\] comprised of African Americans, many of them relatively recent arrivals into city centers from their own migrations out of the southern United States; and, increasingly over the postwar era, of African, Asian, Caribbean, Latina/o, and Middle Eastern populations resulting from immigration into the United States. Suburbanization thus split the socioeconomic fortunes of middle-class, previously urban whites on the one hand, and poorer, urban minorities on the other. Once created, the rift continued to deepen over the length of the postwar era.

In part, suburbanization resulted from a popular desire to leave the crowded city behind and stake out new territory. \[^{22}\] Keith Aoki has recounted that this desire was, in turn, driven partially by aesthetic and moral preferences for the town life ideal, and partially by concern about unhealthy living conditions in parts of the city. \[^{23}\] The move to the suburbs also resonated with the geographical expansionism so closely identified with American culture. \[^{24}\] Yet to view suburbanization as a cultural phenomenon unaided by law would be deeply erroneous. Throughout the twentieth century, law and policy encouraged and at times literally subsidized suburbanization -- and therefore segregation.

This section focuses on federal law and policy that indirectly exacerbated racial segregation by promoting suburbanization. \[^{25}\] In the twentieth century and particularly in the postwar era, the federal government undertook many initiatives intended to increase home ownership. The home ownership agenda was shaped in part by alarm at population growth in the cities and a perceived need to control the problems that would arise from increased population density. A strong social consensus also endorsed home ownership \[^{[*1458]}\] as inherently desirable and therefore a worthy end of government action. As one commentator remarked, "home ownership is the American dream." \[^{26}\]

Most important of all was the goal of economic growth. Increased home ownership could stimulate national economic growth and development through new construction and increased investment. Economic growth resulting from massive new home ownership would be relatively evenly distributed, and would encourage saving and investment across a broad swath of the population. These seemingly admirable goals, however, had disastrous consequences for inner cities.

First, and least objectionably, federal tax law promoted economic growth through home ownership and therefore incidentally promoted segregation even though there was no explicit preference for non-urban areas. At a second level, federal lending, housing and transportation law and policy did target areas outside cities, and therefore more directly facilitated racial segregation. In both these instances, increased racial segregation was not the express goal of federal law and policy; given the strong connection between race and economic status, however, it was a predictable result of policies that drew the middle classes out of the city.

1. Incidental Promotion of Suburbanization

A cornerstone of federal home ownership policy was the federal income tax deduction for interest on home mortgages -in the aggregate, a massive tax subsidy for homeowners. \[^{27}\] Despite the relatively broad group of beneficiaries of the federal income tax deduction among the middle and upper classes, the deduction has necessarily also reinforced economic divisions between these and the lower classes. \[^{28}\] The deduction "much more heavily subsidizes \[^{[*1459]}\] the well-to-do than the poor," since the more valuable the home, the larger the amount deducted. \[^{29}\] It also multiplies the income differential between those that are able to buy homes, and those that are not and must pay all of their money over into rent. The threshold difference of being able to make a down payment and obtain financing increases over time through the appreciation of real estate assets, and through the income refunded under the tax deduction. \[^{30}\]

The home mortgage interest deduction not only increased class divisions but also accelerated movement of the middle class away from the city. The increased demand for residences for sale as opposed to residences for rent translated into a demand for construction of new property. New property
development occurred overwhelmingly outside the city. n31

In establishing a subsidy for homeowners, federal tax law did not explicitly seek to concentrate new economic growth outside cities, nor did it explicitly seek to create geographical barriers between whites and racial minorities that would both reflect and entrench segregation along race and class lines. Yet that is precisely what it did. n32 By helping to engender the suburbanization of the middle classes and failing to correct associated racial disparity, federal tax law helped to concentrate minorities in the inner cities and to set the stage for a downward spiral of urban poverty that would play itself out over the next several decades.

2. Direct Promotion of Suburbanization

While the tax law discussed above caused suburbanization only incidentally, federal loan and housing regulations directly promoted it. In the area of federal lending law, for example, federal appraisal standards applied by the federal Home Owners Loan Corporation "systematically favored suburban neighbourhoods over those in the central city." n33 Probably the most influential loan regulations, however, were the preferences incorporated by the Federal Housing Administration (FHA) into its mortgage insurance program. n34 The FHA program allowed lenders to "originate home loans free from the risk of loss." n35 Intended to benefit "first home buyers or purchasers of relatively inexpensive homes," n36 the FHA program constituted "one of the most important federal programs of the past century." n37

Michael Schill and Susan Wachter have argued that the FHA mortgage insurance program also played a role in the deterioration of inner cities. n38 For example, the agency's "guidelines disfavored 'crowded neighbourhoods' and 'older properties,' both of which were much more prevalent in cities than in the newly forming suburbs." n39 This "bias of the FHA program toward lending in the suburbs, as compared to the cities, encouraged middle-class households to leave the city and exacerbated the income and fiscal disparities between urban and suburban municipalities." n40 The FHA program exacerbated segregation along economic and racial lines in housing markets. n41

In addition to law and policy relating to home ownership, the federal government encouraged suburbanization through its massive transportation project of building a national highway system, deemed by some "the nation's most extensive and expensive continuing public works program." n42 In 1956, pursuant to a committee appointed by President Eisenhower (and chaired by a General Motors executive), Congress mandated the construction of an interstate highway system stretching more than 40,000 miles. n43 The interstate highway system continues to rely on a web of federal, state and local governmental support. n44 According to one estimate, the highway system is only sixty percent "self-financed" through tolls and gas taxes, with the additional forty percent provided through government subsidy. n45

Like tax and lending policy, federal transportation policy supporting highway subsidization aspired to worthy goals. "Governmental expenditure on . . . highways had the well-intended objective of connecting the country and facilitating commerce through a system of national highways. More roads meant more jobs in construction and maintenance, more business along highways, more personal convenience, and an easier delivery of freight." n46

And yet, the highway system created universally recognized costs for cities. n47 Highways encouraged residential exodus to the suburbs by making it easier for city workers to commute into cities. n48 Highways also reduced the "relative advantage of a central city location" and contributed to the relocation of "wholesale trade, trucking, and warehousing outside the city." n49

Federal tax, loan, housing, and transportation regulations entrenched geographic and economic mechanics of racial segregation by encouraging middle-class families and white-collar industries to move into the suburbs. In effect, suburbanization deepened racial segregation. None of these policies were explicitly designed to reinforce racial segregation. Yet the "housing and finance subsidies which favored the suburban, white middle class tilted the playing field against the central cities and older areas of the nation." n50 In doing so, they helped to skew the capacity of poor urban minorities not just to thrive in thenexisting conditions, but also to be able to adjust positively to change, including changes wrought by economic globalization.

B. Intentional Racial Segregation

By realigning economic classes along geographical divides, federal tax, housing and transportation policy also reinforced racial segregation. The federal government was also implicated by varying degrees in explicit racial segregation. First, the federal government in certain cases allowed nonstate actors and state and local governments to pursue racial segregation in housing and lending. Second, there was some explicit racialism in the federal housing policies that helped shaped today's metropolitan areas.
1. Federal Noninterference in Racial Segregation by Local Governments

Racial Segregation in Public Housing. Federal housing regulations encouraged the concentration of public housing in the inner city. Public housing regulations allowed local governments to keep federally funded housing away from white, middle-class areas and to concentrate it in already poor and predominantly minority areas. Given that disproportionately large numbers of those eligible for public housing were racial minorities, this decision cemented segregation for them and reinforced it for the larger communities out of which and into which they were directed by local governments. n51

Several components of federal housing law and policy combined to allow segregation by local governments. First, the Housing Act of 1937 established that "it is the policy of the United States to . . . vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." n52 Under this "local control" policy, local government had virtually free rein to relegate "undesirable" public housing residents to "undesirable" areas. n53 In many cases this federal lenience allowed local decisionmakers to create city slums. The federal government was therefore complicit with racial segregation by local housing agencies. n54

In New York, for example, "power broker" Robert Moses energetically pursued segregation in public housing. n55 In Chicago, the local housing authority's persistent racial discrimination caused Dr. Martin Luther King, Jr. and other civil rights activists to lead "open housing protests" in the 1960s. n56

Second, the Housing Act contained an "equivalent elimination requirement" n57 that required that one unit of "substandard" housing be eliminated for every unit of public housing built. Because most suburbs had little substandard housing, this requirement rendered them ineligible for public housing construction. n58

Finally, segregation became acute in 1949 with more stringent income limitations in public housing. n59

(The income restrictions continue in present day regulations.) n60 The result of all of these components of federal housing law and policy was a deeply entrenched dynamic of segregation of public housing.

Thus, by 1962, "eighty percent of federally supported developments were completely segregated." n61 In the 1960s, reformers attempted to put an end to the federal government's reinforcement of segregation through its housing and homeownership policies. Litigation arising from the Chicago open housing protests found HUD's complicity with local discrimination unconstitutional. n62 The Fair Housing Act of 1968 required the Department of Housing and Urban Development (HUD) to take into account the segregative effects of locating housing. n63 HUD regulations now provide that a project should generally not further racial concentration. n64 Although some courts have attempted to enforce these reforms strictly, n65 most courts deferred to HUD site selection. n66 The result of such deference, according to some, is that HUD site selection continues to exacerbate race and class divisions. n67 Even assuming HUD site selection since 1968 has been ideal, the deeper problem is that the patterns of racial and economic segregation along city-suburb lines had already been drawn by the time the HUD stopped purposely reinforcing them.

Discrimination Through Exclusionary Zoning. According to Richard Ford, "exclusionary zoning is a generic term for zoning restrictions that effectively exclude a particular class of persons from a locality by restricting the land uses those persons are likely to require." n68 The Supreme Court has struck down both explicitly racial exclusionary zoning and state enforcement of racially restrictive covenants as violative of the Fourteenth Amendment of the federal Constitution. n69 However, the Court has upheld local governments' right to exclusionary zoning mechanisms with racially discriminatory effects, such as prohibitions of multifamily housing that exclude lower-income and public housing. n70

Richard Schwemm has observed that "the Court's deferential attitude towards municipal zoning decisions that raise only economic issues has continued to the present day." n71

2. Federal Noninterference with Racial Segregation by Nonstate Actors

A considerable body of legislation, regulation and case law has developed to combat discrimination in lending and housing, both of which critically affect the concentration of racial minority groups in the inner city. Despite this, however, discrimination has persisted. n72 Some commentators believe this persistence is at least partially attributable to wrong-headed legal approaches to discrimination. n73

Failure to Correct Discrimination in Home Sales. Racial discrimination in home sales exacerbated the dynamics of racial segregation described in Part I.A. The racial segregation that arose incidentally as a result of economic disparities between whites and non-whites was secured and reinforced by intentional racial discrimination. Intentional racial discrimination further concentrated racial minorities in inner cities by impeding those proportionately few minorities that wanted and were financially able to leave the inner city...
from doing so. Federal law and policy is deeply implicated in the question of racial discrimination in home sales.

Congress and the courts have become gradually more willing to prohibit racial discrimination in real estate transactions. Courts have applied the Thirteenth Amendment n74 of the federal Constitution to prohibit racially driven refusals to sell or rent to or negotiate with black home seekers; n75 discriminatory terms, conditions or services in property sales or services; n76 and "racial steering," or "directed housing markets" for which n77 prospective home buyers interested in equivalent properties to different areas according to their race. n77

Established a century later, the Fair Housing Act of 1968 ("1968 Act") strengthens the prohibition against racial discrimination in housing. n78 Courts applied the 1968 Act to outlaw racially motivated refusals to sell, rent or negotiate regarding property, n79 or otherwise make property unavailable. n80 Courts have generally agreed that a prima facie case for violation can be made by showing discriminatory effect only, without any showing of discriminatory intent. n81

Despite the range of anti-discrimination law described above, in 1995 a federal official conceded federal fair-housing law to be "weak and inadequate." Another lamented that the federal government had been "deeply involved in the creation of the ghetto system, and it has never committed itself to any remedial action." n82

One difficulty is that the coverage of the law is incomplete. The Act exempts from its antidiscrimination provisions "single-family houses sold or rented by the owner without the use of a real estate agent or discriminatory advertising"; as well as "units in dwellings where the owner lives that are occupied by no more than four families." n83 Moreover, enforcement of the fair-housing laws has proved to be very difficult because it depends almost entirely on individual lawsuits. n84 Although the 1968 Fair Housing act outlawed discrimination on the basis of race in housing-market transactions, n85 it placed most of the burden for recognizing and combating illegal discrimination on the victims themselves. n86

Failure to Correct Discrimination in Lending. Controversy continues to surround the question whether the federal government prevents discriminatory and racially segregative lending by private institutions. Discrimination in lending solidifies geographical segregation along racial lines and concentrates poverty in the inner city by hindering those who are otherwise qualified to purchase new homes or otherwise invest in housing from doing so. Such discrimination both reduces minority influx into new homes in the suburbs and prevents redevelopment of existing housing stock in cities.

Several federal statutes prohibit "redlining," the practice by which lenders deem borrowers from certain neighborhoods unfit for normal loans on the basis of the racial composition of those neighborhoods. n87 The Community Reinvestment Act of 1977 ("CRA") n88 moved beyond merely prohibiting discrimination and affirmatively required financial institutions to ensure that they are providing adequate services to minority neighborhoods. n89 The enforcement mechanism for the CRA was to be the power of federal agencies regulating financial institutions to disapprove proposals by those institutions for bank charters, mergers, deposit insurance and investment in other financial institutions. n90

Unfortunately, enforcement of both the antidiscrimination and the "affirmative action" federal lending regulations has been limited n91 ited. n92 Enforcement of the antidiscrimination statutes proved difficult because discrimination in lending was hard to prove empirically. n93 Given that racial minorities were also often poor and unfamiliar to lending officers, it was difficult to show that racial disparities in lending did not reflect prudent lending policy based on race-neutral criteria. Inadequate enforcement for many years plagued the CRA as well. CRA enforcement consisted of reporting requirements that were criticized by industry as burdensome and by activists as ineffective. n94

In the early 1990s, however, two influential empirical studies found that race did significantly affect likelihood of obtaining home ownership financial assistance, even controlling for disparities in non-racial criteria variables that would create racial disparities in lending. n95 It cannot be said that the federal government turned a blind eye to the problem. Yet, the 1990s reports showed that race (even controlling for associated factors that might affect lending outcomes, such as income level) still significantly affects lending policy. n96 Anthony Taibi has argued that federal lending law has failed because it has overlooked existing structural inequalities and therefore perpetuates economic and racial segregation. n97 Taibi concluded that neither the "equality paradigm" nor the "affirmative action paradigm" in current federal law can address "structural disinvestment" that plagues inner cities, because neither paradigm recognizes the systematic market failure that drives such disinvestment. Taibi's argument mirrors a theme of this Article: without concerted correction, structural inequality persists in liberalized market conditions. n98
3. Promotion of Segregation on the Basis of Race

In addition to acting as an unintentional engine of racial segregation, federal law and policy at times facilitated intentional racial segregation by local authorities. At other times federal authorities have actually promoted racial exclusion.

The term racial redlining discussed above with respect to non-state actors, at least according to some commentators, originated with federal governmental practices. n96 Early versions of the Federal Housing Administration's underwriting manual, for example, "warned against making loans in areas with 'inharmonious racial groups'" n97 in order to prevent "instability and a decline in values." n98 Until 1950, the Federal Housing Administration and Veterans Administration mortgage insurance programs not only permitted, but actually recommended racially restrictive property covenants. n99 Thus, early "racially discriminatory underwriting practices engaged in by the FHA promoted racial segregation in American cities and contributed to the creation of urban ghettos." n100

In 1962 President Kennedy directed the federal government to prevent discrimination in the use, rental or sale of all residential [*1471] property that it financed, operated or owned, n101 and his order was later reinforced by the Civil Rights Act of 1964. n102 These remedies, however, were prospective and not retrospective. That is, they prohibited the creation of racially segregated public housing facilities but did nothing to redress the segregation that already existed. Some have even argued that "the federal government intentionally established the public housing program on a de jure racially segregated basis." n103

In sum, a number of regulatory structures in the postwar period directly or indirectly fuelled the exodus of the middle classes from the suburbs. Because the middle classes were predominantly white, this created not only economic but racial segregation between the cities and suburbs. The racial aspects of suburbanization were not entirely secondary. Early federal housing and lending policies purposely entrenched this racial dynamic. Also damaging was an absence of effective federal policies designed to correct discrimination not only by private actors but also by state and local governments. Although courts attempted to eliminate overt racial restrictions, government did very little to break the link between economic and racial status, so that despite antidiscrimination law racial segregation remained deeply entrenched. n104

The above discussions shed light on a grimly comprehensive set of interlocking dynamics that tie together racial, economic and geographical segregation. Historical conditions produced socioeconomic inequality between whites and racial minorities. Federal law and policy intended to spur economic growth exacerbated these inequalities by placing white middle-class families in suburbs and poor minority families in the inner city. In addition to acting as an unintentional engine of racial segregation, federal law and policy at times facilitated intentional racial segregation by local [*1472] state and nonstate actors; at other times federal authorities explicitly promoted racial exclusion. Against these formidable structural dynamics, federal antidiscrimination law has proved relatively ineffectual in undoing segregation.

C. Deterioration of City Infrastructure

The hierarchy of race, income and geography created in part by the law and policy described in Parts I.A. and I.B. renders urban poor minorities disproportionately vulnerable to adverse effects of globalization. This section indicates additional contours of this hierarchy and the vulnerability it creates.

With the middle class leaving in record proportions from the cities during the postwar period, urban areas deteriorated. While the causes were complex and manifold, legal rules played a role in facilitating the progression of urban malaise. First, federal jurisprudence allowed state and local governments to maintain disparities in spending on infrastructure and public services, including education and police protection. Second, disparities in lending inhibited business and residential development.

1. The Deterioration of Urban Infrastructure and Public Services

Suburbanization led to severe deterioration of the housing stock, infrastructure, and educational systems and economies of inner cities. Because of the jurisdictional separation of cities from suburbs, the tax base that could sustain basic infrastructure and public services crumbled in many cities as the middle classes left for the suburbs. n105 This has often been seen as a natural, if unfortunate, result of such jurisdictional divisions. That perception, however, uncritically accepts the legal separation of the city and suburban tax bases. Richard Ford has shown how courts have reinforced the power of local governments to define their tax bases and revenue distribution as they see fit, even though local governments are mere subdivisions of states and have no special constitutional right to self-determination. In this way, courts have reinforced territorial demarcations and dismissed their effect of entrenching racial segregation. n106 [*1473]
The jurisdictional and distributional divisions entrench inequality in basic public goods provided to urban as opposed to suburban populations. Inner cities often suffer from disproportionately low state funds to maintain infrastructure in comparison to suburbs. n107 With respect to other public services, perhaps the most prominent example is education. Milliken v. Bradley held, for example, that courts could not order desegregation school busing between Detroit schools and Detroit's predominantly white suburban school districts. n108 Further entrenching this disparate relationship between suburban and city schools, San Antonio Independent School District v. Rodriguez held that a school-financing system could maintain large disparities in tax-burden/expenditure ratios among districts without violating the Equal Protection Clause. n109 These decisions have played a role in what one commentator has called the federal government's "quiet abandonment" of the goal of desegregating the public schools. n110

These dynamics have allowed the gap between suburban and inner-city schools to grow over the years, to the point where the deplorable conditions of many urban school systems are wellknown. "Schools in impoverished areas tend to have much lower test scores, higher dropout rates, fewer students in demanding classes, less well-prepared teachers, and a low percentage of students who will eventually finish college." n111 Public schools attended predominantly by children who are racial minorities are sixteen times more likely to be in areas of concentrated poverty than those schools that are not predominantly attended by racial minorities.

Education systems in suburbs also often benefit disproportionately from state spending. In New York, for example, state spending on education outside New York City is higher per child than within the city. At the same time that little has been done to address these inequalities, courts have rolled back affirmative action at the postsecondary level. n112

2. Deterioration of Business and Housing Development

Business faces a number of obstacles if it wants to put down roots and thrive in the inner city. First, capital formation in depressed urban communities remains disproportionately low. As Part I.B. indicated, capital lending to minorities is lower than for whites. While some of this disparity may be explainable on raceneutral grounds, some of it is not. n113 Second, the human capital so crucial both to entrepreneurship and to a productive work force is eroded in the inner city by poverty and inferior education. Third, the deterioration of infrastructure and public services make business prospects in the inner city even more unappealing.

The early bias of federal home ownership programs led to an "unavailability of mortgage capital for purposes of home improvement or home purchase in inner-city neighbourhoods that may have contributed to the disinvestment in housing and decline in property values experienced by most American cities in the second half of the twentieth century." n114 Even now, homeowner lending to minorities is lower than to similarly situated whites, despite the federal prohibition of racially segregative lending. n115 Redlining has made it difficult to obtain loans for renovation or redevelopment. Privately owned housing stock further deteriorated as inner-city landlords became increasingly absentee, and expectations of declining property values led to declining maintenance. As for public housing, "inefficient management and systematic under-maintenance . . . contributed to its ghettoization." n116 All of these dynamics have caused privately owned housing stock in many urban minority neighborhoods to deteriorate over the postwar era.

Other Causes of Inner-City Economic Depression. At the same time that the physical infrastructure and capital stock of the inner city deteriorated, suburbanization moved management-level corporate jobs out of the city. Proximity to skilled workers, better infrastructure, and even tax breaks encouraged this trend; as manufacturing relocated, n119 there was little to impede it. In New York, for example, the "massive decline in manufacturing" was accompanied by a "massive loss of headquarters and hence of office jobs." n120 Thus, cities have become increasingly irrelevant to traditional industrial production, as the manufacturing sector has left cities and the management has moved out to the suburbs.

With low levels of capitalization and deteriorating infrastructure and public services, the economic stimulus to the inner city that might have come from new business or home development replacing the proprietors and homeowners that left did not occur. The rest of the story is not hard to imagine. Decreased employment opportunities further weakened the socioeconomic system left behind. Not surprisingly, the concentration of poverty was not attractive to entrepreneurs. Crime resulting from this concentration further hastened the departure of business and relatively mobile families out of the cities. These factors all conspired to create what Douglas and Massey famously called "American Apartheid." n121
All of these dynamics created conditions of vulnerability among urban poor minorities that rendered them less-equipped to gain from globalization. Part II below describes globalization, and Part III describes the impact of globalization on urban poor minorities.

II. Globalization

Part II begins by describing the economic characteristics of globalization in terms of the increase in international flows in trade, investment and finance. Part II.B. describes federal law and policy facilitating globalization. Part II.C. describes the particular ramifications of globalization for the United States economy. This will provide the basis for determining what the implications are of a "globalized" U.S. economy for relatively vulnerable populations in the U.S., including inner-city racial minorities.

A. The Nature of Globalization

Globalization might preliminarily be defined as the increasingly international nature of production and consumption. Although international production and consumption is as old as the nation-state, the new era of globalization differs from previous eras in the scale and complexity of international flows involved. These differences in turn shape the impact of globalization on the composition of the U.S. economy.

Scale. In the past few decades, international flows of both the "current account" (trade in goods and services) and "capital account" (investment and finance) types have multiplied exponentially. In the area of capital flows, cross-border transactions have increased exponentially in the past few decades. International bank lending increased almost sixteen-fold between 1970 and 1995. Worldwide foreign direct investment in the late 1990s achieved "seven times the level in real terms in the 1970s." "Indirect" investment -- the securities markets -- grew even more remarkably. Worldwide annual short-term capital flows "now total more than $ 2 trillion in gross terms, almost three times those in the 1980s." Finally, trading in foreign currency has skyrocketed: the "daily turnover in foreign exchange markets increased from around $ 10-20 billion in the 1970s to $ 1.5 trillion in 1998," an increase of approximately one hundredfold.

The United States has heavily participated in these aspects of globalization. An IMF Survey entitled "Globalization: Opportunities and Challenges" reports that United States foreign direct investment "more than tripled between the first half of the 1980s and the first half of the 1990s." Total United States capital flows grew over fifty-fold between 1970 and 1996, from 2.8% of gross domestic product to 15.15%.

On the current-account side, world trade grew at a rate twice as fast as the overall world economy in the postwar era. In the United States, trade volume multiplied nearly twenty-fold between 1970 and 1998. In 1970, the combined value of exports and imports was less than fifteen percent of total gross national product; by 1997 that figure had more than doubled.

Exports have grown, but imports have grown by more: hence another distinct trait of the late twentieth-century U.S. economy is its persistent trade deficit. The increase in imported goods that has caused the trade deficit has been partially offset by a healthy surplus in trade in services. Important export services include information services, telecommunications services, financial services, and professional services such as lawyering and accounting. Saskia Sassen has dubbed these "producer services," to distinguish them from "consumer services." However, trade in services, though increasingly important, still only accounts for a fraction (around one-fourth) of total U.S. trade.

Complexity. The trade and finance vectors of globalization described above regularly combine in multiple ways. For example, domestic production might come from a U.S. subsidiary of a foreign company, financed by a syndicate of domestic and foreign banks or private investors. Imported products might come into the United States from a foreign subsidiary that is owned by a U.S. company financed by capital raised on world markets. Lan Cao has documented in detail the increasingly global nature of production. This globalization has often been manifested in the very industrial sectors dominated by U.S. producers in the early postwar era. In the automobile industry, for example, Cao observed that:

A Chevy may be built in Mexico from imported parts and then reimported into the United States; a Ford built in German plants by Turkish workers and sold in Hong Kong and Nigeria; a Toyota Camry designed by an American designer at Toyota's Newport Beach California Calty Design Research Center, assembled at the Georgetown, Kentucky plant from Americanmade parts (except that the engine and drive trains are still Japanese) and then test driven at Toyota's Arizona proving ground.

This growing complexity in production is so widespread that it accounts for a significant portion of the postwar increase in international trade. As "the volume of world trade has grown, the traditional role of national markets is increasingly eclipsed by an
alternative system: trade generated within multinational companies themselves as they export and import among their own . . . subsidiaries." n140 Within the U.S. economy, over forty percent of exports and almost fifty percent of imports are "actually goods that travel not in the open marketplace, but through these intrafirm channels." n141 The IMF Globalization Survey admitted that the "structure of foreign trade has increasingly become intra-industry and intrafirm." n142

B. Law and Policy Creating Globalization

Accounts of globalization tend to portray it as autonomous -- a self-powered juggernaut whose appearance on the horizon has caught governments off-guard. n143 Yet globalization does not naturally or inevitably result from market-driven developments in technology. Certainly, stunning improvements in market-driven technology over the past few decades have played an undeniable role in driving globalization. Communications and information technology advances have made it easier to move money and know-how internationally and to coordinate production internationally. n144

At the same time, however, law and policy have played an important role in spurring globalization forward. International trade agreements have probably been the most important instruments the federal government has used to catalyze globalization. The General Agreement on Tariffs and Trade, established in 1948, provided for six rounds of trade-liberalizing negotiations between 1948 and 1979 that reduced the average level of tariffs imposed by its member states by more than half. n145

The United States federal government has also lowered barriers to trade in goods and services in bilateral agreements and regional agreements. In the 1990s two highly visible such steps were the North American Free Trade Agreement with Canada and Mexico, n146 and the agreements establishing the hundred-plus member World Trade Organization in 1995. n147 Each event marked far-reaching liberalizing reforms in both trade and investment.

These reduced trade barriers have allowed not only for greater competition in the U.S. by foreign producers, but also for the offshore relocation of production facilities by U.S. manufacturers who seek the production-cost advantages offered elsewhere. This consequence of trade liberalization agreements was memorably characterized in 1992 by Presidential candidate Ross Perot as a "giant sucking sound." n148 Whatever the accuracy of Perot's characterization, and whatever the ultimate desirability of the trend, it seems indisputable that the reduction in trade barriers has enabled both foreign competition and U.S. relocation, thereby reducing U.S. manufacturing and accelerating U.S. deindustrialization.

In finance, the federal government created a number of regulatory devices that helped globalize securities markets. n149 Thus, while some of the fuel driving globalization came from technological innovation, a good portion of it also arose from deliberately pursued policies by governmental actors. In the United States, the executive and legislative branches implemented into law a host of liberalizing measures in trade, investment and finance that facilitated the internationalization of the U.S. economy. n150 To point this out is not to compel a conclusion that globalization is desirable or undesirable; it is only to compel the conclusion that globalization cannot be viewed as a natural or inevitable phenomenon. Rather, the dynamics that the term "globalization" encompasses result at least in part from governmental practices, and governmental actors must therefore be held at least partially accountable for their ill effects. n148

Of course, these liberalizing measures were pursued in the belief that they would generate positive effects. Classical economic philosophy holds that the liberalization of market activity will increase both national and international efficiency. Because efficiency maximizes wealth creation, such policies could also be said to maximize social welfare.

To equate social welfare with aggregate social wealth, however, is to adopt only one of a number of potential measures of social welfare. Even if one ignores measures of welfare not related to wealth, the equation of social welfare with national wealth overlooks distributive concerns. Indeed, efficiency-increasing measures such as economic liberalization may exacerbate preexisting distributive inequalities. Classical economic measures of efficiency and welfare are simply "indifferent to the distribution of income and wealth." n151

In the United States among the groups that bear the brunt of this distributive inequality and therefore potentially of the costs of liberalization are racial minorities in the inner city. Part II.C. will articulate the specific effect of globalization on inner cities. Part III will indicate how these specific economic effects exacerbate a preexisting socioeconomic hierarchy of race, income and geography.

C. Transformations Resulting from Globalization

The dynamics discussed in Part II.A. above describe two deeply significant macroeconomic transformations in industrialized countries: the global dispersion of
goods production, and the shift from goods export to goods import and services export.

One of the most visible aspects of globalization is the degree to which geographically diverse economies are participating in types of production that had previously been concentrated in the West. "Manufacturing employment as a share of total employment has declined continuously in most advanced economies since the beginning of the 1970s."  n152 The U.S. trade deficit in goods  n153 has re [\textsuperscript{*1483}] suited in part from increasing competition with non-U.S. manufacturers and in part from the offshore relocation of U.S. manufacturing. Whether due to western-company relocation or the growth of nonwestern competitors, manufacturing is now much less economically significant in the West and much more significant in medium and low income countries in Asia and Latin America.

At the same time, as noted above, the West is increasingly specializing in services.  n154 Among the industrialized world, according to the IMF, "the share of employment in services in the United States is highest, at about seventy-three percent currently."  n155 These dynamics reinforce each other: as manufacturing disperses globally, an increasing array of intermediary services becomes necessary to coordinate global production, and the emergence of such service production in turn facilitates further manufacturing dispersal.  n156

This shift from goods to services production has been called "deindustrialization" and it has "coincided with the growing global integration of economies."  n157 The transformation of the U.S. economy -- from an economy with major goods exports and negligible services activity circa 1970, to a major goods-importer and services-exporter circa 1990 --- has played a major role in the impact of globalization on the inner city. Connecting deindustrialization with the urban deterioration described in Part I, several adverse trends for inner cities emerge.

Because city centers harbored most traditional manufacturing, "deindustrialization" has affected them most acutely. In the 1970s and 1980s, Philadelphia, Chicago, New York and Detroit respectively lost 64% (resulting in the elimination of 160,000 jobs), 60 percent (326,000 jobs), 58% (520,000 jobs), and 51% (108,000 jobs) of their manufacturing sectors.  n158 This was also true more generally for the "ten largest old metropolitan areas of the Northeast and north central states."  n159

Although the traditional industrial sector left cities, cities developed a new niche in the increasingly important provision of producer services.  n160 These financial, telecommunications and professional intermediary services are necessary to any large-scale enterprise, whether manufacturing or service-sector. They are distinct from in-house management services of corporations, many of which have moved to the suburbs.  n161

Producer service-providers have consolidated in urban areas.  n162 Accordingly, producer services have become a much higher percentage of employment in these areas.  n163 Various cities may have specialties in one or another area of services, but in the U.S. producer services are overrepresented in all the major cities.  n164

Thus, cities now "command and are at the heart of a globally dispersed production system."  n165 One consequence is that cities have become more connected internationally and less generative of growth for the national economy. Although conventional wisdom dictates that cities function as "seedbeds" that "promote the diffusion of growth across the national territory,"  n166 this traditional dynamic may be obsolete "now that manufacturing has declined significantly as a share of employment in major cities and . . . producer services have . . . become a leading sector."  n167 The new role of the city may be determined by a global economy that diverts economic flows away from lower strata around the city. Saskia Sassen has interpreted the changes in production flows to indicate that "growth predicated on a global market orientation induces discontinuity in the urban hierarchy."  n168 As Part III shows, this discontinuity may disproportionately harm racial minorities in American inner cities.

In sum, the economic base of city centers over the last few decades has shifted from manufacturing and associated management to producer services such as finance, telecommunications and lawyering.  n169 These changes were not solely driven by technological innovations. Rather, the federal government took deliberate measures liberalizing trade, investment and finance.  n170 These steps were taken in furtherance of a classic economic policy approach that predicted that liberalization would increase aggregate national wealth and therefore welfare. The theory behind this policy, however, does not adequately take into account the distribution of wealth. The theory therefore does not address the possibility that entrenched socioeconomic forces antagonizing "discrete and insular" groups --- such as racial minorities in the inner city --- might prevent those groups from benefiting proportionately in the gains of globalization. Rather, the theory assumes a relatively mobile population, and whatever the truth of the proposition generally, mobility does not characterize
the bottom of the U.S. socioeconomic hierarchy, which is instead rigidly constructed. The costs of globalization may therefore concentrate at this rigidly constructed bottom.

Economists invariably leave it to the political process to address such distributive concerns; social justice demands that government do precisely that. This imperative is all the stronger given the government's role in constructing this hierarchy of race, income and geography to begin with. Part III examines the particular ramifications of contemporary economic trends for minority populations concentrated in the inner cities.

III. Effect of Globalization on the Inner City

Before continuing, it may be useful to provide some description of the racial minority groups that disproportionately inhabit the inner city. While the cultural, linguistic and historical heterogeneity of these groups is extensive, for purposes of the analysis of this Article, racial minority groups living in impoverished urban areas can be broken down into two categories: those who were born in the United States and those who were not. Both groups are racially diverse within themselves. Those not born here include immigrants from Africa, Asia, the Caribbean, Latin America and the Middle East. Those born here include African Americans, most of whom migrated from the rural South in the first half of the century; Mexican Americans that are descended from communities living in the South and West when those communities became part of the United States; and descendants of Latina/o, African, Arab, Asian, and Caribbean immigrants.

Of course, individuals within each of these racial categories exist at every income level and in widespread geographical ranges, and the extent to which individuals in these racial categories are poor varies depending on the particular category. n171 Along those lines, it is important to stress that this paper argues that globalization will have an adverse effect on populations characterized not only by racial minority status, but also by economic status and geographical location. n172

The trends of suburbanization and deindustrialization have been accompanied by the emergence of a "global city" whose specialty is the provision of "producer services" that coordinate a global production system, and whose links to the local economy are more attenuated than those of traditional manufacturing production had been. The transformation of the city from a manufacturing base to a globalized nexus of producer services has had several adverse consequences for the urban poor, who are disproportionately racial minorities. Among the potential ramifications of such a system is the exacerbation of a preexisting socioeconomic hierarchy that has concentrated poor racial minorities in depressed urban areas. This hierarchy manifests in the conditions affecting employment, housing and infrastructure in the inner city.

A. Employment.

In the global city, with its focus on highly skilled producer services, one's ability to earn a "living wage" is increasingly tied to one's skill level. n173 Three trends arising out of the transformation of the city resulting from the globalization of the economy have reinforced impoverishment in many innercity communities.

Decline of Manufacturing Employment. First, the decline of manufacturing employment has had a significant impact on the urban poor, and therefore on many racial minority groups. While some of this decline has resulted from obsolescence due to technological advances, some of the decline is due to the relocation of manufacturing work. n174 The decline in manufacturing also means a decline in jobs that require relatively little previous training but offer a living wage. The increase in income inequality accompanying the shift to a service economy has been well documented. n175

Of the population under study, the decline in traditional manufacturing has primarily affected African Americans and Chicanas/os. n176 This is true even though manufacturing sectors in the United States have hardly acted as havens of racial equality. In the first half of the twentieth century, as these groups migrated to northern city centers, they met with hostility and exclusion from labor unions. n177 Reinforced in places by labor regulations. n178 By the 1970s, these racial barriers to membership had largely dissolved. Even after unions largely relinquished such entry-level barriers, many continued to be criticized for the poor representation of racial minorities in their leadership ranks. n179 Although racial minorities have not been able to achieve completely egalitarian treatment from unions, by the 1970s they had largely succeeded in joining the union rank-and-file in traditional manufacturing sectors, thereby receiving the economic security provided by unions for their members.

This set of dynamics is supported, for example, by Clarence Lusane's study of the impact of NAFTA on minorities. The United States government has argued that NAFTA has been beneficial on the whole for the U.S. economy. n180 However, neither the benefits nor the losses are evenly spread, and Lusane's research
suggests that NAFTA has so far had a disproportionately adverse effect on African Americans because of preexisting vulnerabilities in African American communities. Key among these effects has been the loss of low-skilled jobs. 181 NAFTA resulted in a net loss of manufacturing jobs, which were replaced by jobs in the service sector. Consequently, those who lost their jobs in manufacturing were less likely to find comparable new employment. 182 This situation was "compounded by the fact" that the replacement service-sector jobs "paid less and offered less benefits." 183

New industrial growth in which relatively "formal" work structures are maintained has been located in the outer ring of metropolitan areas and therefore away from concentrated minority populations, and in regions that tend to have less concentrated minority populations in the inner city. 184 Much new growth manufacturing, however, reflects the organizational trends transforming traditional manufacturing sectors, and tends to be lower-wage and lower-security. 185 This is consistent with the second trend, the "informalization" of employment.

"Informalization" of Employment. The second trend is the informalization or "downgrading" of urban manufacturing sectors. 186 This has occurred at the same time as the percentage of union organization has decreased. 187 Some argue this has increased the bargaining power of employers and helped to drive down wages and benefits. 188 The casualization of work has enabled employers to hire more part-time and temporary work. Part-time or temporary work usually involves lower wages and fewer benefits. 189

An extreme example of this informalization process is the rise of "sweatshop" labor. Whereas the decline in traditional manufacturing most directly impacts racial minorities that were born here, the rise in casual manufacturing most directly impacts racial minorities who were not born here. This labor is provided primarily by immigrants who are also members of racial minority groups in the United States. 190

One particular type of sweatshop labor is industrial homework. A home worker works "in or from the home for an employer or contractor who supplies the work." 191 Common types of homework include the production of clothing and clothing accessories. 192 These industries are also among the most frequent violators of federal labor protections. 193 "Away from the watchful eye of the public and the factory inspector, . . . homework tended to be the least amenable to regulatory enforcement and the most susceptible to low wages, long hours, unhealthy conditions, and other exploitation." 194

Industrial homework "partly involves the same industries that used to have largely organized plants and reasonably well-paid jobs." 195 The occupants of these positions are often poor, female, minority, and recent immigrants from Africa, Asia and Latin America. 196

In the early postwar era, the federal government placed a "virtual ban" on industrial homework, ostensibly due to its inability to enforce labor protections in such settings. 197

This ban was rescinded in 1989, reflecting the deregulatory policies of the Reagan Administration's Department of Labor. 198 Since then, homework and other types of sweatshop labor have become an increasing problem both within the United States and abroad. While the causes of this problem are complex and certainly include the influx of a workforce willing to work at lower wages, many commentators have expressed the concern that the possibility of relocation not just of workers, but also of products created by globalization allows for a "race to the bottom" in which manufacturers and other employers exercise the threat of relocation to gain significant concessions in the terms of employment. As the recent protests in Seattle during the Ministerial Conference of the World Trade Organization indicate, many argue that this race to the bottom is facilitated by the existence of an international legal structure in which the mandate of economic liberalization is not accompanied by a commitment to labor standards or other quality-of-life protections.

There are many reasons cited for why informalization of work relations in low-skill sectors has increased. First, relocation and decline of manufacturing has obviously played a role since many of the relocated jobs were at the core of the traditionally unionized workforce. Service-sector jobs are much less likely to be unionized. 199 Many have pointed to the influx of immigrant populations as a second cause of unionization's decline. According to this argument, newly arrived immigrants are willing to work for much less favorable terms than people born in the United States, so they encourage a "race to the bottom" in the manufacturing sectors.

Saskia Sassen makes a useful observation about globalization and immigration. "Linking the informalization and casualisation of work to growth trends takes the analysis beyond" the idea that immigrants cause informalization. Such a link "suggests, rather, that the basic traits of advanced capitalism may promote conditions for informalization. The presence of large immigrant communities then can be seen as mediating in the process of informalization rather than directly generating it: the demand side of
the process of informalization is therewith brought to the fore." n200

A brighter account of the decline in "formal" work relations posits that the U.S. economy is adjusting appropriately to the new challenges of globalization, with its increased competition and volatility, by becoming more competitive and more flexible. If this is true, however, it does not change the fact that low-skill jobs are not as well compensated as they once were. Where discrete groups are concentrated in this low-skill work such a skewed impact is unjust.

Stratification of Workforce According to Skill Level. Many "symbolic analyst" jobs associated with service sectors such as investment banking and lawyering are highly compensated. Given that such services are increasingly exported, it is correct to say, as is often said by proponents of globalization, that new jobs associated with trade liberalization are on average higher paying than those they replaced. n201 However, the entry barriers to these high-paying jobs [*1494] are significant, because they require relatively extensive postsecondary education and training.

The people that used to or would have worked in the manufacturing sector are not easily able to land these new highpaying jobs. Instead, many transfer to low-skill service jobs that pay less than manufacturing jobs requiring the same skill level. Thus, the transformation of highly developed economies into service economies has arguably been accompanied by a reorganization of the work force into a hierarchy in which there are many new high-paying service jobs, but also in which a greater proportion of the total jobs available are "low-wage" jobs than before. n202

These low-skill, low-paying service jobs come in several varieties. First, not all producer services jobs are highly compensated. n203 The vast armies of customer service and telemarketing representatives manning the contemporary service economy often earn very low wages. Second, producer services directly generate demand for support services such as cleaning and maintenance, delivery, office support (courier services and document production), and so on. n204 Third, producer services indirectly generate low-wage service jobs by producing a new high-income workforce that generates demand for residential and personal support services. n205 The concern about the impact of globalization is not primarily a concern about increased unemployment. To the contrary, lower-skill service-sector jobs are abundant. However, such jobs in service sectors as compared to manufacturing are less stable, less likely to be full-time, and offer fewer benefits. n206 Thus, deindustrialization has occurred at the same time as "marked increases in wage inequality . . . between the more skilled and less skilled." n207 [*1495]

The general instability resulting from globalization may also disproportionately harm racial minorities. A GAO study, for example, found that minority groups experience longer unemployment spells and the largest wage losses in their new jobs. n208 In addition to the "last hired, first fired" issue, the simple persistence of employment discrimination at the upper rungs of firms can make minorities relatively more vulnerable to them. n209 [*1496]

B.Housing and Infrastructure.

The trends described above in employment both affect and are affected by other trends arising from suburbanization, deindustrialization and the emergence of the global city. With respect to housing, the integration of cities into global networks has helped to revitalize cities, but in a way that shuts out poorer urban communities. These communities benefit only tangentially in the high-skill, high-reward aspects of the new "global city." Rather, the global city created a highly compensated class of highly skilled workers together with the class of relatively lowskilled and low-compensated service-sector workers who support both their commercial and residential activity.

The new skilled class has contributed to the renovation of the city, but in ways that are sometimes harmful to poor minority urban communities. Urban gentrification and displacement is a central dynamic to the rise of the global city. n210 The increase in producer-services activity and the associated increased concentration of high-income workers in inner cities has helped to bring about a booming high-price real-estate market. This has led to bidding for space in previously "derelict" or abandoned locations that are centrally located, as well as redevelopment of centrally located properties into high-level office and housing markets. n211 Keith Aoki has observed that this rise in demand among high-income populations for central-city residences was also driven by a shift in tastes that led to a favorable reevaluation of the historical and aesthetic qualities of urban real estate. n212 Aoki has also demonstrated that gentrification and accompanying displacement was facilitated by a rise during the 1980s of a deregulatory approach among government policymakers. n213 [*1497]

Cities provide "large-scale, high-cost luxury office and residential complexes," so that "high-income residential and commercial gentrification" are "distinct socio-spatial forms of the new global city." n214 In New York, for example, there has been a significant increase in high-paying service-sector jobs. But, as Saskia Sassen has observed, Manhattan "also contains
areas that have experienced sharp declines in household incomes: northern Manhattan, containing Harlem and East Harlem, has experienced growing unemployment, sharp increases in poverty, and sharp increases in crime and delinquency rates. There is a ring of poverty that runs through northern Manhattan, the South Bronx, and much of northern Brooklyn.\footnote{In these areas, the "low-rent housing market suffered a massive decline in the 1980s that, along with the stagnation and decline in household incomes at the lower end, created a situation that led to severe overcrowding and homelessness."} In the United States, inner-city minority communities who have been penalized those subsisting at the bottom of a hierarchy defined by race, economic status and geography. All of these statistics paint a grim portrait of globalization. It is important to explain exactly how this portrait should be understood. Leading institutional advocates of global economic liberalization, such as the International Monetary Fund ("IMF"), have argued that "deindustrialization clearly cannot be regarded as a symptom of the failure of a country's manufacturing sector, or for that matter, of the economy as a whole. On the contrary, deindustrialization is a natural feature of the process of economic development in advanced economies." Moreover, the IMF asserts that the loss of low-skilled labor should not be of concern because "low-wage imports are simply not that important for most advanced economies." The implication following from this is that no tears should be shed over the loss of these low-skill jobs to other (poorer) countries.

This proposition is uncontroversial. Low-skill industries are not more inherently valuable than any other sort; nor did urban poor racial minority groups enjoy even remotely ideal conditions prior to globalization. The purpose of this article is to show how, because of existing structural inequalities, preexisting dynamics of socioeconomic hierarchy mean that the adverse impact of globalization-induced economic adjustment is born disproportionately by inner-city minority communities who have been crowded into this low-skill work, and who may be crowded into an even less-rewarding replacement.

First, there is disproportionately large underemployment of urban minorities as a result of globalization, because of their disproportionate concentration in low-wage industries. Second, there is the relatively greater difficulty that inner-city minority communities have adjusting to globalization and ultimately benefiting from it. Both difficulties arise in part from the confluence of structural factors explained in Parts I and II. Relatively lower occupational skills mean relatively less ability to transition into higher-skill jobs replacing those lost to globalization. Barriers built on racial, economic and geographical divisions cause low skill levels and hinder minority communities from raising skill levels. There were no "good old days" for these communities; however, the "good new days" that the current Gilded Age has brought to the highly skilled socioeconomic elite are not enjoyed, even proportionately, by those at the bottom of the socioeconomic hierarchy.

The IMF Globalization Survey concedes that "for those workers affected [by deindustrialization], namely, those at the lower end of the income distribution, the effects [of globalization] may . . . be significant." In the United States, inner-city racial minorities are disproportionately concentrated at this lower end.

IV. Conclusions

The theory behind globalization is that everyone benefits from increased efficiency resulting from the removal of government constraints on the market. This theory, however, does not attempt to address the impact of these dynamics on existing inequalities within a society. It is possible that globalization will offer opportunities for some members of previously disadvantaged groups. It is simultaneously possible that globalization will generally entrench existing structural inequalities, and that some of these inequalities will be racial in character. Such inequities may become particularly apparent when the economy enters its cyclical downturn. Consequently, although measures that promote globalization "are not racial in character or construction, that they have a racial dimension should not be ignored." The need for serious empirical inquiry into this area remains critical, and this article offers only some preliminary, and therefore imperfect, observations.

Again, it is important to emphasize that this critique need not compel advocacy for economic protectionism. Let us assume that global economic integration in fact will deliver the gains promised by liberal economic theory. Even if this is true, then a just government must respond to the dilemma described in this Article by taking the difficult steps to eliminate the barriers that prevent minority communities from participating equitably in the gains of globalization. The IMF Survey suggested precisely this approach:
Rather than attempting to limit globalization, the appropriate policy response is instead to address the underlying structural rigidities that prevent labor markets from adjusting to technological change or external competition. n224

This passage is probably intended to refer to labor "rigidities" such as unionization. Both the text and the underlying logic, however, also encompass the socioeconomic rigidities of race, space and economic place that have pinned inner-city minorities to the bottom of the national socioeconomic hierarchy. [*1500]

While this approach may seem sympathetic to classic economic liberalism in that it does not argue against economic liberalization, in fact it raises an important challenge to classic economic liberalism as practiced. A primary criticism of classic economic liberalism is that it assumes a "level playing field," and thus allows and even justifies the persistence of structural inequalities. This Article advocates demanding that structural inequalities be removed. As the debate over affirmative action has shown, as contentious as affirmative action policies have been, they have ultimately proved more politically acceptable than the sorts of reforms that would change the deep-seated inequalities that create the need for affirmative action in the first place, such as entrenched social, economic and geographical segregation between racial groups. n225

Law and policy have played a role both in shaping these pre-existing inequalities, and in fostering globalization. Adverse effects of globalization on minority communities thus stem in part from conditions created by a complex web of law and policy at the federal, state and local levels. Law and policy makers at all levels bear a responsibility to rectify these conditions, for example, through concerted reforms in housing, education and lending. Without such reform, significant sectors of our society may be left behind in the rush to the end of the rainbow.

Audrey McFarlane has examined and found to be insufficient one tool the federal government recently designed to redress the plight of inner-city communities -- the Empowerment Zone and Enterprise Cities Demonstration Program ("Enterprise Zones" Program). The Empowerment Zones Program is designed to revitalize inner-city economies by "providing tax incentives and social service funds within the zone to stimulate business creation and expansion." n226 McFarlane concludes that the limited incentives offered by the program fail "to address the underlying structural reasons for the depressed economic and social conditions existing in the inner-city neighborhoods." n227 McFarlane cites both aspects of the law and policy creating preexisting conditions of vulnerability addressed in Part I, and aspects of the law and policy facilitating [*1501] globalization addressed in Part II, as sources of this underlying structural disparity.

The solutions to such deep-rooted structural problems, of course, are not likely to be popular causes among politicians. Advocates for the urban poor must insist, however, on a continuing focus on these difficulties and on real redress for them. Items on this agenda include imperatives that government resources be redistributed and legal processes reshaped to correct the disadvantages in capital formation, infrastructure, and education and other public services that currently operate to reinforce existing hierarchies.

FOOTNOTE-1:


n4 In its worse forms, such policy condones Social Darwinism, a theory whose purpose is to "justify social inequality," by explaining it as a product of "survival of the fittest" (a term coined by Social Darwinist Herbert Spencer). See Sarah Blaffer Hardy, The Woman that Never Evolved 12-13 (1981); see also

n5 Most commentators agree that "globalization" was triggered in significant part by developments in transportation and communications technology that allowed both production and products to be dispersed over ever-wider areas. See infra notes 158-59. The cultural effects of this were memorably foreseen by Marshall McLuhan in his prediction of a "global village." See Marshall McLuhan, Understanding Media, The Extensions of Man (1964).

n6 For an account of the relationship between classical economics and evolutionary theory in the law, see Herbert Hovenkamp, Evolutionary Models in Jurisprudence, 64 Tex. L. Rev. 645 (1985). Hovenkamp explained:

The earliest Darwinians who called themselves "sociologists," particularly Herbert Spencer and William Graham Sumner, were thoroughgoing economic determinists. For this reason they believed that social science must merely describe the world, using Darwin's economic theory of natural selection to discover the natural rules of resource allocation in human society, but remaining powerless to change these fundamental laws. These evolutionary social scientists were called Social Darwinists. They influenced American jurisprudence greatly, particularly the constitutionalization of the unregulated market today known by the name of "substantive due process," or "liberty of contract."

Id. at 654 (emphasis added).


n9 See Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes J., dissenting). Holmes wrote, "the 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." Id. As Hovenkamp remarked, Holmes's Lochner dissent: "Standing alone, however, does not make a particularly convincing case that Holmes was not a Social Darwinist. He was a complex man, and it is certainly plausible that he believed in Social Darwinism, but believed even more in judicial restraint." Hovenkamp, supra note 6, at 654-63 (discussing Holmes's approach to jurisprudence).

n10 See Brian Bix, Positively Positivism, 85 Va. L. Rev. 889, 893 (1999) (reviewing Anthony J. Sebok, Legal Positivism in American Jurisprudence (1998)) (observing that legal realists were "inspired by the moral and legal skepticism of Oliver Wendell Holmes, Jr." and citing Holmes's Lochner dissent as one of his most influential writings for realists).

n11 See infra Part II.

n12 See infra Part I.

n13 See infra Part III.

n14 The focus of this Article is on federal law and policy for two reasons: first,
because it is simply more accessible and manageable than a state or local survey, although the relationship between federal, state and local law and policy is discussed, and second, because it matches the focus on federal law and policy fostering globalization in Part II.

n15 Elsewhere, I do take up more intensively the question of the desirability of globalization per se. See Thomas, supra note 2. The thesis of this Article builds on the premise that the gains from trade are not evenly distributed, which follows fairly straightforwardly from basic microeconomics. The debate over the extent to which such inequality is just, or the extent to which egalitarian economic outcomes are just, is eternal and intractable, and this Article does not attempt to resolve such questions. The argument is much more limited: that where certain groups are structurally positioned to consistently bear the adverse impact of liberalization, and where that position is a result of government law and policy, justice requires the government to take steps to correct this structural disadvantage.


n20 See id. at 250.

n21 The declines in the percentages of urban populations that were white in Chicago, Philadelphia, Los Angeles, Washington, Baltimore, Houston, San Diego, and San Jose from 1950 to 1990 were respectively 85% to 45%, 81% to 53%, 89% to 52%, 64% to 29%, 76% to 39%, 78% to 52%, 92% to 67% and 96% to 62%. See Suarez, supra note 16, at 10-11.


n23 Aoki, supra note 3, at 707-11 (describing rise of pastoral aesthetic that implied that "the city is bad for you"); see also id. at 711-18 (describing nineteenth-century tenement conditions that gave rise to description of urban life as "drab, squalid and dreary").


n25 This Article does not look at law explicitly establishing segregation, such as the "Jim Crow" legislation of the South. Rather, the Article focuses on law and policy regulating urban areas primarily in the northern and western United States. This focus is for two reasons. First, the Article looks at the effects of globalization on inner cities, and these effects are primarily in the traditional industrial centers. Second, the Article seeks to show how law and policy can entrench dynamics of socioeconomic subordination and vulnerability among urban minorities. For evidence of such entrenchment, one need not look to the early and explicit permission and enforcement of segregation and discrimination against racial minorities. Rather, one need only look to the laws in place after racial minorities had been explicitly granted equal citizenship.


mortgage interest deduction with this colloquy: "There is a major housing program going to be proposed by the President. . . . Here's how it will work. It's going to be massive. It's going to come to about a total of $89 billion a year. This is big time." Id. at 457.

n28 Posin continued: "Here's some other facts about [the federal income tax deduction for home mortgage interest]. Fiftysix percent of this, or $50 billion, is going to go to the richest 20 percent of Americans. The poorest 20% will get $15 billion." Id. at 453.

n29 Id. at 458 ("All of this can be summarized in one succinct piece of tax advice: If you are rich, buy a big house.").

n30 In addition to lacking the income necessary to afford a down payment and mortgage, this initial difference can be exacerbated by information disparities and discrimination in lending. See infra Part I.B.

n31 One might argue that suburbanization was a natural outcome of the increased demand for homes, because property in the city tended to be rental. Yet rental property can easily be converted into property to be owned, as was shown by the largescale conversions of this kind in the 1980s in many cities. In the postwar period, however, much of the new demand was not for converted rentals but rather for new homes.

n32 See Shelby Green, The Search for a National Land Use Policy: For the Cities' Sake, 26 Fordham Urb. L. J. 69, 84 (1998) ("Although not their stated intentions, various federal tax measures have operated since the mid-1940s to shape a particular housing pattern.").


One of the most important contributions of the HOLC was the uniformity it promoted among financial institutions engaged in residential lending. In addition to introducing the fixed-rate, self-amortizing long-term mortgage loan, the HOLC also created uniform appraisal standards through the country. . . . Areas with even relatively small black populations were usually given the lowest rating . . . ."

Schill & Wachter, supra, at 1309.


n35 Schill & Wachter, supra note 33, at 1309. More specifically, a "lender who holds an FHA insured loan may assign the loan to FHA if the borrower defaults and may receive payment equal to the principal outstanding on the loan, plus unpaid interest." Brian Meltzer, Institutional Financing: Home Loans in the 1980s, 65 Chi. Bar Rec. 84, 85 (1983).

n36 See Meltzer, supra note 35, at 85.

n37 Schill & Wachter, supra note 33, at 1309.

n38 See id.

n39 Id.; see also Kenneth T. Jackson, Race, Ethnicity and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration, 6 J. Urb. Hist. 419, 435 (1980) ("Prospective buyers could avoid many of these difficulties . . . by locating in peripheral sections.").

n40 Schill & Wachter, supra note 33, at 1311.

n41 See Roberta Achtenberg, Shaping American Communities: Segregation, Housing and the Urban Poor, 143 U. Pa. L. Rev. 1191, 1193 (1995). Achtenberg was then Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development.


n43 See Michael E. Lewyn, The Urban Crisis: Made in Washington, 4 J.L. & Pol'y 513, 540 (1996). The involvement of General Motors was not seen as a conflict
of interest, given the conventional wisdom at the time that "What is good for General Motors is good for the country." See Linda A. Mabry, Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality, 87 Geo. L.J. 563, 596 & n.126 (1999) (discussing origins of this phrase).

n44 See Buzbee, supra note 18, at 68; Lewyn, supra note 43, at 542.

n45 See Lewyn, supra note 43, at 540.

n46 See Green, supra note 32, at 83.

n47 See, e.g., Buzbee, supra note 18, at 68; Green, supra note 32, at 84.

n48 See Lewyn, supra note 43, at 542.

n49 See Lewyn, supra note 19, at 202.


n51 See generally Schill & Wachter, supra note 33.


n53 See United States v. Certain Lands in City of Louisville, Jefferson County, Ky., 78 F.2d 684, 686 (6th Cir. 1935) (holding that federal power of eminent domain cannot justify construction of low-income housing because such activity does not constitute sufficient "public use" of land).


n58 Schill & Wachter, supra note 33, at 1292.

n59 Id. at 1294.

n60 Id. at 1314-16.


n62 See generally Levit, supra note 56; Alexander Polikoff, Gautreaux And Institutional Litigation, 64 Chi.-Kent L. Rev. 451 (1988).

n63 This interpretation has been given to section 3608 of the Fair Housing Act, which requires HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title." Fair Housing Act of 1968, 42 U.S.C. § 3608 (e)(5) (1994).

n64 The Code of Federal Regulations provides that a HUD project must not be located in an area of:

(1) minority concentration unless (i) sufficient, comparable opportunities exists for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot otherwise be feasibly met in that housing market area; or (2) a racially mixed area if the project will cause a significant increase in the proportion of minority to nonminority residents in the area.

24 C.F.R. § 891.125(b) (1999).

n65 For example, Shannon v. HUD, held that HUD had violated section 3608 when it decided to support a public housing project but did not consider that "the location of this type of project on the site chosen will have the effect of increasing the already high concentration of low income black residents." 436 F.2d 809, 812 (3d Cir. 1970).

n67 See Sam Brownback, Resolving HUD's Existing Problems Should Take Precedence over Implementing New Policies, 16 St. Louis U. Pub. L. Rev. 235, 238 (1997) ("[HUD housing] projects invariably are difficult to manage and maintain, tend to segregate families by race, education and income, and isolate the poor in some of the worst neighborhoods in any city."); Price, supra note 61, at 122-23 (charging that "little has changed" in public housing either in the level of segregation in public housing or in HUD's willingness to combat it, and quoting a HUD official's admission that HUD was "deeply involved in the creation of the ghetto system, and it has never committed itself to any remedial action").

n68 Ford, supra note 3, at 1870.

n69 Section 1 of the Fourteenth Amendment provides that "no State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Supreme Court struck down explicitly racial exclusionary zoning in Buchanan v. Warley. See 245 U.S. 60, 7482 (1917) (holding that Louisville, Kentucky municipal ordinance restricting property sales on basis of race within designated areas violated Fourteenth Amendment's protection of "property from invasion by states without due process of law"). The Court held that state enforcement of racially restrictive property covenants violated the Fourteenth Amendment in Shelley v. Kraemer. See 334 U.S. 1 (1948).

n70 In Euclid v. Ambler Realty Co., the Supreme Court upheld a zoning ordinance that prohibited multi-family housing. See 272 U.S. 365 (1926). In Village of Arlington Heights v. Metropolitan Housing Development Corporation, the Court held that a zoning ordinance prohibiting multifamily housing was not unconstitutional state action, because "official action will not be held unconstitutional [under the Fourteenth Amendment] solely because it results in racially disproportionate impact" and "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U.S. 252, 264-65 (1977). Richard Ford has argued that the intuitive validity of such zoning mechanisms stems from reifications of local government space that allow local governments to flout responsibility for their part in ensuring racial justice. See generally Ford, supra note 3.


n72 See infra notes 85-95.

n73 See Stephen M. Dane, Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws, 26 Mich. L. Rev. 527, 532 (1993) (arguing that "instead of addressing the mortgage-lending discrimination problem directly and comprehensively, Congress has taken a piecemeal and incomplete approach that generally has failed to bring the mortgage-lending industry into equal access compliance").

n74 Section 1 of the Thirteenth Amendment provides that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. Congress enacted the Civil Rights Act of 1866, to reinforce the Thirteenth Amendment. See 42 U.S.C. § 1982 (1994) (providing that "all citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property").


Title VIII of the Civil Rights Act of 1968, is the most important provision, "prohibiting the refusal to sell or rent, or negotiate therefore, on the basis of race, color, religion, sex or national origin." 42 U.S.C. § 3604(a) (1994).


Price, supra note 61, at 122-23.

Schwemm, supra note 71, at 48 (citing 42 U.S.C. § § 3603(b)(1), 3603(b)(2), 3607 (1994)). The Act applies to dwellings owned or operated by the Federal Government; provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government, and; insured, guaranteed, or otherwise secured by the credit of the Federal Government. See 42 U.S.C. § 3603(a)(1) (1994).

Achtenberg, supra note 41, at 1194.

Schwemm, supra note 71, at 187. Section 3605 of Title VIII of the Civil Rights Act of 1968 prohibits discrimination by a financial institution on the basis of race, color, religion, sex or national origin. See 42 U.S.C. § 3605 (1994); see also Harper v. Union Savs.
Wachter, supra note 33, at 1320. In 1995 CRA regulations were approved that marked a turn away from "the efforts/process-based enforcement standard that had been in effect since 1978," and a turn towards "actual results, including loans, investments, and services to an institution's 'assessment area.'" Overby, supra note 89, at 1469. The objections surrounding the CRA, however, have not subsided. Many argue that apparent redlining includes lending decisions with discriminatory effect but based on "rational" factors, and that the CRA tries to solve "the problems of inadequate housing, urban decay, and violence that have become issues of national importance" by "compelling suboptimal lending patterns" in a way which makes it "fundamentally flawed . . . anachronistic and ultimately self-defeating." Id. at 1435-36.


n95 See infra Part IV. This argument is an oft recurring, if seldom-heeded, theme of critical theory. See generally Chantal Thomas, Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development, 9 Transnat'l L. & Contemp. Probs. 1 (1999) (observing postcolonial development theory and American critical race theory both sought to show how dominant legal systems perpetuate structural inequality between dominant and subordinate groups in system).

n96 See Schill & Wachter, supra note 33, at 1310 n.101 ("Redlining obtains its name from the practice of FHA underwriters' circling in red areas of the city that were bad credit risks.") (quoting National Commission on Urban Problems, Building the American City 101 (1969)).

n97 Id. at 1310 (quoting Gary Orfield, Federal Policy, Local Power and Metropolitan Segregation, 89 Pol. Sci. Q. 777, 786 (1975) (quoting FHA Underwriting Manual)).


n100 Schill & Wachter, supra note 33, at 1311.


n102 42 U.S.C. § 2000d (1994). The most famous fairhousing litigation arising from the 1964 Civil Rights Act was Gautreaux v. Romney, which held that racially segregated public housing maintained by the Chicago Housing Authority violated the Act. 448 F.2d 731 (7th Cir. 1971).

n103 See Roisman, supra note 54, at 1357 (citing Gautreaux v. Romney, 448 F.2d 731, 739 (7th Cir. 1971) (finding that HUD intentionally created racial segregation in Chicago public housing); see also Young v. Pierce, 628 F. Supp. 1037, 1043-51 (E.D. Tex. 1985) (describing activities of HUD related to creation and entrenchment of racial segregation).


n105 See infra for a discussion of local government law and its role in creating this effect.

n106 Ford, supra note 3.


n108 See 418 U.S. 717 (1974); see also Ford, supra note 3, at 1875.

n109 See 411 U.S. 1 (1973); see also Ford, supra note 3, at 1876.


n112 For a discussion of inequitable school funding in New York City, see Community Service Society of New York, Separate, Unequal, and Inadequate: Educational Opportunities & Outcomes in New York City Public Schools (1995). For a discussion of affirmative action, see Kimberle Crenshaw, Playing Race Cards: Constructing a ProActive Defense of Affirmative Action, 16 Nat'l Black L.J. 196, 196-97 (1999-2000). While the Supreme Court allowed race to be taken into consideration as one of many factors in determining admissions in post-secondary institutions, states such as California and Texas have disallowed any such considerations in admissions to their state university systems. Texas is a partial exception to this description in the sense that Texas has pursued relatively aggressive redistributive educational spending policies, has actively and explicitly focused on improving minority performance on standardized tests, and has established a policy under which state universities now admit all Texas high school graduates in the top 10% of their classes.

n113 See Schill & Wachter, supra note 33, at 1311.

n114 Id.

n115 Section 3605 of Title VIII of the Civil Rights Act of 1968 prohibits a financial institution from denying financial assistance for purchasing, constructing or maintaining a dwelling, or in fixing the terms or conditions of the financial assistance, because of race, color, religion, sex or national origin. See 42 U.S.C. § 3605 (1994). Section 3605 also prohibits redlining, see Laufman v. Oakley Building & Loan Co., 408 F. Supp. 489 (S.D. Ohio 1976), which is "the practice of identifying certain neighbourhoods as unfit for normal housing loans on the basis of their racial makeup or some other prohibited ground." Schwemm, supra note 71, at 187. In addition, section 3605 prohibits discrimination in the form of mortgage foreclosure policies more aggressive for minority than white homeowners. See Harper v. Union Savs. Ass'n, 429 F. Supp. 1254, 1257-58 (N.D. Ohio 1977) (construing section 3605).

n116 Schill & Wachter, supra note 33, at 1296-97 (citation omitted). "According to a recent report prepared for the national Commission on Severely Distressed Public Housing, the amount needed to modernize existing public housing ranges from $14.5 billion to $29.2 billion." Id.

n117 See infra notes 217-26 for a discussion of gentrification.

n118 See Melvin L. Oliver & Thomas M. Shapiro, Black Wealth/White Wealth 16 (1995).

n119 See infra Parts II and III.

n120 Sassen, supra note 19, at 200.

n121 See Massey & Denton, supra note 104.

n122 See IMF Survey, supra note 1, at 45 ("Globalization refers to the growing economic interdependence of countries worldwide through the increasing volume and variety of crossborder transactions in goods and services and of international capital flows, and also through the more rapid and widespread diffusion of technology.").

n123 See id. ("Economic integration among nations is not a new phenomenon. . . . However, the recent process of global integration is qualitatively different from that of the earlier period.").

n124 These terms are used to categorize international transactions in a country's "balance of payments." The term "balance of payments" refers to a "statement showing all of a nation's transactions with the rest of the world for a given period. It includes purchases and sales of goods and services, gifts, government transactions, and capital movements." Paul A.
n125 Human Development Report, supra note 1, at 25.
n126 Id.
n127 Id.
n128 Id.
n129 IMF Survey, supra note 1, at 60. This figure is for both "inward and outward" foreign direct investment. See id. at 60 tbl.14 n.1. Compared to overall GDP, however, the value of foreign direct investment is still low. Since it began at 1% of gross domestic product, the final percentage was still a relatively low 3.3% of GDP. See id. at 60.
n130 Id. at 60, tbl.13. "Gross domestic product can be defined as the money value of the goods and services produced by a given economy in a given period of time. GDP measures an economy's current account and excludes capital account flows, whose money value can and does exceed that of the current account." Id.
n132 This figure represents exports and imports of goods and services, and earnings and payments on foreign investment. See 1999 Trade Policy Agenda and 1998 Annual Report of the President of the United States on the Trade Agreements Program, at 19 [hereinafter President's Trade Report].
n133 Id. at 19 fig.1.
n134 From 1980 to 1997, exports increased from 271.8 to 937.4 billion dollars, and imports increased from 290.7 billion dollars to 1,043.5 billion dollars. World Bank, World Development Indicators 1999, at 250 (1999).
n135 In 1998, exports in services were 259.9 versus 181.1 in imports, in billions of U.S. dollars. President's Trade Report, supra note 132, at 28.
n136 Sassen, supra note 19, at 90. Saasen has noted: "Central components of the producer services category are a range of industries with mixed business and consumer markets [such as] insurance, banking, financial services, real estate, legal services, accounting, and professional associations." Id. More generally Sassen commented: "Producer services cover financial, legal and general management matters, innovation, development, design, administration, personnel, production technology, maintenance, transport, communications, wholesale distribution, advertising, cleaning services for firms, security and storage." Id.
n137 See id.
n139 See id. at 21 n.80 (citing Benjamin R. Barber, Jihad vs. McWorld 24 & n.7 (1995)).
n141 See id.
n142 Id. at 46. The reality of intrafirm trade contrasts markedly with the ideal that drives international trade liberalization -- that of a market in which "normal" trade is open and at arm's length. See David Kennedy, Receiving the International, 10 Conn. J. Int'l L. 10, 10-11 (1994) ("Broadly conceived, the international trade regime divides traders and trade relations into the normal and the deviant. Normal trade is open, structured solely by comparative costs and pursued by private actors without government intervention. . . . As it turns out, of course, the . . . image of "normal" traders remains largely a fantasy."); cf. Daniel K. Tarullo, Beyond Normalcy in the Regulation of International Trade, 100 Harv. L. Rev. 546, 550 (1987) ("Implicitly or explicitly, tradelaws posit certain norms of economic behavior by government, both foreign and domestic. The usual, 'normal' condition is assumed to be nonintervention.").
143 See, e.g., Greider, supra note 140 (discussing this view of globalization). In the first chapter, entitled "The Storm Upon
Us," Greider described globalism with these words:

Imagine a wondrous new machine, strong and supple, a machine that reaps as it destroys. . . . Think of this awesome machine running over open terrain and ignoring familiar boundaries. It plows across fields and fencerows with fierce momentum that is exhilarating to behold and also frightening. As it goes, the machine throws off enormous mows of wealth and bounty while it leaves behind great furrows of wreckage.

Now imagine that there are skillful hands on board, but no one is at the wheel. In fact, this machine has no wheel or any internal governor to control the speed and direction. It is sustained by its own forward motion, guided mainly by its own appetites. And it is accelerating.

Id. at 11. Greider concluded: "To describe the power structure of the global system does not imply that anyone is in charge of the revolution. The revolution runs itself." Id. at 26.

n144 IMF Survey, supra note 2, at 50.

n145 These six negotiation rounds occurred in: Annecy, France, in 1948; Torquay, England in 1950; and thereafter in Geneva in 1956, 1960-61 (the "Dillon Round"), 1964-67 (the "Kennedy Round"), and 1973-79 (the "Tokyo Round"). See Jackson, supra note 131, at 314. The ratio of duties collected to dutiable imports in the United States, for example, was 12.1 in 1961 and 5.1 in 1981, after the Tokyo Round. See id. at 6. For GATT members more generally, the end of the Kennedy round produced tariff reductions on 70% of total imports, with the majority of the reductions 50% or greater. See John H. Jackson, World Trade and the Law of GATT 228 (1969). The Tokyo Round effected a further reduction of about 35% in "the industrial tariffs of the major industrial participants." John. H. Jackson et al., Implementing the Tokyo Round 13 (1984).


n148 See George F. Will, Free Trade, Faster Change, Wash. Post, Oct. 11, 1992, at C7 (commenting that "Ross Perot, the timidiest Texan, quakes about the menace of Mexico, saying NAFTA would apply 'a giant sucking-sound vacuum on what used to be industrial America'").

n149 These included the creation of American Depositary Receipts and Rule 144A, which encouraged foreign issuers to issue into the U.S. This helped stimulate a trend by which capital offerings would be made in at least two securities markets at once (so-called "global" offerings).

n150 For example, the United States Bilateral Treaty ("BIT") Program played an important role in internationalizing investment. The BIT Program was "formally inaugurated" in 1977 with a treaty-negotiating initiative of the State Department. See Kenneth J. Vandevelde, U.S. Bilateral Investment Treaties: The Second Wave, 14 Mich. J. Int'l J. 621, 621 (1993).

In a remarkably short period of time, BITs have become an important part of the foreign investment landscape. . . . In the 1990s, the pace of BIT signings increased dramatically and by mid 1996, over one thousand BITs had been signed, with almost every country on the globe a party to at least one such treaty.


n151 See Letter from Chris Scott, Reader in Economics, London School of Economics, Apr. 25, 2000 (on file with author). That is, in any given market, there may be equilibria that have different distributional consequences, but that are equally "efficient" in the economic sense
that "all of the probable trades have been made." Hal. R. Varian, Industrialist Microeconomics 17 (5th ed., 1999) (discerning Pareto optimality).

n152 IMF Survey, supra note 1, at 47. The IMF Survey further reported that:

For the industrial countries as a whole, the share of manufacturing employment declined from about 28 percent in 1970 to about 18 percent in 1994. . . De-industrialization began as early as the mid-1960s in the United States, and the trend there has been one of the most pronounced, with the share of manufacturing employment began declining steeply from about 28 percent in 1965 to 16 percent in 1994.

Id. at 47.

n153 The increase in imports leading to the trade deficit has been especially strong in consumer goods but also increasingly capital goods. In 1998 capital goods were 216.8 and consumer goods were 271.9 in imports, as compared to 301.6 and 79.6 in exports. See President's Trade Report, supra note 132, at 22, 25.

n154 The IMF Globalization Survey reported that "the other side of [the decline of manufacturing] has been a continuous increase in the share of employment in services." IMF Survey, supra note 1, at 48.

n155 Id.

n156 In The Global City, Sassen observed that:

Producer services have become central components in the work process of both goods and service-producing firms. . . . The expansion in the use of such services as intermediate inputs is linked with the broader technical and spatial reorganization of the economy. . . . Participation in a world market has created a need for a range of specialized services, and these have in turn facilitated the development of a world market. In brief what is characteristic in the contemporary phase is the ascendance of such services as intermediate inputs and the evolution of a market where they can be bought by foreign or domestic firms and governments.

Sassen, supra note 19, at 124.

n157 IMF Survey, supra note 1. The IMF Survey attributes deindustrialization both to a decline in expenditure in manufacturing and a relatively greater increase in productivity of manufacturing (meaning that technological advances have required less labor to produce the same amount of manufactures). See id. at 48-49.

n158 See Clarence Lusane, Persisting Disparities: Globalization and the Economic Status of African Americans, 42 How. L.J. 431, 437 (1999). This is also supported by Sassen's data for U.S. and N.Y.C. 1977-1985. Decline in manufacturing in city very steep as compared to rest of country (22% vs. 1%). "The share of producer services jobs in New York, London and Tokyo is at least a third higher and often twice as large as the share of these industries in total national employment." Sassen, supra note 19, at 131.

n159 Sassen, supra note 19, at 202 (stating that "growing international competition, inadequate investments for modernization of plants, leading to lower productivity, the development of technologies that made possible locating production and assembly facilities in low-wage countries or low-wage regions of the United States" all played a role here).

n160 See supra Part II for definition.

n161 See supra Part I.

n162 For example, the telecommunication services often necessary to support "producer services" tend to be concentrated in urban areas. "Telecommunications facilities have not been widely dispersed; while the technology has made possible the geographic dispersal of many activities, the distinct conditions under which such facilities are available have promoted centralization of the most advanced users in the most advanced telecommunications centers." Sassen, supra note 19, at 109.

n163 At the same time, national growth in producer services is outpacing city growth. Even though a few cities have become centers for concentrated provision of producer services, "the evidence clearly shows that in all three countries the growth
of producer services were higher at the national level than in those cities." Id. at 129.

n164 See id. at 148-49.

n165 Id. at 110.

n166 Id. at 127.

n167 Id. at 129.

n168 Id. at 165.

n169 See id. at 127. "The decline in manufacturing and the shift to service-dominated employment, the rapid growth of producer services, and the further service-intensification of the economy, are trends evident in . . . cities." Id.

n170 One might ask why the government is being portrayed as an autonomous force since this is a democracy. This raises the question of the extent to which government decisionmakers are "captured" by particular interests -- in this case, interests favoring economic liberalization -- in such a way that they antagonize majority will. For a discussion of this question, see Thomas, supra note 2.


n172 People of color that are middle class do not belong to this vulnerable population, and this Article does not necessarily predict that globalization will adversely impact them. Globalization may also benefit people of color that are on the poverty threshold. An expanding economy will provide new work opportunities even at the lowest skill levels, for example in the retail service industries, that will enable families previously living below the poverty threshold to rise above it. See, e.g., U.S. Census Bureau, Number of African-Americans in Poverty Decline While Income Rises, Press Release CB98-176, Sept. 24, 1998; U.S. Census Bureau, Poverty Level of Hispanic Population Drops, Income Improves, Press Release CB98-178, Sept. 24, 1998. This Article addresses primarily the relative lack of mobility of those living and working just above the poverty threshold.

n173 There is no readily accepted definition of the term "living wage" in the literature. See Peter B. Edelman, Welfare Reform Symposium, 50 Admin. L. Rev. 579, 586 (1998). I use the term to mean the wage necessary to allow an individual and his or her dependents to live above the poverty line. The exact quantity of a living wage, therefore, depends on a number of different factors. Obviously, it depends on how one defines the poverty line. As the U.S. Census Bureau defined it in 1998, the poverty threshold for a one-person household was $ 8,316.00; $ 10,634 for a two-person household; $ 13,003 for a three-person household, and; $ 16,660 for a four-person household. See U.S. Census Bureau, Current Population Reports, Series P60-207, Poverty in the United States: 1998, at A-4 tbl.A-2 (1999) [hereinafter Poverty Report]. There has been some dispute, however, over the Bureau's methodology in measuring both income and need. See id. at xiv; U.S. Census Bureau, Current Population Reports, Series P60-205, Experimental Poverty Measures: 1990 to 1997 (1999). Because wage earners often have dependents, the definition of a living wage may also depend on one's conceptualization of the "normal" division of labor within the family. See Marion Crain, Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech, 82 Geo. L.J. 1903, 1943 (1994) (arguing that some unions "adopted and marketed the family wage ideology, which defined women's role as homemakers and caretakers and men's role as waged workers, in support of its demand for a 'living wage' -- a male wage adequate to support nonworking wives and daughters").

n174 See infra note 207.

n175 See infra notes 201-09.

n176 See Lusane, supra note 158, at 438 ("For those African Americans who have less than a college education, the loss of manufacturing jobs seriously undermines their opportunities for employment."); see also Lester Henry, NAFTA and GATT:


n179 See Hutchinson, supra note 180, at 124-25.

n180 See United States Trade Representative, Study on the Operation and Effect of the NAFTA ii-iii (1997). NAFTA is deemed to have created slightly more jobs than it has eliminated. See id. (asserting that NAFTA "has resulted in a modest increase in United States net exports, controlling for other factors" and that it "has boosted jobs associated with Mexico between roughly 90,000 and 160,000"); Reich Says NAFTA's Net Effect Will Be More Jobs for United States, Int'l Trade Rep. (BNA) (July 21, 1993). There are also reports that dispute the Trade Representative's findings. See, e.g., Robert E. Scott, NAFTA's Pain Deepens (Economic Policy Institute Paper, 1999).

n181 See Bartholomew Armah, The Demographics of Trade-Affected Services and Manufacturing Workers (1987-1990) ("Manufacturing industries that experienced a decline in positive net trade-related unemployment were more likely to employ black females and unskilled (i.e., laborers) and less educated (i.e., high school graduates) black and white workers than were other manufacturing industries."). This Article does not address the important issue of how NAFTA affects those living in the agreement's other member states, Mexico and Canada. For a discussion of Latina/o identity both within and outside the United States, see Elizabeth M. Iglesias, Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates, 28 U. Miami Inter-Am. L. Rev. 361-369-71 (1997), and David Viogt, The Maquiladoras Problem in the Age of NAFTA: Where Will We Find Solutions?, 2 Minn. J. Global Trade 323 (1993).

n182 See Lusane, supra note 158, at 441 (citing Bureau of Labor statistics for proposition that "of the jobs lost as a result of NAFTA, manufacturing workers were the largest share of displaced worker (27%) and the least likely to be re-employed.").

n183 See id. at 445. "The service industry represented 112 percent of the net new jobs created since NAFTA. Those new service jobs paid, on average, only 77 percent of the manufacturing jobs that had been eliminated." Id.

n184 See id. at 438; see also Henry, supra note 178, at 11 ("The pattern of firms, both foreign and domestic, when choosing sites for opening new plants, has been away from predominantly nonwhite areas . . . . The Japanese and other German firms have
also shown a similar preference for plant location in suburban and sunbelt areas where few nonwhites reside.")); Robert Charles Smith, Racism in the Post Civil Rights Era: Now You See It, Now You Don't 134 (1995) (noting that "a study of the location decisions of Japanese firms in the United States and of American auto companies found a fairly consistent pattern of locations in rural and suburban areas about thirty miles from the nearest concentration of blacks, a distance thought to be about the limits of worker commuter time"). Lusane raises the possibility that this is deliberate, but notes that "even if premeditation is not present, the consequences of these site decisions exacerbate the job search crisis growing among the urban black poor." Lusane, supra note 158, at 438.

n185 See Sassen, supra note 19, at 218 ("Major new industries, notably electronics, have a high proportion of low-wage jobs in production and assembly, while several of the older industries have undergone a social reorganization of the work process resulting in a growth of nonunion plants and a rapid increase in subcontracting.").

n186 See id. "The historical forms assumed by industrial expansion . . . promoted the generalization of formal labor market relations [such as unionization and Fordism] and acted against the casualisation of work . . . . Many of the patterns today work in the opposite direction, promoting small scales, less standardization, and an increasingly casualised employment relation." Id. at 249.

n187 See, e.g., Robert J. Lalonde & Bernard D. Meltzer, Hard Times for Unions: Another Look at the Significance of Employer Illegalities, 58 U. Chi. L. Rev. 953, 953 (1991) ("It is well known that the percentage of American workers in the private sector belonging to labor unions . . . has declined sharply in the last four decades."); Paul C. Weiler, Promises to Keep: Securing Workers' Rights to Self-organization Under the NLRA, 96 Harv. L. Rev. 1769, 1771 (1983) ("No feature of contemporary labor-management relations in the United States is more significant than the diminishing reach of collective bargaining.").

n188 See Charles B. Craver, Mandatory Worker Participation Is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy, 66 Geo. Wash. L. Rev. 135, 138 (1997) ("As union membership has declined . . . competitive pressures have caused unionized firms to moderate wage increases and decrease fringe benefit protections."); Peter Kuhn & Arther Sweetman, Wage Loss Following Displacement: The Role of Union Coverage, 51 Indus. & Lab. Rel. Rev. 384, 395-96 (1998) ("Long-tenured union workers who lose their union coverage experience, on average, a massive 30 log point decrease in wages, attributable purely to this change in union coverage and not to any other observable characteristic.").


n192 See id. at 167 (listing items commonly produced by homeworker as "women's apparel, 'nonhazardous' jewelry, handkerchiefs, belts and buckles, embroidery, gloves and mittens, and knitted outerwear.").


n195 Sassen, supra note 19, at 281, 218
n196 See Gonshorek, supra note 191, at 167.
n197 See id. at 174.
n199 See Glen Burkins, Union Membership Fell Further in 1997: Continued Decline Came Despite Huge Outlays Assigned to Recruiting, Wall St. J., Mar. 18, 1998, at A2 (noting that one possible cause for declining union membership could be that "many of the jobs remain largely resistant to unionization -- for example, high technology and financial services").
n200 Sassen, supra note 19, at 282.
n201 See, e.g., Presidential Proclamation No. 6690, 59 Fed. Reg. 26,407 (1994) ("U.S. Exports Equal U.S. Jobs," the theme of World Trade Week [1994], illustrates why the United States must make the push to increase the involvement of American business in international markets."). President Clinton further stated:

Exports have become a critical engine of our Nation's economic progress. In the past 5 years, exports of goods and services have been responsible for more than 40 percent of U.S. economic growth. Today one in every five manufacturing jobs is linked to exports. Exports of goods and services support some 10.5 million jobs. And exports lead to better paying jobs. American workers producing for export earn 17 percent more than the national average wage.

Id.
n202 Sassen, supra note 19, at 217.
n203 See id. at 281.
n204 See id.
n205 See id.
n206 Particularly, "in a range of office occupations, from secretaries, word processors, and file clerks to switchboard operators, average median weekly earnings were lower in the nonmanufacturing industries than in manufacturing." Id. at 225. Indeed, low-skill service jobs in manufacturing-sector firms are likely to be better compensated than the same jobs at servicesector firms.
n207 IMF Survey, supra note 1, at 53. This is the case for the United States that has relatively flexible wages. See id. at 55. In countries with less flexible wages, the increases have been in "rises in unemployment among the less skilled." Id. at 56. It should be noted that the IMF Survey does not believe the bulk of this inequality arises from increased international trade. The Survey concludes that "rather than by competition from lowpriced imports, the increase of wage inequality in the 1980s and 1990s appears to have been driven principally by advances in technology that favor skilled labor." Id. at 58. The IMF's reasoning for this conclusion, however, is in my view not entirely convincing. The primary support presented for this proposition is evidence that "prices of import-competing, low-skill-laborintensive goods" have not fallen in real terms. The hypothesis, called the "Stolper-Samuelson Theorem," see Wolfgang F. Stolper & Paul A. Samuelson, Protection and Real Wages, 9 Rev. Econ. Stud. 58 (1941), is that if low-skill labor in developing countries truly poses a threat to low-skill, but better compensated, labor in industrialized countries, then this threat would be evidenced in the following way: imports from developing countries produced with low-skill labor would be cheaper than the counterpart goods produced in industrialized countries; this would require domestic producers of such goods to lower their prices to stay competitive; this would reduce the profitability of such production; this would induce producers to shift out of low-skill production towards relatively more profitable "skill-intensive" goods. See IMF Survey, supra note 1, at 56. The Survey infers that the alleged threat does not exist from the fact that the prices of domestically produced low-skill goods have not declined. There are at least two possible critiques of this hypothesis. First,
even if the basic mechanics of the theorem are correct, the cost-competitiveness of foreign goods might not necessarily lead to the lowering of prices, but might merely allow prices to remain constant over a longer period of time by allowing producers to avoid increasing prices to pay for wage increases, since such wage increases can be avoided. If this is true, stable rather than declining prices could coexist with and indeed would result from relocation of production specific to the advent of lower wages. Second, the hypothesis assumes competitive markets. Yet the IMF Survey admits, as has been conceded repeatedly elsewhere, that the "structure of foreign trade has increasingly become intra-industry and intrafirm." Id. at 46. If this is true, then both domestic and foreign goods in any given sector are likely to be produced by the same or affiliated companies. Consequently, in this less competitive environment, a cost differential in foreign labor would not necessarily be passed on to the consumer through lower prices, but rather would be absorbed by the company as greater profit. Given the ever-increasing centrality of "shareholder value" in the contemporary stock market, it seems entirely likely that companies would be induced to move production offshore precisely because of this low-cost differential, and thereby increase dividends on shareholder equity.

n208 See Lusane, supra note 158, at 439 (citing a GAO study "which found that African Americans more than whites or Latinos "experience the longest spells of unemployment among displaced workers who eventually found jobs and showed the largest loss in wages in their new jobs"). While Lusane focused on African Americans, Latinas/os also suffer these effects disproportionately to whites.

n209 Lusane cited a study by the San Jose Mercury that stated:

Blacks who were 17 percent of the executive branch workforce in 1992 were 39 percent of those dismissed. Whites made up 72 percent of the workforce and only 48 percent of those fired . . . . It's not that blacks have less education, experience, and seniority. The difference has nothing to do with job performance . . . . Blacks are fired more often because of their skin color . . . . Rank didn't help. Black senior managers were out the door as often as black clerks. It gets worse. The deck is stacked against fired minority workers with legitimate grounds for reinstatement, the study shows. They win only one in every 100 appeals.

n210 See generally Aoki, supra note 3, at 699.

n211 See Sassen, supra note 19, at 186.

n212 See Aoki, supra note 3, at 796-97.

n213 See Sassen, supra note 19, at 186.

n214 Id. at 251.

n215 Id. at 261.

n216 Id.

n217 Id. at 264.

n218 See id. Sassen wrote:

In its original and richest formulation, the postindustrial model posits a major transformation, one where the expansion of the highly educated work force and the centrality of knowledge industries will lead to an overall increase in the quality of life and a greater concern with social rather than narrowly economic objectives.

n219 IMF Survey, supra note 1, at 51.

n220 Id. at 58.

n221 Id.

n222 The most recent U.S. Census contains some indications that some members of minority groups benefited proportionately slightly more from globalization. See supra note 172.

n223 Lusane, supra note 158, at 439-40 (stating that "multinational trade and investment agreements perpetuate inequalities that already exist within national economies").

n224 IMF Survey, supra note 1, at 59.

n226 IMF Survey, supra note 1, at 296.
n227 McFarlane, supra note 225, at 352.
GLOBALIZATION OR GLOBAL SUBORDINATION?: HOW LATCRIT LINKS THE LOCAL TO GLOBAL AND THE GLOBAL TO THE LOCAL: Critical Race Globalism?: Global Political Economy, and the Intersections of Race, Nation, and Class

Gil Gott *

SUMMARY: ... " Some of the early "race crits" and activists such as Ida B. Wells, DuBois, Paul Robeson, Mary McLeod Bethune, Arturo Schomburg, Addie Hunton and Alphaeus Hunton, Jr., whose views found expression in the programmatic commitments of organizations such as the Council on African Affairs ("CAA"), are the precursors of an analytical and normative posture I refer to here as critical race globalism. ... Put simply, critical race globalism entails a synthesis of critical race and international justice perspectives. Though a vast menu of particular research and political projects could flow from such a synthesis, I will limit myself in this Article to the initial task of mapping the historical and theoretical contours of critical race globalism. ... Put simply, critical race globalism entails a synthesis of critical race and international justice perspectives. ... So, to build on a cliche, critical race globalism must be wary of thinking locally and acting globally, when that global action tends toward the neo-imperial. Furthermore, critical race globalism must also avoid thinking globally and acting locally, when that local action effects a regressive nationalism. As a rule of thumb, critical race globalism would require that we respect locality when acting globally, and that we retain global justice commitments when acting locally. ... These "essentialist" miscues are also instructive in modeling critical race globalism on the work of the earlier radical race internationalists. ... Despite the potential pitfalls, a critical race globalization seems crucial if we are to avoid the unsavory convergence of the politics of racial difference with Western global hegemony. Moreover, the best chance for a revival of radical internationalism "on U.S. soil" probably lies precisely with the transnational racial formations that a critical race globalization would underwrite. ... One final context to be considered in understanding the difficulty of pursuing critical race globalization as a scholarly or political agenda, is the culture of postidentity triumphalism that has taken root in the 1990s. ...
our beginning approximations should avoid both an "underdetermined" theory of the global (that is, an overly economistic understanding that fails to theorize issues of identity and culture) and a parochialized vision of the racial (that fails to see articulations with globalized systems of flexible accumulation). In the end, we may indeed need to live on the tension between modernist and postmodernist approaches to both identity and political economy. However, we should do so in the fullest possible engagement of a global that is itself both ruthlessly modern, a seeming iron cage delimiting social organization at the millennium, and profoundly postmodern in the flexible forms of accumulation it enables, and the shifting subjectivities it interpellates.

First, let us consider why we are loath to theorize the United States, and the West in general, as unambiguously racialized actors in the international realm, especially compared to earlier racial justice advocates, like Robeson, who believed that "the foreign and domestic policies of this country . . . come straight from the South." Revisiting the actual trajectory of twentieth century ideologies and structures of globalized racial subordination may be useful in coming to grips with our present dilemma. Consider Frank Furedi's argument that there has been a slow retreat from overtly white supremacist racializations of imperial and post-imperial forms of global domination on the part of Western elites, from the heyday of unabashedly racist discourse in the late nineteenth century, through a period of silent race warfare in the mid-twentieth century, to the acceptance of formal global equality in the 1960s.

Furedi assessed this retreat as the entailment of a strategic adoption of racial pragmatism, a set of policies and discourses designed to secure for the West continued hegemony over the South, while avoiding the potentially devastating effects of a global race war. Intense political and cultural opposition to racialized forms of subordination in the postwar era and, ultimately, the triumph of anticolonial movements rendered overt appeals to white superiority disadvantageous to the maintenance of imperial and post-imperial orders. Nevertheless, the West has been able to successfully reproduce the basic structure of differentiation that underlies earlier racialized forms of imperial domination. However, in its new form, the logic of differentiation makes claims within the categories of the cultural and civilizational, while the superiority of the West comes to be expressed as a moral essence.

In addition to this retreat from overtly racialized discourses of imperialism, which eliminated a defining target of earlier international racial critique (supremacist discourse), a renewed project of critical race globalism must grapple with a set of antinomies resulting from the reconstituted interplay of race, nation, and class in the current globalized conjuncture. Two examples from contemporary Mexico-U.S. relations, in the areas of immigration and regionalized free trade, illustrate the difficulties inherent in reproblematizing racialization of the global.

While immigration politics in the United States remain intensely racialized, displaying strong overtones of white nativism, antiimmigration sentiment seems to crosscut racial groupings. Indeed, even openly Eurocentric immigration restrictionists have learned to deploy a rhetorical concern for the supposed negative effects of immigration on domestic racial minority groups. Moreover, the racial contingency of immigration structures and politics is complicated by transnational economic and social conditions that reflect "sweated" forms of accumulation, which depend on the displacement of workers from their established localities. So, while race progressives may correctly see immigration restrictionism as racist both in its discourse and in its consequences, calling for a civil or human right to free transnational movement for all workers might be inadequate to the task of reversing the deeper problem of transnational racialized divisions of labor.

Equally complicated is the extension of "free trade benefits" through NAFTA to Mexico, a move that could be viewed as the extension of "colorblind neoliberal economic policy" having racially progressive, even if unintended, consequences. After all, it seems inevitable that certain segments of Mexican capital stand to profit from the arrangement. At the same time, NAFTA may be viewed as racially regressive within the United States (and in Mexico vis-à-vis indigenous peoples), especially if the resulting outsourcing of production disproportionately harms African American and Latina/o workers. Moreover, the hyperexploitative forms of transnational accumulation driving the maquila industries are themselves racialized (and feminized) processes of subordination in situ, but which nevertheless "benefit" consumers of all demographic categories. Finally, one must consider the complicated transnational effect of NAFTA on labor politics, as organized labor faces the necessity of pluralizing its base both within and across national boundaries.

In both of these examples, the intersection of race, nation, and class makes it more difficult to hypothesize about the continuing relevance of global white supremacy and privilege. This difficulty is all the more evident when we think comparatively of situations...
facing the earlier generations of critical race internationalists who, for example, witnessed Truman's appointment of a pro-lynching, white supremacist Secretary of State, James Byrnes, n22 who oversaw the administration's objectionable postwar policy toward Liberia and Haiti. n23

In addition to the analytical problems posed by the complex intersection of race, nation, and class in processes of globalization, the twin normative dangers of bad globalism and parochial nationalism make the political pursuit of critical race globalism a tricky proposition. On the one hand, if we sign on to a facile kind of one-worldism, we may simultaneously find ourselves in the service of a neoliberal political economy and a concomitant race to the bottom in abandoning commitments to distributive justice and social welfare. Similarly, if we embrace the cosmopolitan vision of global community and ethics, we may automatically also contribute to a project of cultural imperialism. Furthermore, if we work toward global governance through the strengthening of either transnational civil society or more traditional international governmental organizations, we may also simply reproduce the structures of international law qua imperial domination. n24

On the other hand, critiques that are hastily mounted to reveal globalization as an abusable and oppressive ruse may unintentionally embrace Westphalian modernism, thus enabling objectionable nationalisms. For example, the recent spate of political organizing in the United States against the WTO, NAFTA, fast track, and the [*1510] Multilateral Agreement on Investments may well have been successful in direct proportion to the campaigns' abilities to tap (if not create) and mobilize nationalist political capital. Even though there are excellent reasons for opposing such neoliberal governance initiatives, the nationalisms that may be invoked in the process may be of a piece with those of a Pat Buchanan, or the liberal but exclusionary nationalism of a Michael Lind. n25

So, to build on a cliche, critical race globalism must be wary of thinking locally and acting globally, when that global action tends toward the neo-imperial. Furthermore, critical race globalism must also avoid thinking globally and acting locally, when that local action effects a regressive nationalism. As a rule of thumb, critical race globalism would require that we respect locality when acting globally, and that we retain global justice commitments when acting locally.

Thus, in the context of, say, international migration, scholars may be able to deploy critical race perspectives to explain the racial contingency of the system, by pinpointing the racialized responses to particular refugee flows, or by showing that the structure of postwar refugee law is racialized and Eurocentric. n26 We can look at citizenship, or admissions/exclusion regimes, or the segmentation of labor markets along migrant/nonmigrant lines, and critical race theory can provide purchase for understanding how these regimes operate. n27 However, as we deepen the racial critique of migration, we should be wary of misapprehending the nature of axial divisions of privilege, i.e., between periphery (sending countries) and core (receiving countries).

By imposing familiar, U.S.-based racial understandings on the sets of oppressive relationships operating in the realm of migration, our local thinking should not become at the global level a kind of neoimperial imposition that fails to grasp the specific nature of migration in the global system. n28 Moreover, we have to sub [*1511] ject our advocacy of freer transnational movement to critique informed by nonmainstream, non-neoliberal approaches to global political economy. Indeed, we should be wary of a regime of "free" movement that remains ensconced within global conditions of predator capitalism, even as we continue to place protection of immigrants and immigration law reform at the forefront of racial justice struggles that resist nationalist and nativist impulses.

The earlier race internationalists faced similar tensions in pursuing their intellectual and political project of race conscious antiimperialism. When the CAA hit its stride, just after the Second World War, the anticommunist parochialism of the mainstream simultaneously took hold. n29 This turn of events divided the civil rights community between the more anticapitalist and internationalist CAA of Robeson, DuBois, the Huntons, and Bethune on the one side and the more domestic-minded, if not patriotic, anticommunist and reformist NAACP of Walter White on the other. n30

The final triumph of a domestic over an international focus in the mainstream U.S. civil rights movement ultimately entailed the intellectual embrace of a truncated racial analysis, which cast racial justice as a domestic matter, and a postwar political settlement akin to that which existed between labor and capital through the 1960s. Superficially, the approaches of the NAACP and those involved with the CAA actually evinced a common international awareness. Each group placed the struggle for racial justice in the United States in the broader context of international anticolonial and anti-imperial struggle. For the NAACP, the United States as "leader of the free world" housed an exploitable internal contradiction so long as it practiced Jim Crow at home, while preaching
oppression within western nation-states, such as the example, the particular mechanisms of race-based difficulties, internationalism. To be sure, the internationalization of analytical and political vision of radical race internationalists, who remained wedded to both an analytically and politically, to anticolonial national liberation struggles in Africa and throughout the Third World.

The political rejection of radical internationalism on the part of the NAACP led ineluctably to a kind of analytical atrophy as well, which contributed to the reproduction of a narrowly construed, "stops-at-the-water's-edge," procapitalist understanding of racial justice in the United States. n33 This analytical shortfall, in turn, had political resonance beyond the civil rights movement. Indeed, the effective end of the first wave of critical race internationalism, signaled by the demise of the CAA, also marked the half-century retreat of radical internationalism as a viable political movement in the United States. The revival in the 1960s of radical internationalist, identity-based movements, through groups such as the Black Panthers, proved to be short-lived exceptions to the overall trend. n34 The result has been that global capital expansion, which has only accelerated in the post-Cold War period, proceeds apace in the relative absence of a distinct racial justice-based critique. The recent protests at the WTO conference in Seattle, led by traditional, mostly white, contingents from the organized labor, environmental, and human and animal rights movements, only serve to confirm that a specifically race-based perspective is missing from the critique of global capitalism. n35

In order to reverse this fifty-year trend, critical race globalists might consider the example of the earlier race internationalists, who remained wedded to both an analytical and political vision of radical race internationalism. To be sure, the internationalization of a race-based critical paradigm presented analytical difficulties, [*1513] just as it does today. For example, the particular mechanisms of race-based oppression within western nation-states, such as the United States, were distinct in many ways from those at work in the African colonial system, which involved domination by the colonizing state of geographically distant territories. In particular, colonial techniques had to allow for the suppression of a majority population by a minority colonialist group, usually entailing the creation of a comprador, or middle-man economic and bureaucratic class. In the United States, struggling against racial oppression meant taking on the majority whose interests thoroughly structured the state itself. Even apartheid South Africa, an approximate analog to Jim Crow America insofar as the state directly embodied white supremacy, presented a radically different social context in which a minority settler population dominated a majority of African and "colored" peoples. On the whole, the differences that existed analytically between racial oppression in the United States and colonial domination abroad suggested that the respective freedom struggles would take different forms as well.

However, the early radical race internationalists began from a different premise. Rather than attacking race-based oppressions according to the particular social conditions that obtain within each individual nation-state, which putatively had come to be uniquely expressed in each state's structure and function, these leaders envisioned the type of political struggle that would be necessary to challenge the epochal problem of "capitalist imperialism." n36 A global system integrally linked to the racial oppressions in question. n37 Theirs was the understanding that Marx seems to have had at times, that the globalization of capitalism, the extension of [*1514] markets, defined the necessities of capitalism, and an inseparable part of that necessity was the extirpation, enslavement and subjugation of Others, i.e., those found territorially outside the core upon whose bodies the differentiae of race came to be inscribed. n38 The earlier race internationalists remained committed to an internationalism that understood capitalism as an irreducibly imperial, global system.

To be sure, certain blind spots befell even a mature Du Bois as he analyzed and became politically involved in the first successful independence struggle of the twentieth century in Sub-Saharan Africa. The ascendance to power of Ghana's Kwame Nkrumah in 1957, a participant 12 years earlier in Du Bois's Sixth Pan-African Congress, seems to have confounded Du Bois's critical capacity. n39 In particular, Du Bois apparently mistook the pan-Africanism of Nkrumah and his government for a commitment to democratic socialism. n40 In fact, until resistance in Ghana forced a change, Nkrumah had pursued a marketoriented policy to encourage for [*1515] eign direct investment with the likely outcome of creating the type of postcolonial African bourgeoisie n41 that Frantz Fanon excoriated. n42 Moreover, while Du Bois's "seriously flawed" assessment of Gold Coast politics n43 may indicate a reductionist identification of pan-Africanism with democratic socialism, he was likewise apt to identify any state-controlled economy as an instance of progressive socialism. n44 These "essentialist" miscues are also instructive in modeling
critical race globalism on the work of the earlier radical race internationalists.

Despite the potential pitfalls, a critical race globalism seems crucial if we are to avoid the unsavory convergence of the politics of racial difference with Western global hegemony. Moreover, the best chance for a revival of radical internationalism "on U.S. soil" probably lies precisely with the transnational racial formations that a critical race globalism would underwrite. n45 There could be several immediately observable effects of a renewal of the radical race internationalist spirit. For example, instead of the human rights and, increasingly, foreign policy establishments setting the terms of engagement with global labor exploitation and predictable lapses into a neo-imperialist discourse of Western civilizational moral superiority, progressive race crits would take the lead in addressing the current conjuncture of mutually determined, globalized race and class oppressions. Or, instead of mainstream environmentalists being at the forefront of efforts to advocate sustainable forms of development and combat the many gradual ethnocide of indigenous peoples that globalization entails, race crits would provide environmental justice-oriented leadership for those initiatives, militating against the impositions of either eco-imperialism or green protectionism. And rather than mainstream nongovernmental organizations creating a clientelist culture for the pursuit of development and human rights, particularly in Africa, n46 race crits [*1516] could provide a more grass-roots oriented, context-sensitive approach and, thus, foster a culture of equal partnership with African peoples.

In short, the challenge would be for those pursuing progressive politics of difference, progressive race-based politics, in the West to remember the lessons of the precursors and maintain an internationalist commitment to social and economic justice. Race crits that seek to deepen their analyses of racial oppression by problematizing its intersection with class oppression should note that the critique of capitalism that seemed lost with the "end of history" just ten years ago is robust again today, at least with regard to international political economy. The current political climate is thus an inversion of the one the earlier radical race internationalists faced. For them, internationalizing the struggle for racial justice meant forfeiting domestic political viability because it placed on them the stigma of communism. Today, political struggle beyond the national often contains a de facto anticapitalist critique that seems to have popular appeal, albeit perhaps more often than not for nationalistic and protectionist reasons. The goal of critical race globalism would be to pursue issues of transnational social and economic justice with the same integrity that distinguished those precursors who challenged their own constituencies to struggle in solidarity with people far removed from their constituencies' apparent communities of interest, against powerful default ideologies.

One final context to be considered in understanding the difficulty of pursuing critical race globalism as a scholarly or political agenda, is the culture of postidentity triumphalism that has taken root in the 1990s. It seems particularly quixotic to propose reinvigorating a robust racial politics debate in the international level at precisely the same time that "identity politics" has been under such severe attack particularly by left-liberal social movement theorists. Indeed, the new conditions of victor capitalism would seem to bolster anti-identity critiques in that globalization is a tide that swamps all boats, hurting minority and majority group members alike, so long as they are not part of the new multicultural global elite. Certainly, if the nation-state currently suffers from declining significance in the face of nonidentitarian market forces, it would [*1517] follow that other modern forms of bounded collectivities such as races and ethnicities would fall into irrelevance as well. n47

But there are many reasons both to value identity politics and to believe that "new social movements" of racial and sexual minorities, women, and those facing physical adversity will continue to play a constitutive role in progressive politics. For example, simultaneous with, and arguably inseparable from, the so-called declining significance of the nation-state in Europe and other parts of the world, has been a rise of diasporic and pan-ethnic racial consciousness among Blacks, Latinos and Asians in various Western societies. n48 This correlation may suggest that the onset of a postnational West may in fact be linked in important ways to transnational racial formation. Manuel Castells' work on globalization and identity would explain such a linkage by arguing that the processes of globalization themselves contribute to redoubled identity-based resistances and, potentially, "project identities" or new forms of political subjectivity that are relatively unrelated to the modern political form of the nation-state. n49 As David Kennedy recently wrote, we might do well to pursue "an international which is open to a politics of identity, to struggles over affiliation and a shifting embrace of the conflicting and intersecting patterns of identity [*1518] asserting themselves in the newly opened international regime." n50 Globalization processes are apparently not slowing the five hundred year rise of racial and ethnic identity as central axes of social organization. The task is to insure that the new forms of identity politics that ascend reflect sensibilities such as those given voice to through LatCrit and RaceCrit scholarship.
Although Du Bois clearly saw the globalized color-line as early as 1904, it took him another thirty to fifty years to develop his understanding of the link between race, nation, and class, a process that remained incomplete up until his death in Ghana. n51 The task for critical race globalism is to build on the work of the earlier race internationalists, while avoiding uncritical embraces of transnational or diasporic identity movements that fail to challenge globalized forms of flexible accumulation or identity nationalisms that lead to the return of nondemocratic state "socialisms." In particular, we need to develop approaches that can tell the story of race as integral across the levels of "social forces (ideas, institutions, material capabilities), forms of state, and world orders." n52 In pursuing such a multi-level project, race critical legal scholars should push themselves to think "outside the box" of democratic free market neoliberalism and avoid a stops-at-the-water'sedge approach to racial critique. Looking to the spirit of earlier race internationalists, we can revive links between the struggles for racial and economic justice, not just within one country but within and among many at once.

FOOTNOTE-1:

n1 The basis of this Article was my contribution to a panel on new and Third World approaches to international law, convened at the LatCrit IV Conference in Lake Tahoe, California in May 1999. I thank my co-presenters Robert Chang, Lisa Iglesias, Tayyab Mahmud and Ediberto Roman, and Jerome Culp for stimulating my subsequent reflection on the topic.

n2 W.E.B. Du Bois, The Souls of Black Folk 9 (1965) (1903) ("The problem of the twentieth century is the problem of the colour-line, the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea.").

n3 Though the terms critical race globalization and critical race internationalism, both of which appear in this paper, might appear to be interchangeable, the former is more useful in referring to conditions in the current conjuncture of "globalization," see infra note 16, whereas the latter might be reserved for use in referring to the worldviews of earlier racial justice advocates who linked their struggles to the movements for international socialism and communism. Generally, globalization refers to a context in which states and their agents function less as neomercantilist protectors of national economies and capital and more as facilitators of transnational economic and cultural structures. For a recent and authoritative work on globalization in the field of international relations, see David Held et al., Global Transformations: Politics, Economics and Culture (1999). For the argument that the significance of globalization has been overstated, see Paul Hirst & Grahame Thompson, Globalization in Question: The International Economy and Possibilities of Governance (1996). For critical international political economy approaches to globalization, see Globalization: Critical Reflections (James H. Mittelman ed., 1996), and Robert W. Cox, Civilizations: Encounters and Transformations, 47 Stud. in Pol. Econ. 7 (1995). For cultural studies approaches to globalization, see The Cultures of Globalization (Fredric Jameson & Masao Miyoshi eds., 1998).


n5 See Michael Omi & Howard Winant, On the Theoretical Status of the Concept of Race, in Race, Identity, and Representation in Education 3, 7 (Cameron McCarthy & Warren Crichlow eds., 1993) ("Racial space is becoming globalized and
thus accessible to a new kind of comparative analysis.

n6 Generally, white supremacy refers to "the attitudes, ideologies, and policies associated with the rise of blatant forms of white or European dominance over 'nonwhite' populations." George Fredrickson, White Supremacy: A Comparative Study in American and South African History xi (1981). Global white supremacy denotes the operation of such an ideology and power structure beyond national boundaries. Cf. Immanuel Wallerstein, The Construction of Peoplehood: Racism, Nationalism, Ethnicity, in Race, Nation, Class 71, 79 (Etienne Balibar & Immanuel Wallerstein eds., 1991) (suggesting centrality of racial hierarchy in expansion of global capitalism, whereby "axial" (core/periphery) divisions in the global economic system coincide with, and are underwritten by, racialized set of beliefs and practices).

n7 Critical Race and LatCrit movements pursue antisubordinationist, action-oriented scholarly agendas that challenge the liberal legal paradigm in its formal and reductionist understanding of race and law. For a recent explication of the Critical Race program, written in response to the mounting "liberal" backlash, see Jerome McCristal Culp, Jr., To the Bone: Race and White Privilege, 83 Minn. L. Rev. 1637 (1999). For information on the LatCrit program, see Francisco Valdes, Latina/o Ethnicities, Critical Race Theory, and PostIdentity Politics in Postmodern Legal Culture: From Practices to Possibilities, 9 La Raza L.J. 1 (1996).

n8 Several initiatives within (and against) the discipline of international law have undertaken this work from a legal perspective. So-called New Approaches to International Law (NAIL) and Third World Approaches to International Law (TWAIL) are analyzed in Ediberto Roman, A Race Approach to International Law (RAIL): Is There a Need for yet Another Critique of International Law?, 33 U.C. Davis L. Rev. 1519 (2000).

n9 Althusser developed the neo-Marxian concept of overdetermination in order to explain the relationship between a relatively autonomous superstructure and an "in-the-last-instance" determining economic base. In this view, the Capital-Labour contradiction is never simple, but always specified by the historically concrete forms and circumstances in which it is exercised. It is specified by the forms of the superstructure (the State, the dominant ideology, religion, politically organized movements, and so on); specified by the internal and external historical situation which determines it on the one hand as a function of the national past . . . and on the other as functions of the existing world context.

Louis Althusser, Contradiction and Overdetermination, in Louis Althusser, For Marx 87, 106 (Ben Brewster trans., 1969). In an unfortunate deflection of Althusser's original conception, Laclau and Mouffe use the concept of overdetermination to cast a shadow on identity-based social struggle, arguing that it does not evince multiple subjectivity that would be necessary for "radical democratic struggle." See Ernesto Laclau & Chantal Mouffe, Hegemony and Socialist Strategy: Towards a Radical Democratic Politics 98, 114-45 (1985). In rejecting this characterization, this paper foregrounds the centrality of identity-based social movements, but emphasizes the necessity of deepening conceptions of race, sexuality and gender in order to grasp their full complexity. For the argument that identity-based social movements are currently the most suitable vehicles for achieving radical democratic struggle in the political realm, through a "race-plus" model of coalitional organizing, see Sumi Cho & Robert Westley, Critical Race Coalitions: Key Movements that Performed the Theory, 33 U.C. Davis L. Rev. 1377 (2000).

n10 See Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 Cal. L. Rev. 741, 744 (1994).


n13 See id. at 79-107. Furedi also traces a process of "eternalisation," whereby racism came to be treated ahistorically, that is, as an idea or consciousness that could be housed just as easily in the oppressed as in the oppressor. See id. at 225-31. Eternalisation also contributes to the deracialized understanding of imperial domination since "everyone and no one is implicated as a racist." Id. at 238.


n15 See Furedi, supra note 12, at 239-40 ("Increasingly the vocabulary that is applied to the South is morally different from that which is used in relation to the North. . . . The new moral equation between a superior North and an inferior South helps legitimise a two-tiered international system.").

n16 My use of the concept of globalization is provisional, and it is good to remain aware of challenges to the current fixation on the global. See generally Hirst & Thompson, supra note 3. A number of critiques are possible. For example, world systems theory holds that capitalism has been thoroughly global for over five hundred years. See, e.g., Immanuel Wallerstein, The Modern World-System I (1974). For a magisterial, anthropologically based history of modern global capitalist expansion, see Eric R. Wolf, Europe and the People Without History (1982). Hirst and Thompson argued that nation-states still control the international economic scene, and Hirst asserted that globalization provides a usable rationalization for imposing neoliberal economic strategies. See Paul Hirst, The Global Economy: Myths and Realities, 73 Int'l Aff. 409 (1997).

Despite these critiques, the cultural aspects of globalization indeed seem to present something particularly new under the sun. It is these cultural transformations that make it possible to rethink the formation of political identities, most notably beyond modern nationalist limits. The articulation of globalized economic and cultural conditions in such reconstituted (perhaps resistant) identities does seem to carry transformative potential, possibly ultimately raising an unprecedented set of challenges to market-based forms of exploitation, notwithstanding that the latter have always already been global. For an analysis of the globalized production of identity and difference and its relationship to the latest forms of capital accumulation captured in the phrase "global cultural economy," see Arjun Appadurai, Modernity at Large: Cultural Dimensions of Globalization (1996).


n20 See, e.g., Roy Beck, The Case Against Immigration 176202 (1996) (arguing against immigration because it harms Black Americans); Peter Brimelow, Dissolving the American People, 1 Rutgers Race & L.J. 137, 139 (1998) (asserting that immigration "is a major reason for some of the problems that have overwhelmed the Black community"). The most thorough
mainstream analysis to date on the effects of immigration on the wages of nonimmigrant racial minorities belies the restrictionists' rhetoric. See The New Americans, supra note 19, at 221-25.


n22 See Plummer supra note 4, at 107, 169.

n23 See Von Eschen, supra note 4, at 105-06.

n24 For a treatment of these pitfalls understood more generally as an aspect of the interdisciplinary aporias of comparative and international law, see David Kennedy, The Disciplines of International Law and Policy, 12 Leiden J. int'l L. 9, 125-31 (1999).


n27 See generally IMMIGRANTS OUT!, supra note 18; Symposium, Citizenship and its Discontents: Centering the Immigrant in the Inter/National Imagination, 76 Or. L. Rev. 1 (1997) (covering immigration and nationality law).

n28 As well, the effects of transnational migration on "internal" racial formation should not escape attention.

n29 During this same period, the American Communist Party was proving itself incapable of effectively centering race in its program and building a movement among African Americans, a failure that would be evident in the widespread rejection of Marxian internationalism in the movement for civil rights of the 1960s. The Maoist Black Panther movement was, of course, an exception. See Earl Ofari Hutchinson, Blacks and Reds: Race and Class in Conflict 1919-1990, at 22377 (1995).

n30 See Von Eschen, supra note 4, at 114-18.

n31 See id.

n32 See Manning Marable, W.E.B. Du Bois: Black Radical Democrat 166-89 (1986); Von Eschen, supra note 4, at 117.

n33 See Horne, supra note 4, at 57-82.

n34 One might also recall Martin Luther King Jr.'s turn toward anti-imperial and economic justice stances in the mid-1960s. See generally Michael Eric Dyson, I May Not Get There with You: The True Martin Luther King, Jr. (2000).

n35 See Elizabeth Martinez, The WTO: Where Was the Color in Seattle?, 3 ColorLines 11 (2000). More recently, the work of Barbara Ransby, Robin D.G. Kelly, Abdul Alkalimat and others in the Radical Black Congress may signal a renewed commitment among racial justice advocates to radical internationalism, a movement to which critical race globalism could contribute.

n36 I use the term "capitalist imperialism" in the sense developed by Walter Rodney and consistent with world systems theory. See Walter Rodney, How Europe Underdeveloped Africa 135-45 (Vincent Harding et al. eds., 1981) (1972) (arguing that economic logic of capitalism required overseas expansion, and that development of Europe and underdevelopment of Africa are part of single system).

n37 Fanon's explanation of the colonial system is instructive:

When you examine at close quarters the colonial context, it is evident that what parcels out the world is to begin with the fact of belonging to or not belonging to a given race, a given species. In the colonies the economic substructure is also a racialized superstructure. . . . You are rich because you are white, you are white because you are rich.

A passage from the first volume of Capital illustrates Marx's thinking on this relationship:

The discovery of gold and silver in America, the extirpation, enslavement and entombment in mines of the aboriginal population, the beginning of the conquest and looting of the East Indies, the turning of Africa into a warren for the commercial hunting of black-skins, signalled the rosy dawn of the era of capitalist production. These idyllic proceedings are the chief moments of primitive accumulation.


Unfortunately, Marx did not fully develop an integrated analysis of race, or for that matter nation, in his critique of capitalism, and subsequent generations of Marxian theorists have been rather uniform in relegating race to the secondary status of epiphenomenal superstructure. Marxian theorists have more robustly debated "the national question." See generally Walker Connor, The National Question in Marxist-Leninist Theory and Strategy (1984). Moreover, leftist political movements, often wed to the Western tradition of Marxism, have been notoriously deficient in their embrace and empowerment of racially oppressed groups. See, e.g., Hutchinson, supra note 29 (providing critical history of relationship between American Communist Party and African American political organizations). In the 1960s, a theory of "internal colonialism" provided a long overdue wedding of Marxian and race-based analyses that was used to explain the domestic context of racial oppression in Western countries. Despite its primarily domestic focus, however, internal colonial thinking provided clear conceptual linkages between colonial forms of domination in Africa and Asia and domestic, Western forms of racial oppression. See, e.g., Mario Barrera, Race and Class in the Southwest 174-219 (1979); Robert Blauner, Racial Oppression in America (1972).

Objections to identity-based social movements blend this kind of scientistic positivism with politico-ethical consequentialism and normative deontologism. The more positivist critiques would include (somewhat ironically) the so-called anti-essentialist and more orthodox Marxist variants. These critiques argue that identity-based theory and political action simply get things wrong. Identities, if they can be said to exist at all, cannot be essentialized in the way identity-based theory and movements would have it. Or, alternatively, the determinants of oppression and exploitation are irreducibly material, a category not captured by resort to identity-based thinking and social action. Consequentialist, politico-ethical critiques deny that "particularist" theory and politics can produce outcomes consistent with a liberal or progressive agenda. The deontological variant insists on the a priori normative superiority of a universalist agenda, which is defined as counter to the goals of identity-based movements. A historicist response to these critiques suggests itself, asserting that a Gramscian transformative potential inheres in identity-based theory and action (based on the notion of counter-historical bloc formation), and that a critical organicism...
links identity politics directly to lived social and economic conditions that are particular to the contradictions of the current conjuncture.

n48 See Appadurai, supra note 16; Omi & Winant, supra note 5, at 7.

n49 See Manuel Castells, The Power of Identity 65-67 (1997). Castells saw substate, culture-based "nations," religions, and territorially delimited or "local" communities as the most likely bases of resistant identity formation. See id. He considered but rejected race and ethnicity as a likely, stand-alone base of either resistant or project identity formation, a conclusion with which I would disagree. See id. at 52-59. Castells did see race and ethnicity playing a reinforcing role in relation to the other three axes of identity his analysis favors. See id. at 65.

n50 See Kennedy, supra note 24, at 131.

n51 In addition to Du Bois's undue faith in all state-run economic systems alluded to earlier, Marable pointed out that Du Bois remained uncertain concerning the relationship between nationalism and socialism. See Marable, supra note 32, at 215.

n52 This formulation is taken from James Mittelman's recent article analyzing the importance for international relations theory of Robert Cox's idiosyncratic historicism. See James H. Mittelman, Coxian Historicism as an Alternative Perspective in International Studies, 23 Alternatives: School Transformation & Humane Governance 63, 72 (1998).
GLOBALIZATION OR GLOBAL SUBORDINATION?: HOW LATCRIT LINKS THE LOCAL TO GLOBAL AND THE GLOBAL TO THE LOCAL: A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?

Ediberto Roman *

BIO:

* Associate Professor of Law, St. Thomas University; J.D., University of Wisconsin; B.A. Lehman College. This work is dedicated in loving memory to Carmen Hernandez. Special thanks to Professors Peter Margulies, Jean Thomas, and Siegfried Wiessner for their comments on earlier drafts and Ms. Raquel A. Regalado for her invaluable research and editorial assistance. This is a footnoted version of my comments at the Fourth Annual LatCrit Conference, Lake Tahoe, Nevada, April, 1999.

SUMMARY: ... The past few decades have produced formidable scholarly efforts that have examined, questioned, criticized and even shielded the theoretical and philosophical foundations of public international law and liberal theory. ... Pragmatically speaking, the notion of methods or frameworks to international law as utilized here is the application of various approaches in an attempt to explain and address the actual problems the international community faces. ... A Race Approach to International Law could have the effect of including voices of people of color, even if they may be part of the intellectual elite that heretofore had not been adequately heard. ... In particular, the voices of immigrants whose family originate from the so-called third world are often directly as well as indirectly affected by international law, but are rarely examined. ... If successful, a race discourse could produce a reformation of international law that could insure all people, including those of the third world within and outside of the United States, are addressed and hopefully respected in international law. ... In this sense, RAIL would enhance both NAIL and a fledgling discourse known as TWAIL or Third World Approaches to International Law. ... A Race Approach to International Law or RAIL a framework acknowledges the reality that race has been a focal point of the international discourse. ...
policy debates. Additionally, this work attempts to explain how a discourse that positions race at the center of the discourse increases the prospect of a coherent view of international law. At its core, this work recognizes that both the traditional approach and its responses contain some virtue, but are woefully lacking in at least one important respect. The existing approaches to international law fail to adequately explore the consequential nature that race has played in the development of international law. By reviewing the theoretical foundations of the approaches and by providing vivid examples of the racialized nature of movements in international law, this article will demonstrate how race has been a real but unspoken determinant of international policy. This Article, in addition to acknowledging the beginnings of a new racebased approach to international law, formally proposes a race-focused international discourse in order to ensure that an often determinative variable to international action is not at best relegated to merely one of a host of potential relevant factors to international policy making. Following a handful of scholars who have begun to address the impact of race on certain international issues, this paper calls for the recognition of a race-focused discourse that will extend and expand the scope and depth of international dialogue, as well as ensure an inclusion of diverse voices in the already robust debate that is the methods discourse on international law. Finally, a race approach to international law will attempt to debunk the purported objectivity of the liberal paradigm and question the reality of the humanitarian rhetoric that is at the root of international law.

I. The Traditional Discourse

Traditional international law contains two doctrines that seek to provide the rationale for the rules of international law that validate the actions of nation-states. Proponents of these doctrines attempted "to formulate a philosophical justification for the binding force" that international law has on nation-states. The first is the fundamental rights doctrine, which is a corollary of the doctrine of the "states of nature," also known as natural law, is one such justification. n11

"Under the 'fundamental rights' doctrine, principles of international law can be deduced from the essential nature of the State." Hence, much like individuals, "every State, by virtue of [being a state.] is endowed with certain fundamental, inherent, or natural rights." n13 However, recent responses to the traditional approach have criticized this theory because it is based on a naive faith in a moral order or authority. n14

The second traditional doctrine, positivism, asserts that international law is simply an aggregation of rules consented to by nation-states. Under this theory, international law is reduced to the acquiescence of nation-states. Thus for positivists, international law consists of the rules to which nation-states have agreed through treaties and custom. Consequently, the nation-state or sovereign is the protagonist in the international drama, and in the absence of the nation-state's consent to a particular international law it is free to undertake whatever act it pleases. Not surprisingly, the two underlying theoretical foundations of the traditional approach to international law conflict. While the natural law framework advocates an ordained basis for legitimacy, the positivist basis posits a consensual basis for legitimacy.

Despite the tension between them, the traditional doctrines to international law have produced what has been described as an uneasy positivist truce. This positivist formulation has been referred to by its chief twentieth century proponent, Hans Kelsen, as the pure theory of law. Under the pure theory, the authority of law is not questioned but explained. As was recently observed, positivism is not necessarily taking the so-called bad man's view of the law, namely, that people would only obey the law because they fear . . . punishment . . . . For most of the time, most obey the law because they regard the law to rest upon moral order and to derive its legitimization from it.

As this quote verifies, the so-called positivist truce is often explained by terminology that resembles the doctrine of natural rights.

And yet, the truce has not eradicated the traditional doctrines of which it is comprised. One vindicator of the traditional paradigm, Thomas Franck, has argued that the very consent-based structure of the international formulation promotes adherence among nation-states, and thereby legitimacy, because it accommodates a deeply felt popular belief that for a system of rules to be fair, it must be firmly rooted in a framework of agreed upon formal requirements. Such observations reflect the view that the primary subjects of international law are the nation-states.

The nation-state is thus "the authoritative political institution" which as a result has dominion or sovereignty over its citizens, and is equal to all other nation-states. This position is evidenced by the international court of justices holding that international law does not address individuals directly. Though individuals can be beneficiaries of international legal norms, the traditional paradigm continues to assume that norms that affect individuals will be ne
appears to stem from the premise that the nation-state will act in the best interest of its constituency.

The classic positivist contends that the "law is regarded as a unified system of rules that . . . emanate from the will of the [nationstate]." n27 "This system of rules is an 'objective'" and legitimate reality, unlike the subjective questions of what the rules should be, that emanates from the nation-state's will, n28 so that in a sense, positivism is the acceptance of the systemization of international order.

II. The Response to the Traditional Approach

The positivist-naturalist conventional doctrines, which are at the bedrock of the dominant liberal paradigm, have produced ample criticism. The critiques, which are rooted in a variety of theoretical methodologies, challenge the conventional doctrines. Particularly this is achieved by contesting the efficacy of the positivist formulation.

Arguably, the most prominent current critique stems from a group of theorists who have been labeled "new stream" scholars. This group, influenced by critical legal studies, seeks to move beyond the doctrine and relevance of law by exposing the contradictions of traditional international discourse. n29 In so doing they seek [^1525] to refine an understanding of the importance of culture and policy in the development of international law. n30

Another critique of the traditional discourse is from the camp of international law and relations. This group, known as the IR/IL camp, provides an interdisciplinary approach that seeks to incorporate political science and international relations insight into international law. n31 Meanwhile, another group, the New Haven or policy-oriented jurisprudence has taken an approach that eschews positivism's structuralism and formalistic adherence to rules. n32 This method views law as a process towards making decisions. n33 It shares with legal realism a focus on the empirical: on delineating the problem in the context of relevant conditioning factors. n34 After considering a problem in that light, this group seeks to resolve the problem in accordance with "a world public order of human dignity." n35

Finally, feminist scholars have introduced an approach, known as feminist international jurisprudence, n36 which seeks to emphasize the significance of gender relations in the creation of international law. This group also questions international law's claim to objectivity and impartiality and challenges the traditional separation of public from private in the international law discourse because it serves as a tool for excluding gender issues. n37

While exerting different methods, all these critics of the traditional paradigm seem to share a common belief that in practice the actions of nation-states rarely comport with the humanitarian rhetoric of the traditional edifice. n38 Put another way, the responses examine the failure of international law to provide a viable framework for deterring and responding to human rights violations. n39 The new stream critiques, while considered harsh, are relevant in that they argue that the focus of the traditional paradigm is based on contradictory justifications that result in an inherent indeterminacy. n40 For example, they reject the positivist's blanket acceptance that what is fundamental is determined by mere sovereign agreement that such things are fundamental. n41 These critiques challenge the dominant paradigm by questioning the adherence to the normativity of the nation-state. n42 Accordingly, they note that the acceptance of the virtue of the sovereign or nation-state and its actions ignores the contemporary upheavals and transformations that will not stay swept under some static rug. n43

Recently, a pointed critique of the positivist paradigm by the policy-oriented camp observed that positivism's "focus on 'existing' rules, emanating solely from entities deemed to be equally 'sovereign' does not properly reflect the reality of how law is made, applied and changed." n44 They noted that positivism "remains fixated on the past, trying to reap from words laid down, irrespective of the context in which they were written, the solution to a problem that arises today or tomorrow in very different circumstances." n45 Thus, the thrust of the critiques of the traditional liberal international law paradigm has been whether the paradigm can adequately address and respond to the needs of those who are affected by actions of nation-states.

Given this deficiency, some of the critics, such as the policy-oriented approach and the international relations approach, have expounded alternative approaches to reach solutions for international law. n46 While others, such as the feminist critique, rather than discerning ultimate truths or explanations to international issues, have tried to shift the positioning of the discourse so as to insure that certain issues are not marginalized. n47 This latter group, building on deconstructionist philosophies, has introduced different perspectives or modes of emphasis that were omitted from the traditional discourse. n48 Some of these critics have concluded that international regimes that seem too weak to pursue an intended political program and, unable to withstand scrutiny, are also too technocratic to assist those in need. n49
Despite the differences, a common trend exists among all critics. They all assert that the philosophical and theoretical structures justifying nation-states' compliance with the rules of international law have failed to cause nation-states to comport with these rules. This has produced incoherence in the application of international law, which in turn marks the utter failure of international law to achieve the reforms that were the impetus for its creation. n50 These critiques of the dominant formulation often also assert that the liberal foundations of the internationalist edifice fail to address the [*1528] problem of indeterminacy. n51 This problem of indeterminacy may display itself in different fashions. Namely, the indeterminacy may arise from decision-making that is not predictable, which is particularly troubling in the vast array of international context in which issues may arise. In addition, indeterminacy may arise from unpredictable value clashes. n52

Professor David Kennedy, quite possibly the leading explorer of the traditional paradigm, has apparently come to a similar conclusion. He described the methodology of international public law as giving the appearance of movements from imagined origins to a desired end, but in actuality existing precariously and ever fluctuating among the constructed imagined points. n53 This critique of the positivist paradigm also recognizes that a considerable amount of cynicism stems from the traditional discourses anointment of the sovereign state as the core being of international order. n54 Related to this critique is the argument that the dominant liberal tradition of international law also produces policies and practices that are skewed against progressive politics. n55 In part because the new stream approach has introduced issues of consequence, such as culture and race, that had previously not been addressed, this paper will further explore this new wave of critiques. n56

The new stream or new approaches group has attempted to shift the forms of international legal scholarship from analysis of doctrine to acceptance of the determinative quality of culture and policy. n57 The leader and founder of the New Approaches to International Law, or NAIL group, David Kennedy, recently described the traditional international law theorist as being constantly worried [*1529] about the ability of international law to accurately reflect the sovereign's will and to bring sovereign behavior within its ken. n58 He added that the traditional theorist is virtually always searching for better methods to enforce norms in international society and feels the need to defend international law even when enforcement seems unlikely. n59

Kennedy notes that for the traditional theorist, law and culture occupy different stages of development. n60 In fact, cultural differences precede the move to the moral high ground of the law. n61 Kennedy argues that the internationalist seeks to build bonds among states by being agnostic about culture, by having no culture. n62 Another writer similarly observes western legal theory views law as an autonomous, abstract, and rational entity distinct from the society it regulates. n63 To the internationalist, the problem of culture disappears because it is equated with the notion of the nation-state. n64 In what perhaps would be of interest to critical race theorists, one of Kennedy's most recent works emphasized this point by means of the narrative mode of discourse, also referred to as explanation by metaphor. This story or metaphor will be the starting point of a movement that my colleague Tayal Mahmud in a panel at this conference somewhat fancifully characterized as a RAIL or Race Approaches to International Law.

In order to reveal the shortcomings of the traditionalist, Kennedy asks us to envision the traditionalist as a photographer, and the sovereign as the subject of his photograph. n65 Kennedy likens the traditionalist focus on the global to the local to that of a photographer's adjustment of the lens to capture the lake behind Aunt Betty's head. n66 Like Uncle Chuck, whose insistence on getting into the picture would be annoying to the photographer, culture throws [*1530] a wringer into the international scene or snapshot. n67 According to Kennedy, culture may embody a host of issues and identities -- ethnic, religious, familial, gender, racial, and indigenous. n68 Meanwhile, Aunt Betty, much like the sovereign is, as the result of the intrusion, no longer the focal point of the picture. She is reduced to merely a participant in the picture. At this point Kennedy's story essentially ends and a RAIL critique would begin.

What could RAIL effectuate?

A Race Approach to International Law could have the effect of including voices of people of color, even if they may be part of the intellectual elite that heretofore had not been adequately heard. While these voices may not represent all race perspectives, they may force the dominant gaze to consider differing perceptions of reality. A RAIL critique would invite race-centered international discourses from both within and without the United States. This is not to say that there have not been voices from the third world. However, there are numerous cultures within the United States. In a sense, because of the amalgam of cultures, nationalities, and races within this country, the United States has within itself the so-called first through third world, and as many as possible of those voices should be heard. The
multicultural make-up of this country virtually ensures that international issues will affect people in this country. In particular, the voices of immigrants whose family originate from the so-called third world are often directly as well as indirectly affected by international law, but are rarely examined. Some examples of this impact include the recent incarnations of immigration and free trade issues arising in this country's relations with Mexico. n69 As the Chinese exclusion cases also demonstrate, the racialized history of U.S. immigration laws has literally affected the color of the migration of people into this country, who all too often live with immutable characteristics of both citizen and alien or foreigner status. n70 Similarly, the "free-trade benefits" of NAFTA, [*1531] which do not include "free or unrestricted migration," implicate the alien as well as those here who, because of race and ethnicity, are all too often treated as aliens. n71

A RAIL critique could expand upon NAIL's cultural critique generally and Critical Race and LatCrit theories' focus on race in particular. It will likely be similar to the feminist international critique by seeking to examine the effect of international legal processes and norms that emanate from a western and accordingly white Eurocentric construction. n72

A RAIL approach would also likely reject the assumption that there is some overarching neutral standpoint, a nonpolitical academic standard that allows this method of politics to be discussed from the outside of particular methodological or political controversies. n73 RAIL will likely question the normativity of the nation-state since it often is a mere reflection of majority voices and given the dominant international structure all too often promotes a form of European or western domination. n74 As was recently observed, "international law owes its origins to European Cultural norms which maintained that nation's owed duties to others of the same race." n75 "International law was a distillation of European cultural norms into a system of rules." n76 A clear division of the world into European and non-European realms marked international law.

RAIL could advance a variety of goals forcing the dominant perspective to appreciate the impact of European domination on the international discourse, an issue that has long been masked in the [*1532] facade of neutrality. Such an emphasis will focus on the impact international policies or rules have on racial minorities, thereby continually providing a race conscious voice in international law. n77 In a sense, this approach would respond to Elizabeth Iglesias' call to expand the parameters of the antisuubordination agenda of critical theory by highlighting the myriad ways in which white supremacy is embedded in the structures of privilege. n78 Heretofore critical race critics have focused on domestic struggles for racial justice. n79 While this Article's call for a race conscious examination is perhaps a novel approach, it is one that has already begun with scholars, such as Antony Anghie, n80 Ruth Gordon, n81 and Robert Williams, n82 who have examined a series of international issues from a critical race perspective. n83 This work is an effort to acknowledge this movement that is in its fledgling, as well as formally recognize the international critical race theory efforts as RAIL.

A race-focused discourse will likely depart from NAIL in the nature of the focus of the dialogue. While a discourse on culture could include race, issues of race would be relegated to a component part of the "cultural" focus. However, the amalgam of issues that can be included in the term culture fail to sufficiently capture [*1533] the importance of race in many international issues. Much in the same way the feminists recognized the importance and need for a gendered emphasis, there is similarly a need for a race focus. In a recent work on the subject, Professor Gott emphasized the need to "reinvigorate the analysis of global white supremacy and, in so doing, inject Critical Race and LatCrit approaches into the growing mass of critical perspective on globalization." n84

RAIL would emphasize conversations and dialogue, rather than the production of a single, triumphant truth. n85 RAIL would assert and focus on the importance of race, which would contain an intersectional component n86 by including, out of necessity, other related areas such as gender in international law. The intersection between RAIL and a feminist critique on certain international issues will create paradigm shifts from a RAIL discourse critiquing the traditional framework. Unlike a critique of white supremacy, when addressing an international issue that implicates race as well as gender that are oppositionally situated, such as in the case of Female Genital Mutilation, a RAIL critique would have to struggle with its goals and any proposed solution. When addressing controversial issues such as Female Genital Mutilation ("FGM") a RAIL critique would have to struggle with the conflicts concerning sovereignty, cultural relativism, and European or Western paternalism on the one side and human dignity, health, inviolability and sanctity of the body to be free from what many believe is a form of torture. In such a delicate debate a RAIL discourse may tread dangerously close to sanctioning violence or replicating western constructions of the so-called "other" on the third world. The question will likely turn on whether there are truly universal foundations to international law. In a sense a FGM examination from
a RAIL critique will be another question of the moral foundationalism of the law. From this writer's perspective, obviously tainted by western norms, an exhaustive RAIL critique of FGM would ultimately conclude that the sanctity of human dignity and inviolability should [*1534] overcome concerns of sovereignty and western paternalism. n87 If successful, a race discourse could produce a reformation of international law that could insure all people, including those of the third world within and outside of the United States, are addressed and hopefully respected in international law. n88 Just as NAIL reminds us of the importance of culture and the feminist methods remind us of the need to consider gender, RAIL would bring to the forefront the significance of race in the international discourse. For instance, a RAIL critique would acknowledge the humanitarian interests behind the United Nations' military involvement in Bosnia, but would question the lack of similar interest in the taking of innocent lives in Rwanda, and the utter silence of the domestic media in addressing these apparently fungible people.

In this sense, RAIL would enhance both NAIL and a fledgling discourse known as TWAIL or Third World Approaches to International Law. The TWAIL discourse, which is difficult to describe and research because of the lack of easily identifiable writings which would be considered TWAIL works, n89 is predominantly viewed as stemming from scholars originally mentored by NAIL founders, but who originate from various countries and are engaging in a third world perspective to the international law critique. n90 Nonetheless, a RAIL critique can be understood by analogism to [*1535] the manner in which critical race theory is perceived as a response to critical legal studies. n91

RAIL, as alluded to before, follows Critical Race and LatCrit theory by emphasizing that which is at the heart of what NAIL's Kennedy described as culture. n92 Instead of using the broad but cautious term of culture, RAIL would seek to have the international focus on the underlying and equally broad component relevant to virtually all legal discourse, race and the myriad of all its constructions. This is a significant contribution in that when we talk of culture, of minorities, of difference, of colonialism, of the first and third world, we are engaging in a discourse about race. Until this moment much of international discourse on race has masked the importance of race through the use of these other labels and has avoided race because many find it discomforting.

To illustrate how RAIL could force the global discourse to face the uncomfortable, let us return to Professor Kennedy's metaphor about the picture. A RAIL approach would add to the vista an issue that is so immersed with racial implications, but whose existence amazingly is rarely openly addressed.

When last we discussed Aunt Betty's picture, Kennedy compared Uncle Chuck's insistence on entering the frame to culture thrusting itself unto the traditional discourse. RAIL enhances this image by reminding us that part of the international picture involves all sorts of people of color that are too often, while not in the picture, the subjects of Aunt Betty's writings, the white or European description of the picture. RAIL in other words would be akin to a "color-advanced" film product, which would ensure that the viewer captures a truer picture of what has transpired.

Furthermore, by tapping into the antisubordinate, anti-essentialist nature of Critical Race and LatCrit theory, RAIL would force us to ask a few more questions. For example, if Uncle Chuck were African American, Latino, or Asian American, would he be in [*1536] the picture? If so, then why did it take so long to include Uncle Chuck in the frame, which by analogy could very well be the theoretical discourse? Given the delay, will he ever truly be a participant in the practical discourse -- will he ever be allowed to take the picture? Which, given the amount of control the photographer has over the final product, begs the question; who is currently taking the picture? n93

While at first blush, this RAIL perspective as a theoretical progeny of NAIL appears to be narrow, upon closer examination it would provide a fuller discourse by forcing traditionalists and other participants in the method debate to face the reality of race, which does not neatly fall within the paradigm of the sovereign. A RAIL approach would challenge the assumptions of other methodological approaches. Specifically, it would question whether issues of race continue to be marginalized. In so doing RAIL would invite all of the outsiders' voices. n94 Unlike other approaches, it would not necessarily replicate the hierarchy it seeks to question as it was not conceived by inside international intelligentsia n95 and arguably did not originate in Europe or Cambridge, Massachusetts.

Functionally speaking RAIL could provide a critique of a concrete problem that is faced or avoided in the international community. Contrary to both the traditionalists and those that critique them, a RAIL critique would seek to focus on race in order to add an emphasis to new approaches. The following is an example of a RAIL discourse concerning the international issue of colonialism. By looking at the relatively small amount of race-focused discourse in the area of self-determination movements, n96 a RAIL discourse [*1537] could bring to the forefront an
issue that has been, in the past, merely a component of a cultural discourse.

This approach would enhance the dialogue in that, as Antony Anghie observed, "colonialism and the developing country experience is one that still remains to be elaborated and theorized in terms of its role in the making of international law." n97 And yet, with the exception of certain scholars in fields outside the law, such as Edward Said and Rubin Weston, n98 and within the legal academia, such as Ruth Gordon, n99 Antony Anghie, n100 and Henry Richardson, n101 in the context of colonial discourse race has been an all too often marginalized theme.

Despite this marginalization, issues of race permeate international and colonial discourse. n102 Issues of race have arisen subtly in a form of western paternalism that was and is at the heart of colonial discourse. This form of paternalism actually legitimized the institution of colonialism through nineteenth century notions such as manifest destiny and the white man's burden. More recently, in the League of Nations Mandate System and the United Nations Trusteeship System the theme was no less pervasive. Using terms such as "advanced," "matured," "sacred trust," "civilized," and "failed states," international bodies have used thinly veiled euphemisms for race in their international law lexicon. n103 These loaded terms have typically legitimized western determinations of when people of color could be endowed with the basic human right to rule themselves.

For instance, the United States' major twentieth century colonial expansion began as a consequence of the Spanish-American War. n104 [*1538] One of the repercussions of these conquests was the development of a United States Supreme Court jurisprudence that embraced colonialism. In a series of decisions known as the Insular cases the Supreme Court affirmed colonialism via issues of race and racial constructions. n105 And yet, few legal scholars and even fewer law school courses address this constitutional development. n106

The Insular Cases occurred after the Spanish-American war, in a time of intense governmental debate over the fate of the territories acquired by the United States as booty of war. n107 While the debate centered on the largest possessions, Puerto Rico and the Philippines, the Island of Guam was also acquired. n108 Prior to this period the United States philosophy towards expansion as evidenced by the Northwest Ordinance of 1787 was acquisition of territories with the intention of future incorporation as states of the Union. n109 However, unlike its previous acquisitions, following the Spanish-American war, the United States occupied "offshore" territories in the Caribbean and the Pacific that were inhabited by people of color who had different cultures and spoke different languages. n110

This distinction was the basis for the United States' development of a different approach towards incorporation with respect to these territories. Ultimately, the U.S. decided to take up a share of the white man's burden, and acquire distant lands while maintaining [*1539] the inhabitants of said territories in a subordinated status. From the statements of congressional leaders to the decisions of the United States Supreme Court, the determinative role that the race of the inhabitants played in this debate is unequivocal. n111

For example, at a time when Filipinos were portrayed as "physical weaklings of low stature, with black skin, closely curling hair, flat noses, thick lips, and large clumsy feet," n112 Representative Payne argued for preferential treatment for Puerto Rico via the census reports which demonstrated that Whites, generally full-blooded white people, descendants of the Spaniards, outnumbered by nearly two-to-one the combined total of Negroes and mulattoes. n113 Similarly, Representative Spight stated, "how different the case of the Philippine Islands. . . . The inhabitants are of wholly different races of people from ours -Asiatics, Malays, Negroes and mixed blood." n114 Representative George Gilbert further delineated the role of race when he warned against "opening wide the door by which these Negroes and Asians can pour like the locusts of Egypt into this country." n115 Senator William Bate concurred with this sentiment when he proclaimed "let us not take the Philippines in our embrace to keep them simply because we are able to do so . . . . Let us beware of those mongrels of the East with breath of pestilence and touch of leprosy." n116

The race debate concerning these territories is not limited to legislative history. n117 It also became part of United States Supreme Court jurisprudence. The Insular Cases, as mentioned earlier, created this permanency by endorsing territorial expansion and legitimizing colonialism. This effectively proclaimed American imperialism as constitutionally permissible. In Downes v. Bidwell, n118 Justice Brown, writing for the plurality warned: "If the[] inhabi [*1540] tants [of offshore territorial acquisitions] do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages of civilized, are such . . . . If such be their status, the consequences will be extremely serious." n119 Justice Brown further elaborated upon the prevalent Anglo-Saxon nativistic thought:
If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action. n120

Justice White's opinion concurring in judgment further justified disparate treatment by warning against "the evil of immediate incorporation." n121 This shibboleth would open up the borders to "millions of inhabitants of alien territory" who could overthrow "the whole structure of the government." n122 Justice White's racially based incorporation doctrine is still effectively the law of the land and forms the basis for the existing disparate treatment of the residents of America's island dependencies.

Racial undercurrents were also at the heart of the global movement against colonialism, through the right of self-determination. n123 Self-determination is regarded as the right of a people to pursue freely, absent outside pressure, their political and legal status as a separate entity. n124 Self-determination is grounded [*1541] on human rights precepts that recognize that all people are equally entitled to be in control of their own destinies. The principle is based on ideas of human freedom and equality, and is, as such, at odds with colonial rule or any other similar form of foreign determination. n125 As Professor Ruth Gordon notes, however, after World War I, the principle was applicable only to certain Europeans. n126 Any semblance of self-determination for non-Europeans was embodied in the League of Nations Mandate System. n127 Article 22 of the League of Nations Covenant called upon "advanced" guardians over certain colonies and territories that were incapable of self-rule. n128 These people who were categorized as incapable of self-rule were, as luck would have it, in many instances nonwestern Europeans, and in virtually every other instance residents of the third world. n129

The reality is that, rhetoric about self-determination aside, under the framework of the mandate system, self-determination was essentially unavailable for the less-advanced people of the Third World. n130 Instead, these people, absent their consent, were entrusted to the tutelage of "advanced nations." Typically European or descendants of Europeans were responsible for the well-being and development of their charges and carried out this responsibility as a "sacred trust" of civilization. n131

While the United Nations Charter referred to and adopted the principle of self-determination, it simultaneously retained vestiges of the subordinating mandate system through the Trusteeship System. So much so that Chapters XI and XII of the United Nations Charter established that self-determination for non-self-governing territories was to proceed at a pace dictated by the colonial administrators. Article 73(b), for instance, called upon the signatories "to develop self-government . . . according to the particular circumstances of each territory and its peoples and their varying stages of advancement." n132 Article 76 likewise included a duty "to promote the . . . advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples." n133

Again, the signatories of the charter were the so-called advanced nations and those who were to be "developed" were people of the third world. The largely demeaning and insulting proclamations contained in the international documents have a Messianic tone that reflects the self-proclaimed advanced nations' self-depiction as the White Messiahs, who utilize paternalism to perpetuate the so-called white man's burden of manifest destiny. Indeed, even the methodology of the trusteeship system, with terms such as advanced nations and sacred trust, is brimming with paternalism and, despite the countervailing nuances, resembles the nineteenth century's white man's burden of manifest destiny.

However, a change in the face of the international community occurred shortly after World War II via the formation of several "socialist democracies" in Eastern Europe as well as the liberation of a number of countries subjected to colonial domination. This latter group gained political independence as a result of the erosion of the colonial empires of France, the United Kingdom, Belgium, the Netherlands, Portugal, and Italy. n134 One scholar observed that this liberation resulted from a series of forces including indigenous liberation efforts, the increasing cost of empire, and a philosophical shift in the perception of empire by those doing the subjugating as well as the international community generally. n135 Those nations liberated during the first two decades after the war, including Syria, Lebanon, India, Pakistan, Burma, Libya, Tunisia, Morocco, Sudan, Ghana, Malay, and Guinea, n136 showed, as Antonio Cassese has noted, "striking similarities to the emancipation of slaves which had taken place in the second half of the nineteenth century in the U.S. In both cases the people gaining emancipation [*1543] were black and in both instances freedom came as a result of a war" which
was not waged for the purpose of freedom from slavery or colonial rule, and which the black or colonial peoples did not begin or dictate. n137

As a result of this liberation movement political life in the international community changed dramatically as western countries were no longer in a state of complete domination. n138 Not surprisingly, the newly formed developing countries, which were largely non-western and non-white, recognized a unifying factor in their desire to end colonial rule and the attendant western focus. n139 During the transition period of international structure the newly created countries recognized that the forms of modernity that were imbedded in international thought did not fully respond to their needs. These new countries, backed by socialist states, prompted a revision of the rules of international law. n140 Among the major changes that resulted from the creation of the new countries was reconfiguration of the legal focus of the United Nations. Notions of self-determination, decolonization, and racial equality became major points of the international community's legal agenda. n141 Fortunately, some of the goals on this agenda were met. For instance, in 1960 and 1966, three covenants on human rights included the current substantive components of the right of self-determination. n142 These resolutions were followed by other proclamations concerning the right of selfdetermination.

As this brief portrayal of recent international movements in the area of de-colonization demonstrates, it was only after people of color were free from the binds of colonialism that decolonization became a focus of the international community. More recently, several scholars have recognized that current discussions concerning colonialism in the context of the failed states phenomenon has had an equally racialized tone. n143 The following discussion will demonstrate the very different solutions proposed by those schol [*1544] are within the traditional framework versus those who have examined the problem from a critical race perspective or framework.

The concept of failed states has arisen in large part due to the phenomenon of disintegrating, collapsed, or failing governments of recently decolonized African countries such as Somalia, Rwanda, and Liberia. n144 The concept of a failed state or government arises when, due to civil strife, war, or other calamity, a country's government is unable to discharge basic governmental functions. n145 These failed functions include an inability to: maintain control over its territory; provide oversight of its own resources; collect revenue; maintain an adequate infrastructure; and maintain law and order. While several solutions have been proposed to address this problem, most have suggested that the failed governments relinquish their authority to the United Nations or similar group of nation-states. n146 They have proposed a form of trusteeship or conservatorship, n147 which may last for decades or until the problem is fixed. n148 Professors Gordon and Richardson have responded to these proposed solutions by observing that they are a call to return to the paternalistic and cultural elitism that justified colonialism in the first instance. n149 Instead of focusing on an inclusive paradigm that will incorporate the views of those directly affected and propose cooperative diplomacy, the primary response was to return to foreign subjugation. As this ongoing dilemma demonstrates, even during these "enlightened times" when the third world is in trouble, the first and primary solution is to return these "failed" groups to the supervision of the advanced nations.

Thus, despite the fact that it was not directly mentioned, race has been and still remains an essential component in the de-colonization movement which was geared towards the granting of freedom to all peoples as well as the discourse on how to treat the recently decolonized who are facing serious problems. As these [*1545] examples illustrate, race has been and perhaps may always be an essential component of international law.

Conclusion

Much to the credit of recent scholarly undertakings, theory in international law has gained importance. At the heart of the methods that defend or critique current structures is whether these methods adequately respond to the needs of those directly affected by international law. Some of the more challenging methodological approaches have taken this a step further by championing a focus on the importance of cultural and gender issues. Using the example of United States colonialism as well as the international effort to eradicate colonialism, this work argues that race has always been a real but unspoken factor in international policy. A Race Approach to International Law or RAIL a framework acknowledges the reality that race has been a focal point of the international discourse. This framework calls for scholars to consider centering an examination of an international issue from the perspective of the issue's implications on race as well as the implication of race constructions on an international issue. This request for the inclusion of a race conscious dialogue is in the spirit of extending recent methodological developments which seek to broaden the scope and depth of international issues, and in turn prevent the historical relegation of racial issues in the international discourse to unspoken or unemphasized components of a larger construct.
FOOTNOTE-1:


n3 See, e.g., Anthony Carty, The Decay of International Law?: A Reappraisal of the Limits of Legal Imagination in International Affairs 1-11 (1986) (positing that international law has not been and cannot be purely positivist); Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 1 (1989) (asserting that international law's traditional normative approach is faulty and should reflect social determinants); Hilary Charlesworth et al., Feminist Approaches to International Law, 85 Am. J. Int'l L. 613, 621-43 (1991) (arguing that traditional international law ignores women's voices).

n4 See, e.g., Thomas M. Franck, Fairness in International Law and Institutions 483-84 (1995) (proposing modifying state-centered system of international law instead of radical change); Hans Kelsen, Principles of International Law 438 (Robert W. Tucker ed., 2d ed. 1966) (arguing that international law is valid even when understood as part of national law).

n5 See David Kennedy & Chris Tennant, New Approaches to International Law: A Bibliography, 35 Harv. Int'l L.J. 417, 418 (1994) (stating that in past two decades volume of scholarly work that is rethinking international law has increased).

n6 This debate is commonly referred to as the discourse on the methods or methodology of international law. See Steven R. Ratner & Anne-Marie Slaughter, Appraising the Methods of International Law: A Prospectus for Readers, 93 Am. J. Int'l L. 291, 291 (1999) (stating that debate regarding public international law turns on methodology); see also Rosenne, supra note 1, at 1 (asserting that questions regarding nature and purpose of international law are hotly debated).

n7 See Ratner & Slaughter, supra note 6, at 292 (noting that theories of international law explain nature of international law but may not always be relevant to contemporary issues).

n8 See id. (asserting that international law theory must be analyzed in light of its relevance to contemporary issues).


n10 Kennedy, supra note 1, at 17 (stating that traditional scholars struggled to justify why sovereigns should adhere to international law).

n11 See id. at 17-18.


n13 Id.

n14 See, e.g., Kennedy, supra note 1, at 16 (stating that ancient scholars' faith in moral order is dated because scholars today find distinction between legal and moral norms).
n15 See Ratner & Slaughter, supra note 6, at 293 (stating that international law comprises set of rules nations agree to through treaties, custom, or otherwise).

n16 See id. (stating that positivists assume nations are free to act unless nations choose to abide by international law).

n17 See id.

n18 See id. (stating that positivists view nation-states as only subjects of international law).

n19 See Kennedy, supra note 1, at 3 (stating that modern international lawyers in United States harmonized naturalism and positivism).


n22 See Franck, supra note 4, at 25-26 (stating that legitimacy of rules is based on belief that rule exists and operates because process that created rule is correct).


n24 See Crawford Young, The African Colonial State in Comparative Perspective 27-30 (1994) (outlining territorial and power limitations inherent in concept of "state").


n26 See Charlesworth et al., supra note 3, at 625 (stating that international jurisprudence assumes that international norms directed at individuals are universally applicable).


n28 See id. (stating that classic positivism views legal rules as objective and divorced from subjective concerns).

n29 See Ratner & Slaughter, supra note 6, at 294 (describing New Stream scholars as influenced by critical legal studies and seeking to focus on contradictions of international law discourse). Anthony Carty described the range of critical legal studies' influence when he noted:

Critical international legal studies . . . opposes itself to positivist international law, as representative of an actual consensus among States. [It asks] whether a positive system of universal internal law actually exists, or whether particular States and their representative legal scholars merely appeal to such positivist discourse so as to impose a particularist language upon others as if it were a universally accepted legal discourse. So postmodernism is concerned with unearthing difference, heterogeneity and conflict as reality in place of fictional representations of universality and consensus.


n31 See Ratner & Slaughter, supra note 6, at 294 (describing IR/IL school as seeking to incorporate international relations theory). This piece is a survey of several critiques and is not to be interpreted as an extensive study of all the methodological approaches to international law. See generally Symposium, Method in International Law, 93 Am. J. Int'l L. 291 (1999).
n32 See Ratner & Slaughter, supra note 6, at 293-94 (describing New Haven School as rejecting positivism's objectivity and instead emphasizing policy).

n33 See id. at 294.


n35 See id. at 314 (stating that policy-oriented theory seeks ultimately to reflect global interest in human dignity).

n36 See Ratner & Slaughter, supra note 6, at 294 (stating feminist scholars seek to examine international law to reflect how it reflects men's domination).

n37 See Hilary Charlesworth, Feminist Methods in International Law, 93 Am. J. Int'l L. 379, 392 (1999) (concluding that feminist approach to international law seeks to question objectivity because this ignores gender); Charlesworth et al., supra note 3, at 644 (concluding that relegating gender issues to private discourse is inappropriate).

n38 Cf. Ratner & Slaughter, supra note 6, at 295 (noting that symposium question regarding accountability for human rights was accepted by all authors espousing differing methodologies).

n39 Cf. Kennedy & Tennant, supra note 5, at 419-20 (noting that new approach scholars are critical of international law's traditional response to what such scholars find important).

n40 See Ana Sljivic, Why Do They Think It's Yours?: An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural Internationalism, 31 Geo. Wash. J. Int'l L. & Econ. 393, 431-33 (1997-98) (stating that new stream scholars criticize traditional discourse because conflicting theories are continually advanced, thus leading to indeterminacy).

n41 See Carty, supra note 3, at 110 (questioning whether mere acceptance of rule by states proves its validity internationally); Koskenniemi, supra note 3, at 20-21 (noting that determining validity of international law is uncertain because standard to be used is uncertain).


n43 See id. at 102,

n44 Wiessner & Willard, supra note 34, at 320.

n45 Id.

n46 See Ratner & Slaughter, supra note 6, at 293 (noting that legal positivism, international legal process, policy-oriented, critical legal studies, international law and relations, feminism, and law and economics theories represent major theories of international law today).

n47 See Koskenniemi, supra note 3, at 476-501 (using critical legal studies approach to critique the traditional discourse); Charlesworth et al., supra note 3, at 621-25 (challenging male dominated formulation of international law).

n48 See supra note 3 and accompanying text (using deconstructionist philosophy to criticize traditional discourse).

n49 See, e.g., David Kennedy, The International Style in Postwar Law and Policy, 1994 Utah L. Rev. 7, 103 (noting that "technocratic excesses and political weakness" renders lesser developed countries unable to help needy).

n50 See Carty, supra note 3, at 1 (stating that no legal system comprehensively defines duties of states); Kennedy, supra note 1, at 2 (stating that international public law exists with its stated goal); Kennedy & Tennant, supra note 5, at 418.

n52 See Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 Cal. L. Rev. 1441, 1472-73 (1990) (arguing that value clashes occur because law is same as politics).

n53 See Kennedy, supra note 1, at 38 (defining distinction between substance and process in international law).

n54 See id.

n55 See Carty, supra note 29, at 66 (focusing on contradictions in international law discourse).

n56 See Cass, supra note 1, at 341-42 (arguing that difference between mainstream and "new stream" changed perception about international law and public policy); Simpson, supra note 30, at 615 (explaining that "newstream" scholars shift focus from doctrine to culture).

n57 See Simpson, supra note 30, at 615 (stating that Kennedy has established new school of legal study).


n59 See id.

n60 See id. (discussing precursors to mainstream international law).

n61 See id.

n62 See id.

n63 Ruth Gordon, Saving Failed States: Sometimes a Neocolonialist Nation, 12 Am. U. Int'l L. & Pol'y 903, 971 (1997) (questioning supremacy of Western views to detriment of "multi-cultural dialogue").

n64 See id. at 967-68 (arguing that international law is "sovereigncentric").

n65 See Kennedy, supra note 58, at 551.

n66 See id.

n67 See id.

n68 See id.


n72 See Charlesworth et al., supra note 3, at 613 (exposing gender bias of American legal theory).


n75 Gordon, supra note 63, at 936 (describing how Westerners did not value rights of indigenous people).

n77 See Charlesworth et al., supra note 3, at 634 (noting Eurocentric view of international law).


n79 See id. at 381.


n81 See Gordon, supra note 63, at 963 (using critical race perspective to re-examine international law).


n84 See Gott, supra note 69, at .

n85 Charlesworth et al., supra note 3, at 614-15 (questioning why feminism is not part of new stream legal theory).

n86 See generally Kimberle Crenshaw, Race, Gender, and Sexual Harrassment, 65 S. Cal. L. Rev. 1467 (1992) (introducing concept of intersectionality which arises when systems of subordination meet).

n87 See Karen Engle, Female Subjects of Public International Law: Human Rights and the Exotic Other Female, 26 New Eng. L. Rev. 1509, 1516 (1992) (arguing that when institutions ignore differences between men and women, women's issues will be ignored); Hope Lewis, Between IRUA and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide, 8 Harv. Hum. Rts. J. 1, 10-12 (1995) (stating that women's concept of dignity outweighs sovereignty concerns); see also Jaimee K. Wellerstein, In the Name of Tradition: Eradicating the Harmful Practice of Female Genital Mutilation, 22 Loy. L.A. Int'l & Comp. L. Rev. 99, 113-15 (1999) (arguing that because genital mutilation is such culturally-bound practice, U.N. must work with individual countries to abandon custom).

n88 See Charlesworth et al., supra note 3, at 644 (noting that restructuring international law could lead to revisions of state responsibility).


n90 See Kennedy & Tennant, supra note 5, at 418-20 (describing volume of scholarly work from third world countries).

n91 Much of the TWAIL movement originates from the Harvard Law School's Conferences on New Approaches to International Law, in which some workshops focused on addressing the
outsider's perspectives to traditional international law. The TWAIL working groups attendees reviewed works from such renowned theorists as Edward Said and Frantz Fanon. These papers, not unlike certain NAIL critiques, questioned the Eurocentric perspective of nineteenth and twentieth century history and attempted to debunk the nostalgic romanticism associated with the age of imperialism.

n92 I here seek to take ownership of the outsider perspective to international law if for no other reason that TWAIL other than discussion groups arising in workshops held by Harvard professors at Harvard, to me, does not qualify as at least a scholarly movement.

n93 As this article argues, the photographer, until this moment, has been the white male traditionalist.


n95 See Kennedy, supra note 1, at 2 (demonstrating public laws' repetition of simple narrative structure).

n96 See Hannah Arendt, Origins of Totalitarianism 1-10 (1995) (discussing role of anti-Semitism in Nazi movement). Colonialism is defined as a relationship of domination between an indigenous (or forcibly imported) majority and a minority, of foreign invaders. The fundamental decisions affecting the lives of the colonized people are made and implemented by the colonial rulers in pursuit of interests that are often defined in a distant metropolis. Rejecting cultural compromises with the colonized population, the colonizers are convinced of their own superiority and of their ordained mandate to rule. See Jurgen Osterhammel, Colonialism 16-17 (1999).

n97 Kennedy & Tennant, supra note 5, at 422.


n100 See Anghie, supra note 80.


n103 See Ruth Gordon, United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond, 15 Mich. J. Int'l L. 519, 540 n.110 (1994) (noting that powerful "metropolitan" nations would freely intervene in affairs of current and former colonies); id. at 545 (associating "colonialism" with racism).


n105 See, e.g., De Lima v. Bidwell, 182 U.S. 174, 196-97 (1901) (stating that Congress has power over acquired territories and their people fettered only by Constitution); Downes v. Bidwell, 182 U.S. 244, 279 (1901) (plurality opinion) (commenting upon "serious" consequences if inhabitants of unincorporated territories
or their children become citizens en masse).

n106 See Torruella, supra note 104, at 3-4. The leading scholarly work on the United States's relationship with its territorial possessions, Defining Status: A Comprehensive Analysis of United States Territorial Relations, for instance, is largely devoid of any references to the racial implications of the United States conquests. While this work is truly impressive and I have learned much from it, the book only discusses race in four pages of a 757 page book and largely focuses on racism among the inhabitants of the territories. See Arnold Leibowitz, Defining Status: A Comprehensive Analysis of United States Territorial Relations 102-05 (1989).


n108 See Leibowitz, supra note 106, at 17.

n109 See id. at 6.

n110 See id. at 4; see also Roman, supra note 70, at 7.

n111 See Cabranes, supra note 107, at 29-31; Efren Rivera Ramos, The Legal Construction of American Colonialism: The Insular Cases (1901-1922), 65 Rev. Jur. U. P.R. 225, 235 (1996); see also Downes v. Bidwell, 182 U.S. 244, 282 (1901) (asserting "that in the annexation of outlying . . . possessions grave questions will arise from differences of race" that would not arise "in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of Indians").


n113 Id. at 1941 (statement of Rep. Payne).

n114 Id. at 2105 (statement of Rep. Spight).

n115 Id. at 2172 (remarks of Rep. Gilbert).

n116 Id. at 3616 (remarks of Sen. Bate).

n117 See Kennedy & Tennant, supra note 5, at 419.

n118 182 U.S. 244 (1901).

n119 Id. at 279.

n120 Id. at 287.

n121 Id. at 313.

n122 Id.

n123 See Gordon, supra note 99, at 317-23.


n126 See Gordon, supra note 63, at 935.

n127 See Franck, supra note 124, at 53-54.

n128 League of Nations Covenant art. 22, para. 2.

n129 See Franck, supra note 124, at 54.

n130 See id.
n131 League of Nations Covenant art. 22, paras. 1 & 2.
n132 U.N. Charter art. 73, para. 6.
n133 Id. art. 76, para. 6.
n134 See Cassese, supra note 89, at 67.
n136 See id.
n137 See Cassese, supra note 89, at 66.
n138 See id. at 68.
n139 See id.
n140 See id. at 70.
n141 See id. at 72.
n143 See, e.g., Gordon, supra note 63, at 903-40; Richardson, supra note 83, at 1-28.
n145 See Gordon, supra note 63, at 915.

n148 See Pfaff, supra note 147, at 1.
n149 See Gordon, supra note 63, at 925-26; Richardson, supra note 84, at 29-30.
GLOBALIZATION OR GLOBAL SUBORDINATION?: HOW LATCRIT LINKS THE LOCAL TO GLOBAL AND THE GLOBAL TO THE LOCAL: Global Finance and the International Monetary Fund's Neoliberal Agenda: The Threat to the Employment, Ethnic Identity, and Cultural Pluralism of Latina/o Communities

Timothy A. Canova *

BIO:

* Assistant Professor, University of New Mexico School of Law. I would like to thank Margaret Montoya, Barbara Creel, and Lisa Iglesias for very helpful comments on an earlier draft of this article. I am particularly grateful to Dean Robert Desiderio for a summer research grant to complete this project. Thanks also to David Abraham, Gloria Valencia-Weber, and Irwin Stotzky for discussions that helped me to conceptualize the issues raised in this Article.

SUMMARY: ... While some LatCrit scholars have recognized the pressing challenges that globalization presents to the integrity of ethnic identity and cultural pluralism, such critiques must extend to the global financial system and the role of the International Monetary Fund ("IMF") as primary institutional vehicles that subordinate Latina/o people as well as people of all colors. ... While Romany mentioned that structural adjustment programs and loan conditionalities present real challenges to debtor nations, she did not expressly name the IMF as the architect of such policies that undermine the integrity of ethnic identity and cultural pluralism in such countries. ... Critical legal scholars should understand and appreciate the relationship of this global employment crisis to the subordination of ethnic identity and cultural pluralism. ... The lesson, worth repeating once again, is that a high level of employment is a necessary, if not always sufficient, condition to the safeguarding of ethnic identity and cultural pluralism. ... This Article argues that the global financial system, and the IMF in particular, systematically subordinates a great many people while undermining ethnic identity and cultural pluralism. ... Seen this way, a more fully developed critique of the neoliberal agenda would represent an initial answer to Angela Harris's call for a creative discursive balance that generates progressive and transformative theorizing, while also responding to Berta Hernandez-Truyol's call 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. ...
It is difficult to speak about the increasing threat to Latina/o culture and communities stemming from transnational capital without discussing the global financial system and the particular policies and agenda of the IMF. n14 In her keynote address to the Fourth Annual LatCrit Conference, Professor Celina Romany argued that the power of transnational capital has grown to dominate and weaken the traditional nation-state. n15 While Romany mentioned that structural adjustment programs and loan conditionalities present real challenges to debtor nations, she did not expressly name the IMF as the architect of such policies that undermine the integrity of ethnic identity and cultural pluralism in such countries. n16 But naming the IMF, its particular neoliberal agenda, and the adverse effects of IMF policies on the nation-state and on multicultural character and identity, is an important exercise in critical analysis and entirely consistent with Romany's endorsement of LatCrit methodologies to expose the subordination of ethnic cultural identity and to advance alternative epistemological accounts of such subordination. n17

This Article views subordination through the prism of employment and income in order to better understand the various ways in which the IMF and its neoliberal program harms communities around the world while undermining identity formation. n18 This view, of course, is in sharp contrast to the narrow financial criteria used by the IMF to proclaim its programs a success. n19 By elevating employment as a primary indicator to evaluate the IMF program, we also recognize that people develop identity and derive deep meaning and purpose through their work. The condition of joblessness has significant material and spiritual costs. Not only does joblessness impoverish and weaken an individual, but it also undermines an individual's identity formation, n20 contributes to passive or negative identity, and leads to potentially destructive behavior. n21

While the centrality of employment to an individual's and a community's sense of meaning and purpose should be self-evident, it may need repeating to those that have not recently, personally experienced the demoralization of joblessness or underemployment. n22 At the Bretton Woods Conference of 1944, which gave birth to the IMF and the World Bank, the United States and Great Britain attempted to construct a postwar global monetary order that would achieve several vital policy objectives. n23 The choice of objectives reflected the times. Policymakers understood that extremely high levels of unemployment had brought fascist dictators to power, led to ethnic and religious scapegoating and persecution, and brought on the Second World War. Genuine full employment of human and industrial capacity was the overriding economic reality that lifted the Allied powers out of Depression and to military victory. n24 Article I of the IMF's Articles of Agreement (the Bretton Woods Agreement) mandated...
that the IMF's purpose was to contribute to "the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy." n25 Other provisions were designed to permit member countries to maintain their policy-making capabilities for the purpose of achieving full employment. n26

However, in the decades since Bretton Woods, the IMF has pushed policies that are explicitly calculated to lead to very depressed levels of employment and real income as part of its systematic program of downward adjustment. n27 The Articles of Agreement [*1554] ment provide the IMF with explicit powers of "surveillance" to monitor and supervise the economic policies of member nations. n28 In practice, these IMF surveillance powers have been used to advance a particularly neoliberal agenda. According to Jerome I. Levinson, a former official of the InterAmerican Development Bank:

The debt crisis afforded an unparalleled opportunity to achieve, in the debtor countries, the structural reforms favored by the Reagan administration. The core of these reforms was a commitment on the part of the debtor countries to reduce the role of the public sector as a vehicle for economic and social development and rely more on market forces and private enterprise, domestic and foreign. n29

While it may have been possible to view the IMF's agenda in somewhat partisan terms during the Reagan years, there should now be no doubt of the complicity of Democrats in the new freedom of contract for owners of financial capital. n30 In many ways, the neoliberal agenda has been championed more by the Clinton administration than it was by its Republican predecessors. n31 This neoliberal agenda promises greater liberty, but only for the owners of financial capital, while the agenda results in less freedom for those who must rely on wages and salaries, rather than interest on capital [*1555] holdings, for their means of livelihood. n32 The disturbing results of this neoliberal agenda include: the century's highest sustained real interest rates, n33 a widening disparity in wealth and income between the rich and the not rich, n34 growing poverty and hardship for millions, and an unemployment crisis throughout much of the Third World, n35 including the Third World within the First World. n36

Unfortunately, the dominant response to such mass subordination is neoliberal hand wringing, combined with a large dose of "blaming the victim" to ensure that the foundations of the neoliberal order will not be threatened. These foundations include the neoliberalization of private short-term capital transfers (i.e., "hot money flows") between countries and a commitment to impose the burdens of adjustment solely on deficit countries. n37 The proliferation of hot money speculative capital flows undermines the financial position of less developed countries. Thus, while imposing the [*1556] burdens of adjustment solely on deficit countries, the neoliberal agenda ensures that the First World will continue to enjoy the fruits of cheap labor and commodity prices by keeping the terms of trade stacked against popular aspirations in the Third World. n38

The IMF's Structural Adjustment Program ("SAP") is the major vehicle for imposing asymmetrical adjustment burdens. n39 SAP is intended to drive wages down to a level where they would be internationally competitive, so that the deficit country may export its way out of debt, or at least export its way to repaying interest and principal as they come due. As more and more deficit countries are fed the medicine of downward adjustment, a classic "race to the bottom" ensues, in which the competitive wage is continually redefined downward. n40 Of course, we have other alternatives ("WHOA"): the Articles of Agreement explicitly empower the IMF to place adjustment burdens on countries in chronic trade and payments surplus. Such a reform could encourage such countries to transfer their surpluses through foreign aid like the Marshall Plan grants that recycled the U.S. surplus to rebuild Western Europe after the Second World War. n41 [*1557]

One important function of the IMF, therefore, is to decide which nations "merit" success and which should be disciplined with economic austerity in the supposedly colorblind system of neoliberal law and economics. In this way, the IMF has helped enforce the Western backlash against the 1970's economic gains of the Third World. n42 As with other politics of backlash closer to home, this backlash reflects a yearning for a merit that never was. n43 The history of European exploitation of Latin America and other parts of the Third World gives proof to the lie that the privileged position of the privileged classes in the West has been properly earned and is justified by merit. n44

Today's legal regimes serve to further reinforce that dominance by subverting the terms of trade against Third World nations. n45 The IMF's "objective" markers of merit, including idle stockpiles of foreign currency reserves and private investor confidence, are socially constructed. Likewise, trade surpluses are largely the product of the institutions that enforce a particular imbalance in the terms of trade, which strongly favored advanced countries over less developed countries. And unfavorable terms of trade,
like the decision to open one's currency to the vagaries of private speculative forces, are social constructions that serve to benefit an elite class while justifying structural adjustment for subordinated peoples and [*1558] enforcing a racialized, ethnicized, and gendered construction of economic and financial merit. n46 Global financing decisions should not be based on biased questions. Instead we should ask what makes a successful economy and what criterion should be used to label an economy as successful and deserving of merit and credit. n47

It has been estimated that developing countries struggling under the IMF's Structural Adjustment Programs have transferred nearly $200 billion to western financial institutions from 1984 to 1990. n48 This wealth transfer has only intensified during the 1990s in the form of "hot money" outflows of short-term capital, i.e., capital flight from submerging markets that contributed to the global currency contagion. n49 This transfer of immense resources from submerging to advanced countries n50 prompted a former World Bank official to remark: "Not since the conquistadors plundered Latin America has the world experienced such a flow in the direction we see today." n51 Such historical imagery of European exploitation and subjugation of indigenous populations should not be lost on LatCrits concerned with the present day subordination of Latina/o peoples.

The IMF's downward adjustment for deficit countries directly reinforces the poverty of the most vulnerable segments of subordinated populations (i.e., the Third World within the Third World) [*1559] by recreating conditions of recession and austerity. Previously sovereign nations have surrendered their policy-making capabilities by losing effective control over both monetary and fiscal policies. n52 The resulting conditions are far from what the architects of the Bretton Woods system had originally envisioned. n53 Instead of empowering IMF member nations to promote and maintain "high levels of employment and real income" and develop their productive resources "as primary objectives of economic policy," n54 the IMF has helped fuel an employment and income crisis that has exacerbated poverty, despair, and broken dreams throughout Latin America and much of the rest of the Third World. n55

Critical legal scholars should understand and appreciate the relationship of this global employment crisis to the subordination of ethnic identity and cultural pluralism. The profound alienation stemming from unemployment undermines the formation and development of the same individual identity that would be necessary to question the larger social forces that contribute to the reality of weak labor markets, mass unemployment, and pervasive underemployment. n56 In addition, socioeconomic conditions of mass poverty and joblessness undermine the formation and development of individual identity for poor and economically subordinated people. n57 As a result, these material realities also undermine the formation and development of group identities that can effectively address the real concerns of oppressed people of color.

For instance, in the spring of 1999, Guatemalan voters rejected a constitutional referendum that would have offered official recognition to the country's twenty-four Indian groups, required the Guatemalan Congress to consult with Indian groups before passing legislation affecting them, insured Indian access to sacred grounds, and required government services to be provided in indigenous languages. n58 Reportedly, voters defeated the ballot measure because many Indians living in poverty had to focus on meeting their basic needs, rather than expend their limited time and resources to actively support the initiative. n59 During the debate, opponents of the referendum argued that the measure's reforms would cost the country hundreds of millions of dollars. n60

Fiscal austerity, the IMF's favored solution to all Third World balance of payments problems, therefore undermined efforts to safeguard Guatemalan Indian identity. Fiscal austerity directly impeded Indian efforts by giving support to arguments that the government could not afford the budget outlays for the Indian recognition measures. Such austerity also undermined Indian efforts indirectly, by contributing to the poverty that kept many Indians from participating in the campaign and voting in the referendum. n61 [*1561] According to David Maybury-Lewis, "Genocide, the physical extermination of a people, is universally condemned. But ethnocide, the destruction of a people's way of life, is not only not condemned when it comes to indigenous peoples, it is advocated as appropriate policy." n62

Likewise, some critical scholars have viewed the debt crisis and IMF structural adjustment programs as mechanisms designed to force the reform and redefinition of land ownership from communal land relations to private ownership in parts of Africa. n63 IMF-imposed policies have left many postcolonial and postapartheid governments in such desperate conditions and vulnerable positions that they lack the capabilities to pursue any progressive social policies, including progressive land policies. For instance, in Zimbabwe, IMF structural adjustment programs resulted in forty-five percent interest rates for peasant farmers and small entrepreneurs, fifty percent unemployment rate for high school graduates, and a
sixty percent drop in real wage incomes. As a result, the country has also experienced steep declines in public health and education facilities, as well as violent food riots, a pattern replicated in other African countries on IMF adjustment programs.

The employment and income crisis that has spread throughout Latin America and the Third World provides the context for count [*1562] less untold stories of subordination and resistance, such as the student strike that closed classrooms six months for 270,000 students at Mexico's largest university, the National Autonomous University in Mexico City. The students protested against a proposed tuition increase from the equivalent of twenty cents to about $120 per semester that came out of the government's IMF-backed austerity measures. Likewise, in Argentina, nationwide student protests were sparked by government plans to cut $280 million from the Education Ministry as part of an agreement with the IMF to cut $1.4 billion in overall spending. Finally, in Brazil, a coalition of opposition political parties and labor unions drew as many as 100,000 protesters to the streets demanding the end of an IMF-backed fiscal austerity program and the privatization of state-owned companies.

The IMF's structural adjustment punishment should be seen as a direct threat to Latin American cultural values. The IMF's one-size-fits-all solution of downward adjustment has "a leveling effect" on local political cultures and social progress. Some Latin Americans have referred to this leveling trend as "the Americanization of Latin values." For instance, IMF-imposed austerity threatens Argentina's state-provided health care, free public universities, legal protections from layoffs, and six-month maternity leave. In Mexico, IMF-imposed austerity and recession has resulted in the elimination or drastic cutback of subsidies for food (including the torilla food staple) and energy, and the closing of the country's finest modern art museum.

The global employment crisis also results in even more destructive and self-destructive behavior. In South Africa, the transition from apartheid has been marred and jeopardized by an unemployment rate among young black men of approximately fifty percent. According to Dr. Mamphela Ramphele, the vice chancellor of the University of Cape Town, the employment crisis "is a much deeper problem than material deprivation. It's a spiritual depravity -- giving up on humanity. You see it in the levels of the abuse of women." One is struck by the parallels of these stories to the subordination of the Third World within the First World. In many U.S. communities, a lack of education, job training, and employment opportunities have contributed to rampant alcoholism, drug addiction and abuse, and violence.

Critical scholars must also consider the obvious connection between high levels of joblessness and ethnic scapegoating and violent conflict. The tragic breakup of Yugoslavia and ensuing violence throughout the Balkans can be seen as further proof of IMF policies' failures, regardless of one's political views on the war in Kosovo and NATO's spring 1999 bombing. One can easily forget that not so long ago Yugoslavia was hailed as an economic and social miracle, a remarkable example of a multi-ethnic, multinational, multireligious, nation-state, with one of the fastest growing economies in the world.

For several decades Yugoslavia also did a fairly good job of preserving diverse ethnic identities and cultural pluralism, in large part because its economy was marked by decentralized worker self-management.

Many analysts have concluded that Yugoslavia's fortunes changed for the worse with the introduction of IMF austerity programs, and particularly with the strict loan conditionality of the IMF's structural adjustment programs. Rather than the natural workings of free-market discipline, the punishment inflicted upon Yugoslavia, like the punishment inflicted upon Latin American and other Third World nations, was the result of political decisions made at the highest levels of government and finance.

Throughout the 1980s, unemployment increased dramatically throughout the Yugoslav confederation. By the start of the 1990s, reported unemployment reached nearly twenty percent nationwide, but much higher in some of the provinces. In addition, as real income and economic activity plummeted, there was a marked increase in income inequality; and then the economy fell further downward into a freefall.

This economic crisis, in turn, led to the rise of secessionist movements, as well as the xenophobic appeal of Slobodan Milosovic and the continuing violent breakup of the country. In just a few years, the awesome power of transnational capital undermined Yugoslavia's sovereignty and swept away the very idea of Yugoslavia as an inclusive, pluralist nation-state. The IMF's neoliberal program directly contributed to the economic crisis conditions that swept away the authority of Yugoslavia, a nation-state that both restrained and preserved ethnic identities and cultural pluralism for several decades.

As private finance and IMF adjustment programs have gone global in recent years, so have conditions of mass unemployment. Throughout 1998 and 1999 the World...
Bank and the International Labour Organization reported dramatic increases in worldwide poverty and unemployment as a result of the currency contagion and IMF structural adjustment programs. More than one billion people, representing one-third of the world's labor force, are either unemployed or dangerously unemployed in below-poverty-wage jobs. For example, the world has seen a very disturbing escalation in ethnic and religious violence in the Balkans, in northern Africa, in sub-Saharan Africa, throughout large parts of Eastern Europe and Asia, an economic downturn in South and Central America, and a rise in white supremacist movements in the U.S. The lesson, worth repeating once again, is that a high level of employment is a necessary, if not always sufficient, condition to the safeguarding of ethnic identity and cultural pluralism.

Of course there are a great many other untold stories that remain hidden behind the neoliberal pretense that the market objectively determines merit and that institutions like the IMF objectively determine who is deserving of the punishment of fiscal austerity and fiscal discipline. Therefore, LatCrit is confronted by a neoliberal global financial regime, monitored and supervised by the IMF, that serves to reinforce the subordination of entire nations of Latina/o peoples and other peoples of color, and that undermines ethnic identity and cultural pluralism at home and around the world.

II. In Search of a Critical Distance

This Article argues that the global financial system, and the IMF in particular, systematically subordinates a great many people while undermining ethnic identity and cultural pluralism. While LatCrit and other legal scholars increasingly criticize the dynamics of such subordination, there is some inherent tension about the appropriate means for resisting and reversing the inequities of the neoliberal program. Seeking reform from the outside by challenging the basic premises of neoliberal policy may offer the appeal of maintaining intellectual consistency and ideological purity. On the other hand, seeking reform from within by assisting in the policy implementation process has the appeal of engagement, but may also underestimate the threat of being co-opted into accepting the basic direction of neoliberal policy. Yet, these two inclinations could be seen as complementary: both approaches are necessary, but neither is sufficient to bring about real reform in the dominant regime.

Professor Enrique Carrasco has articulated the case for engagement and for seeking reform from within. In an October 1996 LatCrit colloquium entitled International Law, Human Rights, and LatCrit Theory, Carrasco called on LatCrits with an interest in law and development to "cautiously support the neoliberal policies of the International Monetary Fund and World Bank." He counseled an incrementalist approach to bring about the reform of multilateral institutions like the IMF from within.

Other LatCrit scholars, while advocating changes in IMF and World Bank policies, have also been critical of the foundations of the neoliberal policy agenda. For instance, Professor Elizabeth Iglesias has recognized the World Bank's structural adjustment loans as "major incursions into the domestic policy making prerogatives of the state," which have adversely affected local communities and escalated political instability throughout Latin America. Likewise, Professor Irwin Stotzky has referred to the oppressive nature of structural adjustment in the context of Haiti's attempts to attract private investment and foreign aid.

Professor Carrasco's skepticism of such frontal assaults on the dominant orthodoxy is based on disillusionment with the substantive position of critics. For instance, he asserts that "oppositional" voices have fallen in the past because of "flawed scholarship" and the futility of "a grand counter-hegemonic strategy." Yet, there may be more compelling explanations for the decline of oppositional voices. The New International Economic Order ("NIEO"), the most visible oppositional effort, was a collective yet often uncoordinated project with impressive theoretical and empirical support that was constructed by leading scholars in both the Third World and the First World. Far from displaying flawed scholarship, the NIEO's critique effectively analyzed and explained the unfolding global economic crisis, from the Third World debt crisis and declining terms of trade, to the breakdown of the Bretton Woods regime of exchange rate stability, and the rise of global financial speculation. The NIEO also offered alternative innovative solutions including proposals to reform the IMF, the global monetary system, and the asymmetrical burdens of adjustment.

Carrasco has also recognized that oppositional critiques were abandoned to neoliberalism as a result of the debt crisis and the disintegration of the Soviet Union and socialist bloc in Eastern Europe. This recognition is an important concession. If the debt crisis made the Third World more vulnerable to the political backlash of the First World, then blaming the NIEO for falling on deaf ears and then collapsing because of its political vulnerability is a classic example of today's dominant neoliberal discourses which "blame the victim." Such narratives have advanced hand-in-hand with neoliberal policies in a mutually reinforcing dynamic.
Furthermore, these narratives border on defeatist by accepting the dominant discourses that constantly tell us that "there is no alternative" to the IMF's neoliberal project. Such a view ignores the very rich literature of heterodox critiques of neoliberal economics and policy, while undermining the credibility of other serious alternatives to the neoliberal agenda.

However, scholars need not tear down yesterday's counterhegemonic strategies to make the case against critical disengagement. Carrasco is on stronger ground when he seeks to justify his constructive engagement as necessary to maintain mainstream credibility. His inclination is to protect vulnerable groups within Latin America, and elsewhere, by building distributive justice into the IMF program. But Carrasco may be overly optimistic about the ability of both scholars and policymakers to maintain their critical distance after they have entered the IMF's orbit of neoliberal assumptions.

Constructive engagement constantly runs the risk of being coopted by muting criticism to make it more acceptable to policymakers. For instance, Carrasco repeats as fact the IMF's own description that it insists on "high quality" economic growth, macroeconomic stability, good governance, more equitable income distribution, social safety nets for the poor, and increased employment. He urges LatCrit to accomplish this task by "radically rigorous monitoring" of the IMF, a concept that is hard to get our hands around, particularly if we choose to support the basic direction of the IMF's neoliberal agenda.

Professor Iglesias's insights on the World Bank's Inspection Panel may also suggest the limits of constructive engagement and incremental reform efforts. According to Iglesias, none of the ten Requests for Inspection reported in the panel's first two years dealt with any claim arising out of a World Bank structural adjustment loan. Reform from within, in the particular context of the World Bank's Inspection Panel, seems limited to ensuring that World Bank projects are implemented in a manner consistent with the Bank's own policies, rather than any criticism or even discussion about the Bank's underlying policy direction. As Iglesias concluded:

While a number of Latin American governments have tried to address popular concerns through a constructive national dialogue and to resist the conditionalities imposed by World Bank structural adjustment loans, neither dialogue nor resistance has been very effective, in large part, because the terms of World Bank structural adjustment loans are, in effect, nonnegotiable.

One may conclude that in addition to burrowing from within to claim a place in the policy implementation process, critics must also be free to criticize the direction and foundations of such policy. But by offering such criticism, critics may run the risk of being excluded and disengaged from the implementation process.

A more optimistic way to view the stance of critical disengagement is one that recognizes the importance of maintaining intellectual independence. When MIT economist Paul Krugman broke ranks in mid-1998 with the IMF over his support for Malaysia's go-it-alone program of exchange controls on currency and capital transactions, Krugman certainly ran the risk of isolation and even derision by Western policymakers. One could argue that only an economist of Krugman's pedigree and stature could risk the wrath of established opinion makers, or conversely that Krugman had much more to lose than many lesser-known quantities. In any event, within a year of Krugman's defection, the IMF was forced to concede that Malaysia's exchange controls had produced positive results, and Krugman's views were still taken seriously, though not always concurred with by policymakers.

The World Bank's unprecedented criticism of IMF policy helped buttress critics like Krugman, and kept the pressure on the IMF to soften its opposition to Malaysia's exchange control program. The World Bank's critical position was due in large measure to the views of its president, James Wolfensohn, and its chief economist, Joseph Stiglitz, two anomalies -- people in powerful positions who remained critically engaged while resisting co-option by other institutions. Without the high profile of Krugman's critique, as well as the World Bank's criticalism, the IMF may have been less inclined to acknowledge the shortcomings of its own approach and more inclined to ignore the mounting evidence of Malaysia's relative success.

Throughout much of the Asian financial crisis, Stiglitz represented the promise of an insider articulating outsider criticism of the orthodox model. Yet, eventually Stiglitz felt constrained in such a role and was forced to choose between muting his criticism or quitting his official World Bank position. He chose the latter.
decisions are bad economics. Should he go public, or should he confine his disagreement to closed-door discussions with other officials and then, once the decision is made, remain silent?" n122 By going public with his disagreements with IMF and Treasury policy, Stiglitz apparently invited strenuous opposition of more orthodox insiders. n123 In his defense, Stiglitz claimed that less visible dissent is appropriate when there is time for gradual change, but that "working from the inside was not leading to responses at the speed which responses were needed." n124 While Stiglitz's insider criticism ultimately led to his resignation, during a crucial period it also may have served to temper the worst excesses of IMF policy.

The major benefit of mounting a frontal assault on the neoliberal orthodoxy and articulating an alternative vision is that the cumulative effect of such criticism may help create a more conducive climate for reform efforts. Neither the critically engaged Krugman nor the constructively engaged dynamic duo at the World Bank may have turned so critical so quickly without the prodding of others. Each built upon the groundswell of criticism expressed by lesser-known and lesserengaged critics. n125 This suggests that when critical scholars maintain their critical distance from policymakers, they alter the quality of public discourse, though in unquantifiable terms. LatCrit scholars have maintained their critical distance, and hence their critical independence, in matters close to the heart. n126 [*1575] Yet, it may be more difficult to resist the argument that in matters closer to our wallets, in the area of money and finance, we should follow the lead of self-proclaimed policy experts. n127 But there is no reason to accept a different ethic of responsibility when discussing money issues. n128

The failures, contradictions, and injustices of the neoliberal program have become more apparent in recent years, and have divided leading economists on such fundamental questions as capital mobility and the distribution of adjustment burdens. n129 IMF policies continue to bring austerity and economic deprivation to millions of people throughout Latin America and the Third World, n130 [*1576] while contributing to growing ethnic conflict and undermining cultural diversity. n131 These sorry developments may provide an opening for resistance to the supranational legal regime that subordinates for private profit, and the context for more penetrating criticism of the IMF's neoliberal policy agenda in the future. The role of critical scholars in such a resistance, in criticizing the neoliberal orthodoxy, and in articulating an alternative vision, is a challenging one that continually demands the critical scholar to strike a balance between the appeals of constructive engagement and the need to maintain a critical distance.

III. Conclusion: Towards a New Critical Legal Synthesis

The LatCrit movement has derived much strength and vitality from its inclusive character and its commitment to a broad antisubordination agenda that resists assimilation and oppression of Latina/o identity. n132 Latina/o identity is often discussed in terms as a "species of race in American society," n133 but not often as a species of class in American society. Race can also be contextualized within an account of socioeconomic class and an indictment of the institutions that serve to reinforce the socio-economic subordination of racial and ethnic minorities. But if we focus our critiques on the class aspects of power, we are in danger of dividing Latina/o scholars of various different ideological perspectives. n134 And yet the avoidance of ideological arguments itself entails the acceptance of certain unspoken normative assumptions, many of which are highly ideological and deserving of our critical analysis. n135 [*1577] Therefore, LatCrit is faced with the important challenge and exciting opportunity to create a new synthesis of critical legal scholarship to better analyze and understand the legal structures and processes that subordinate people based on race, ethnic identity, culture, and socio-economic class. n136

LatCrit IV's discussions of the subordination of Latina/o and other oppressed farm workers n137 demonstrate that LatCrit is evolving as an inclusive movement, concerned with the subordination of people of lower socio-economic classes. n138 Furthermore, such discussions demonstrate that LatCrit will not become merely a vehicle for the privileging of a Latina/o professional elite, which overlooks and ignores the subordination of the masses of Latinas/os and other peoples of color. n139 Much work must be done to build the coalitions within LatCrit that will address the subordination of lower class Latinas/os by listening to real stories of subordination and resistance. n140 LatCrit scholars must continue to develop critiques of the legal structures and structures of thought that keep people down, particularly, critiques of the global financial system and IMF agenda. n141 As Nancy Ehrenreich reminds us,

One of the main ways in which power hierarchies are maintained in this country is through an ideology that convinces subordinated groups that their interests are in conflict . . . . In reality, however, those identity groups share a common interest in redistributing resources and influence in an equitable way. n142 [*1578] We must all learn about the mechanisms of globalization that threaten to divide subordinated groups while entrenching power hierarchies.
The sophistication of global financial discourse must be tempered with a profound disenchantment with the governing legal regime. Seen this way, a more fully developed critique of the neoliberal agenda would represent an initial answer to Angela Harris's call for a creative discursive balance that generates progressive and transformative theorizing, n143 while also responding to Berta Hernandez-Truyol's call 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." n144 Hernandez-Truyol's "diversity perspective" is consistent with a more expansive conception of international human rights norms that borrow from domestic and international notions of economic sovereignty and rights to human development. n145

Genuine "cultural resistance to Anglo assimilation" means resisting assimilation into the Anglo political culture. n146 The dominant neoliberal culture, grounded in orthodox Anglo-American economic theory, views unemployment as a necessary evil and often as a private failing. At stake is how those with power treat those without power. The reality is that the international trading and monetary system permits those with power to subordinate those without power. n147 We must not compromise on the belief that each and every person has a right to find meaning in productive work, n148 that the renewed vitality of ethnic identity and cultural pluralism requires such opportunities for work and meaning, and that the inclusive democratic state has an obligation as "employer of last resort" which is every bit as profound and crucial as is its role of "lender as last resort" to the private banking sector. We must, therefore, affirm that each and every man and woman has a right to exist, and that the right to employment at a living wage is a fundamental precondition to such an existence. n149

FOOTNOTE-1:


n6 The inclusion of such critical voices could also be seen as coming full circle to a new synthesis that opens the door to include the original class-based focus of the Critical Legal Studies movement that spawned RaceCrit and LatCrit, but integrating that class-based critique within a more complex and culturally textured context that includes socio-economic identity. See Critical Legal Studies: Articles, Notes, and Book Reviews Selected from the Pages of the Harvard Law Review (1986); The Politics of Law (David Kairys ed., 1982); see also infra notes 136-41 and accompanying text.

n7 See Margaret E. Montoya, Academic Mestizaje: Re/Producing Clinical Teaching and Re/Framing Wills as Latina Praxis, 2 Harv. Latino L. Rev. 349, 350 n.2 (1997) (arguing that LatCrit discourse must focus on experience and history of Latina/o communities and conditions in which they survive to "alleviate the misery and desperation in which too many Latinas/os live").

n8 See Harris, supra note 5.

n9 See Celina Romany, Global Capitalism, Transnational Social Justice and LatCrit Theory as Antisubordination Praxis, May
n10 See Colloquium: International Law, Human Rights, and LatCrit Theory, 28 U. Miami Inter-Am. L. Rev. 177 (1996-1997); Romany Keynote Remarks at LatCrit IV, supra note 9. But see Romany, Interrupting the Dinner Table Conversation, supra note 9, at 4, 20 (arguing that "discursive reflections on stories told publicly within and between groups develops a normative language that names their injustice and narrates the suffering surrounding it").

n11 LatCrit has traditionally been concerned with understanding, analyzing, and struggling against the subordination of people of color. This antisubordination agenda extends to oppression that is expressly based on the person's racial or ethnic characteristics as well as unintentional discrimination that has a disparate impact on people of color. See Barbara J. Flagg, Was Blind But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent, 91 Mich. L. Rev. 953 (1993). While it is debatable whether the global financial system in general and the IMF agenda in particular are implicitly designed to subordinate people based on racial or ethnic identity, there is little doubt that both have a disparate impact on people of color. See Gunnar Myrdal, Rich Lands and Poor 23-38, 50-66 (1957) (explaining how private market forces, global trading, and financial systems lead to growing economic inequalities along ethnic and racial lines); see also Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. Miami Inter-Am. L. Rev. 263, 289 (1996-1997) ("Though facially-neutral, restrictionist measures have disproportionate impacts on people of color.").


n14 See Canova, supra note 12; see also Robert L. Rothstein, Global Bargaining: UNCTAD and the Quest for a New International Economic Order 77 n.32 (1979) (citing Paul Streeten, World Trade in Agricultural Commodities and the Terms of Trade with Industrial Goods, in Agricultural Policy in Developing Countries 207-23 (Nurul Islam ed., 1974)) (discussing arguments that less developed countries have suffered secular decline in terms of trade, which in turn has caused much of their poverty); Philip Turner, Capital Flows in the 1980s: A Survey of Major Trends, 30 BIS Econ. Papers 11
(describing how private capital movements punish deficit countries while serving to benefit surplus countries).

n15 See Romany Keynote Remarks at LatCrit IV, supra note 9. Romany argued that the nation-state undermines ethnic cultural identity by privileging certain elite interests and facilitating the prerogatives of global capital. See id. In calling for reform of the nation-state to permit greater democratic participation and a politics of inclusion, Romany implicitly recognized that the nation-state is an important protection for safeguarding ethnic cultural identity from the leveling influence of private transnational capital development. See id.; see also Romany, Interrupting the Dinner Table Conversation, supra note 9, at 16 (stating that "a humane global governance requires the enabling of institutions and structures which both at national and inter-national levels, prevents a community or a class from being systematically subordinated").

n16 See Romany Keynote Remarks at LatCrit IV, supra note 9. In particular, deficit nations following IMF prescriptions are effectively prevented from pursuing policies that promote full employment and social welfare. See id.

n17 See id. Chantal Thomas pointed out part of the challenge of extending LatCrit's antisubordination agenda to globalization: "While conditions of subordination are visible, the causative dynamics and law's complicity are often invisible." Thomas, supra note 13; see also infra notes 61-71 and accompanying text.

n18 Keeping employment at the center of our analysis is consistent with Berta Esperanza Hernandez-Truyol's call for a holistic approach "that promotes the indivisibility and interdependence of our identities." Berta Esperanza Hernandez-Truyol, International Law, Human Rights, and LatCrit Theory: Civil and Political Rights -- An Introduction, 28 U. Miami Inter-Am. L. Rev. 223, 225, 243 (1997). In addition, the United Nation's Universal Declaration of Human Rights "recognizes the rights to social security, full employment, fair working conditions, an adequate standard of living, education, and participation in the cultural life of the community." Id. at 235; see also Public Papers and Addresses of Franklin D. Roosevelt: 1944-1945, at 32, 41 (State of the Union Address, Jan. 11, 1944) (proposing second American Bill of Rights to include fundamental economic rights such as right to useful and remunerative employment for all Americans); cf. Daniel D. Bradlow, The World Bank, the IMF, and Human Rights, 6 Transnat'l L. & Contemp. Probs. 47 (1996) (urging IMF and World Bank to develop explicit human rights policy); Balakrishnan Rajagopal, Crossing the Rubicon: Synthesizing the Soft International Law or the IMF and Human Rights, 11 B.U. Int'l L.J. 81 (1993) (arguing that IMF must condition assistance on fundamental human rights, including the right to full human development).

n19 As long as a country manages to remain current in its payment obligations, IMF economists remain largely unconcerned about the so-called collateral damage of IMF austerity programs on the mass of a country's population. For instance, the IMF prematurely proclaimed success after the Mexican peso crash and $51 billion bailout package for Mexico, and more recently after the $41 billion assistance program for Brazil, based on narrow criteria of financial solvency while ignoring the large economic and social costs of the austerity medicine. See Canova, supra note 12, at 1586-87, 1600-02.

n20 See Erich Fromm, The Sane Society 180-81 (1969) (describing the workplace alienation that undermines individuals' sanity); Abraham H. Maslow, Toward a Psychology of Being 196-97 (1968) (arguing that identity is developed as individual achieves hierarchy of functional needs, culminating in self-actualization, requiring people to feel that her essential core is fundamentally accepted and respected by others and by herself).

n21 See Erik H. Erikson, Dimensions of a New Identity 10809 (1974); Roxanne Rimstead, Subverting Poor Me: Negative Constructions of Identity in Poor and Working-Class Women's Autobiographies, in The Language and Politics of Exclusion:
n22 See Bertram Silverman, The Rise and Fall of the Swedish Model, Challenge 69, 87-88 (Jan./Feb. 1998) (interviewing Rudolf Meidner and discussing how people often internalize the experience of joblessness and blame themselves); see also Romany, Interrupting the Dinner Table Conversation, supra note 9, at 17 (arguing that we must see "world history and contemporary social life from the perspective of radical equality of peoples in status, potential and rights") (citing Ella Shohat & Robert Stam, Unthinking Eurocentrism 48 (1994)).


n24 By the end of the Second World War, the unemployment rate in the United States was less than two percent, a level reflecting mere frictional unemployment. The rate of industrial capacity utilization was also at full employment, and for some industries exceeded 100 percent of the prewar capacity estimates. See Lynn Turgeon, Bastard Keynesianism: The Evolution of Economic Thinking and Policymaking Since World War II, at 5, 125 n.2 (1996). At genuine full employment there is only frictional unemployment that reflects the short amount of time that it would take anyone in the labor force to change jobs. See James K. Galbraith & William Darity, Jr., Macroeconomics 20 (1994).

n25 Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39, Article I(ii) [hereinafter Articles] (emphasis added). According to the Articles, the IMF would contribute to full employment and economic development by facilitating "the expansion and balanced growth of international trade." See id. (emphasis added to reflect idea that balanced growth would contemplate certain limits, such as limits to free flow of short-term capital).

n26 For instance, Article VI permits member nations to impose restrictions on capital transfers, a potentially potent weapon against destabilizing speculative capital flows. See Articles, supra note 25, 2 U.N.T.S. at 39. Article VII the "scarce currency clause," could be invoked to spread the burdens of adjustment to surplus countries by encouraging them to recycle their surpluses. See Articles, supra note 25, 2 U.N.T.S. at 39; Canova, supra note 12, at 1610-13, 1636-39, 1642-43.

n27 IMF austerity programs typically involve fiscal and monetary austerity, currency devaluation, rising interest rates, sharply higher unemployment, and declining real income levels. See Canova, supra note 12, at 1578, 1590, 1596; Enrique R. Carrasco & Randall Thomas, Encouraging Relational Investment and Controlling Portfolio Investment in Developing Countries in the Aftermath of the Mexican Financial Crisis, 34 Colum. J. Transnatl. L. 539, 565-71 (1996). For further discussion of the rationale of downward adjustment, see infra notes 3940 and accompanying text. The IMF's neoliberal policies may actually undermine the Bretton Woods Agreement's objective of open trade by contributing to currency and macroeconomic instability. See Roger Cohen, Poland's Glossy Capitalism Displays a Darker Underside, N.Y. Times, Sept. 30, 1999, at A1, A8 (reporting that "the Russian [currency and financial] crisis has hit Poland hard, effectively removing important export market for farm goods and other products").

n28 Article VIII requires members to consult with and to obtain the approval of the IMF to impose restrictions on current transactions. See Articles, supra note 25, 2 U.N.T.S. at 39. Article IV gives the IMF more general surveillance powers over a wide range of members' economic and financial policies. See id.


n30 My perception of Democratic complicity is based in part on first-hand observation. In the early 1980s I served as a legislative staffer to former United States Senator Paul Tsongas, who helped move the Democratic Party in a distinctly
neoliberal direction. See generally Paul Tsongas, The Road From Here: Liberalism and Realities in the 1980s, at 135, 202-03, 233 (1981); see also Norman Birnbaum, Elections 2000 -- A Bad Dream?, 269 Nation, Aug. 9-16, 1999, at 28 (arguing that Vice President Al Gore's position in Clinton administration and background in neoliberal Democratic Leadership Council leads to conclusion that Gore's call for "practical idealism" is "a euphemism for the continuing and purposeful degradation of the New Deal tradition, its reduction to clientelism and ineffectual incrementalism").


n32 More than half a century ago the great British economist John Maynard Keynes criticized the "cumulative oppressive power of the capitalist to exploit the scarcity value of capital" and warned of the dangers of basing society upon the protection of the money-motives of a "rentier" class that lives solely on income derived from interest. See John Maynard Keynes, The General Theory of Employment Interest and Money 376 (1964) (arguing that owner of capital can obtain excessive interest because capital is kept scarce by convention and central bank policy, although "there are no intrinsic reasons for the scarcity of capital"); Joan Robinson, Economic Philosophy 19-20 (1962) (quoting from Keynes's Essays in Persuasion). Writing during the Great Depression, Keynes predicted that the eventual "euthanasia of the rentier, of the functionless investor, will be nothing sudden, merely a gradual but prolonged continuance of what we have seen recently . . . and will need no revolution." Keynes, supra, at 376. In the decades since, the rentier has not just refused to disappear, but has come to once again predominate over enterprise by dominating the interest rate and monetary policy-making process. See James Medoff & Andrew Harless, The Indebted Society 46-53 (1996).

n33 See Sidney Homer & Richard Sylla, A History of Interest Rates 386 (1991) (providing data on historically high level of real interest rates).

n34 See Medoff & Harless, supra note 32; Canova, supra note 12, at 1632 n.255 (discussing America's increasingly unequal distribution of income).


n36 For a discussion of the employment crisis within the First World, see infra note 77 and accompanying text. Celina Romany refers to the Third World conditions of poverty that exist within the First World as the "South within the North." See Celina Romany, Claiming a Global Identity: Latino/a Critical Scholarship and International Human Rights, 28 U. Miami Inter-Am. L. Rev. 215, 221 (1997).

n37 See Canova, supra note 12, at 1596, 1610-18. Economists often refer to short-term portfolio capital flows as "hot money" because of the speed and unpredictability by which such investment capital can move out of the country. Such short-term portfolio investments usually takes the form of highly liquid stocks and bonds that can be sold quickly. See id.

n38 See Michael Bleaney, Liberalisation and the Terms of Trade of Developing Countries: A Cause For Concern?, 16 World Econ. 453, 464 (July 1993).

n39 See Carrasco & Thomas, supra note 27, at 565-71 (describing Mexico's IMF-led downward adjustment); see also Silvia Federici, The Debt Crisis, Africa and the New Enclosures, in Midnight Oil: Work, Energy, War, 1973-1992, at 308 (Midnight...
Notes Collective ed., 1992) (reprinted from The New Enclosures 10, 13 (Midnight Notes Collective ed., 1990)) (reporting that SAP's stated objective is "to create an environment more congenial to business investment, and to make [Third World] labor competitive on the international market").


n41 See Canova, supra note 12, at 1636-43. "We Have Other Alternatives!" (WHOA!) is a response that we must continue to repeat to proponents of TINA ("There Is No Alternative"). See Timothy A. Canova, The Disorders of Unrestricted Capital Mobility and the Limits of the Orthodox Imagination: A Critique of Robert Solomon, Money on the Move: the Revolution in International Finance Since 1980, 9 Minn. J. Global Trade 219, 228 n.43, 230 n.52 (2000); see also infra notes 93, 102 and accompanying text. West European countries may have been considered deserving of Marshall Plan aid by United States elites and policymakers, who were able to "positively identify" with white victims of war dwelling in their own ancestral homelands. This is in marked contrast to the paltry United States assistance to the pressing needs of Latin America and the Third World, "nonwhite" lands that United States elites have failed to identify with. See Robert Chang, The Nativist's Dream of Return, 9 La Raza L.J. 55, 57 (1996) (arguing that even labels of Asian-American, Latin-American, and African American connote that their "true home lies elsewhere"); see also Stephen Hellinger, The Wrong Hurricane Relief, N.Y. Times, Dec. 7, 1998, at A22 (arguing that debt relief to Central American nations ravaged by Hurricane Mitch must not be conditioned upon adoption of IMF "structural adjustment" policies, and that such loan conditionalities will only increase economic dependence and suffering in the region).


n43 See Keith Aoki, The Scholarship of Reconstruction and the Politics of Backlash, 81 Iowa L. Rev. 1467, 1469-70, 1473 (1996); Valdes, supra note 1. The neoliberal policy of liberalizing markets to empower propertied and privileged interests and people should also be viewed as a politics of backlash that seeks an imaginary status quo ante and invoke false justifications based on colorblind merit. Decisions by local elites within the Third World to liberalize markets and privatize national resources are the twin vendido policies by which the backlash operates.

n44 See generally Eduardo Galeano, Open Veins of Latin America: Five Centuries of the Pillage of a Continent (1973). Colonial exploitation cannot be dismissed as merely a thing of the past since First World dominance often rests on the fruits of past takings. See id.

n45 For instance, Keith Aoki demonstrates how the institution of intellectual property law has been constructed to benefit the more technologically advanced. Keith Aoki, Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection, 6 Ind. J. Global Legal Stud. 11 (1998).

n46 This analysis borrows from Leslie Espinoza's critique of the social construction of merit in another context. See Espinoza, supra note 42, at 34, 36-37; see also Leslie Espinoza, The LSAT: Narratives and Bias, 1 Am. U. J. Gender & L. 121 (1993).
n47 See id. The great iconoclastic British economist Joan Robinson raised
the question of what allocation of resources would best contribute to human
welfare. She noted that "the best reply that laissez-
faire ideology can offer is not to ask the
question." Robinson, supra note 32, at 138.
Others have written critically of the biased
way that legal structures permit financial
markets to allocate resources. See Anthony
D. Taibi, Racial Justice in the Age of the
Global Economy: Community
Empowerment and Global Strategy, 44
Duke L.J. 928 (1995); Fred Galves, Giving
Credit Where Credit Is Due: The
Economic and Moral Case for Reforming
Traditional Lending Criteria and Making
Fair Lending a Reality, Work-in-Progress,
LatCrit IV Conference, supra note 13; see
also Martha Albertson Fineman, The
Inevitability of Dependency and the
Politics of Subsidy, 9 Stan. L. & Pol'y Rev.
89 (1998) (questioning conceptualization
of "subsidy" and "dependency").

n48 See Asad Ismi, Plunder with a Human

n49 See Canova, supra note 12, at 1584-
86, 1598, 1612-18.

n50 Third World nations were once
commonly referred to as lessdeveloped
countries (LDCs). But in today's neoliberal
discourse, we have come to refer to them
as "emerging market economies," a
euphemism that often gives the false
impression of progress and hope. It would
often be more accurate to characterize
these countries as "submerging market
economies," a term that better conveys the
pain and despair that has descended upon
many of the citizens of these countries as a
result of the IMF's neoliberal agenda. See
Canova, supra note 12, at 1600, 1604.

n51 See Ismi, supra note 48; see also
Galeano, supra note 44.

n52 See Ilene Grabel, Crossing Borders: A
Case for Cooperation in International
Financial Markets, in Creating a New
World Economy: Forces of Change and
Plans of Action 70 (G. Epstein et al. eds.,
1993) (describing how asset markets
increasingly dictate monetary policy).

n53 In concluding that the Bretton Woods
negotiators were largely uninterested with
issues related to income equity and
poverty, scholars must rewrite history to
overlook the original full employment
objectives and powers of the IMF. Cf.
Canova, supra note 12, at 1610-12 n.169,
1642-43; Enrique R. Carrasco & M. Ayhan
Kose, Income Distribution and the Bretton
Woods Institutions: Promoting an Enabling
Environment for Social Development, 6
Transnat'l L. & Contemp. Probs. 1, 5
(1996). See generally Gloria Valencia-
Weber, American Indian Law and History:
Instructional Mirrors, 44 J. Legal Educ.
251, 261 (1994) (warning of "the
consequences of flawed history").

n54 See Articles, supra note 25, at Art.
I(ii).

n55 See Global Financial Crisis Will
Trigger Jump in World Unemployment,
Press Release on the ILO World
Employment Report (last modified Sept.
24, 1998) (visited April 17, 2000)
http://www.ilo.org/public/english/region/
eurpro/ankara/eng3.htm> (on file with
author); Paul Lewis, World Bank Says
Poverty Is Increasing, N.Y. Times, June 3,
1999, at C7; David E. Sanger, U.S. and
I.M.F. Made Asia Crisis Worse, World
A1; World of Trouble: Crumbling
Economies Burying Workers Everywhere,
Albuquerque J., Nov. 1, 1998, B10
(reporting on mass economic hardship in
Mexico, Russia, and Japan); see also infra
note 39 and accompanying text.

n56 See Erich Fromm, Escape From
Freedom 132-35 (1941). Fromm wrote:
"Capitalistic economy put the individual
together entirely on his own feet. What he did, how
he did it, whether he succeeded or whether he
failed, was entirely his own affair." Id.
at 108.

n57 See infra notes 20-22 and
accompanying text. The global
employment crisis has also contributed to
an increase in illegal immigration to the
United States as many people desperately
seek work far from home, often in unsafe
conditions. See Canova, supra note 12, at
1587 n.62; Nancy Simmons, The Mexican
Immigrant Moving North Can Be an Easy
Mark for Exploitation, Albuquerque Trib.,
Aug. 4, 1999, C1; see also Kevin R.
Johnson, An Essay on Immigration,

n58 See Guatemalan Indians Lament Recognition Measure's Defeat, N.Y. Times, May 18, 1999, at A5 (reporting suppression of Mayan Indian languages in Guatemalan schools under Spanish rule and after independence); see also Romany, Interrupting the Dinner Table Conversation, supra note 9, at 19 (citing Charles Taylor, The Politics of Recognition, in Multiculturalism and the Politics of Recognition 25-73 (Amy Gutman ed., 1992)) (arguing that real inclusion is basic element of justice, requiring politics of recognition for cultural groups).

n59 See Guatemalan Indians Lament Recognition Measure's Defeat, supra note 58, at A5.

n60 See id. (noting that Guatemalan voters "also rejected proposals to strengthen civilian control over police forces, limit presidential powers and bolster the judiciary").

n61 The IMF can be seen as playing the role of the Church during the Inquisition by enforcing the officially sanctioned free-market religion and preventing movements for social reform by imposing punishing conditions. See Jaime Suchlicki, Mexico: From Montezuma to NAFTA, Chiapas, and Beyond 37, 39 (1996) ("The Church was a wealthy and powerful institution, and priests shared the psychology of the landed classes in Mexico, which induced obedience among the workers and exploitation of the native population . . ."). Suchlicki adds that "the Crown also used the Inquisition as an instrument of royal control to investigate both political and religious dissidents and to ensure loyalty and obedience to Spain." Id.

n62 See Wade Davis, Vanishing Cultures: The Issue Is Whether Ancient Cultures Will Be Free to Change on Their Own Terms, 196 Nat'l Geographic 62, 76 (1999). Maybury-Lewis is a professor of anthropology at Harvard and president of Cultural Survival, a nonprofit organization that works with indigenous peoples. See id.; see also Christine Zuni Cruz, [On The] Road Back In: Community Lawyering in Indigenous Communities, 5 Clinical L. Rev. 557 (1999) (warning that client-oriented lawyering, as opposed to community lawyering, poses threats to indigenous cultural identity).

n63 See Federici, supra note 39, at 304-07; see also John E. Peck, Asian Meltdown Hits Zimbabwe, Z Mag., Sept. 1998 (visited April 17, 2000) (on file with author) <http://www.lol.shareworld.com/zmag/articles/pecksept98.htm> (reporting that western financial institutions have impeded land reform efforts by threatening "to hold future credit hostage if private property rights are not respected in Zimbabwe"). In addition, IMF-imposed budget cutbacks decimated the ranks of Zimbabwe's national park rangers, triggering a poaching "free-for-all" of the country's already endangered black rhino population.

n64 See Peck, supra note 63.


n66 See Richard Chacon, Tuition Hike Sparks Fight Over Mexico University's Mission, Boston Globe, Apr. 25, 1999, at A3; Julia Preston, Student Strike in Capital Jarring All Mexico, N.Y. Times, June 25, 1999, A8 (observing that after university's governing council decided to cancel tuition increase, protests expanded to oppose role of private enterprise in Mexican society). This story of Mexican student resistance has been underreported in the United States press and first came to my attention weeks after the start of the student strike via a solitary e-mail from a student in Mexico City.


n68 See Brazil: Protesters on the March, N.Y. Times, Aug. 27, 1999, at A6; see also

n69 See generally International Monetary Fund (visited April 17, 2000) <http://www.imf.org/external/np/loi/mempub.htm> (on file with author) (providing copies of some of the Letters of Intent which includes many of the austerity policies that submerging countries promise to undertake in exchange for IMF assistance).


n71 See id.

n72 See Henry Tricks, Mexico May End Food Subsidies, Fin. Times, Nov. 6, 1998, at 5.


n75 See Canova, supra note 41, at 1340 n.146 (noting that rising levels of unemployment correlate with "increases in homicide, suicide, admissions to state mental hospitals and deaths from cirrhosis of the liver associated with alcoholism"); Steve Devitt, Grave Reservations: Death and Detox in Indian Country, Wkly. Alibi (Albuquerque, N.M.), Aug. 12-18, 1999, at 16, 18 (estimating that unemployment rate of 42% and average per capita income of about $7000 have contributed to despair, alcoholism, and violence in Navajo Nation); Peter T. Kilborn, Clinton, Amid the Squalor on a Reservation, Again Pledges Help, N.Y. Times, July 8, 1999, at A12 (reporting estimates of 85% unemployment rate on Oglala Lakota Sioux Indian reservation, rampant alcoholism, diabetes, and suicide, and male life expectancy rate of 56.5 years).

n76 For instance, recessions in Japan and Germany have revived xenophobic fantasies in those countries. See Howard W. French, Japan Now Officially Hails The Emperor and a Rising Sun, N.Y. Times, Aug. 10, 1999, at A3; Amy Harmon, Internet Sale of Nazi Books in Germany Assailed, N.Y. Times, Aug. 9, 1999, at C12.

n77 See The Bank for International Settlements, 61st Annual Report 53 (1991) (reporting that average annual growth rates for Yugoslavia declined from double digits in the 1950s to 6.7% in the 1960s, 5.8% in the 1970s, and to negative growth in the 1980s and 1990s).

n78 See Romany Keynote Remarks at LatCrit IV, supra note 9, at 53 (calling for labor rights as center of international human rights discussion).

n79 See id.

n80 In 1982 the Reagan administration decided to treat the debt crisis of four particular countries -- Yugoslavia, Mexico, Brazil, and Argentina -- as financial problems that merited IMF-backed austerity programs. See Steven Solomon, The Confidence Game: How Unelected Central Bankers Are Governing the Changed Global Economy 223, 240 (1995). Yugoslavia was also the site of former Federal Reserve Board Chairman Paul Volcker's conversion to monetarism. He rushed back from the 1980 IMF-World Bank annual meeting in Belgrade to embark on his monetarist experiment. The
result, according to former German Chancellor Helmut Schmidt, was "the highest real interest rate since the birth of Christ." Robert L. Bartley, Seven Fat Years, and How To Do It Again 84 (1992); Paul Volcker & Toyoo Gyohten, Changing Fortunes 168-81 (1992).

n81 World Employment Report, supra note 35; Global Financial Crisis Will Trigger Jump in World Unemployment, supra note 55; see also Aleksa Djilas, Imagining Kosovo, 77 Foreign Affairs 124, 130 (Sept./Oct. 1998) (reporting unemployment among Albanians in Kosovo at approximately 50%).

n82 Comparisons of Serbian atrocities to the Jewish Holocaust and the demonization of Milosovic as another Hitler will certainly strike some observers as overstatements. But one analogy to Nazi Germany is accurate. In both 1930s Germany and 1980s Yugoslavia, mass unemployment led to ethnic scapegoating and xenophobic leaders coming to power. Dr. Martin Luther King, Jr. once argued that when you deny a person a job, you are in essence telling that person that he or she has no right to exist. See The Words of Martin Luther King 45 (Coretta Scott King ed., 1983). But when a man's existence is threatened, he will find his enemies. See Erich Fromm, Man For Himself: An Inquiry Into the Psychology of Ethics 110 (1947) (stating that "the impulse to destroy others follows from the fear of being destroyed by them"). In the case of Yugoslavia, the unemployed and desperate citizens of a once-proud republic did not look all the way to IMF policymakers in Washington or foreign exchange traders in New York, London, or Frankfurt. There were more convenient scapegoats much closer to home: Croats, Slovenes, Serbs, Albanians, and Bosnians all blamed each other.

n83 See Romany Keynote Remarks at LatCrit IV, supra note 9, at 220-21 (warning of power of transnational capital to undermine nationstate).

n84 The rebalkanization of the Balkans was entirely predictable.

Back in 1982, the Wall Street Journal's Amity Shlaes filed a story on the upheaval caused by an IMF austerity program in Yugoslavia. The program was causing unrest, especially in a small province in Kosovo. No one would argue that the IMF program led directly to today's war. But it would be equally foolish to dismiss the dangers of a huge multilateral institution pushing policies that aggregate a country's natural problems.

Claudia Rosett, The World's Poor Pay the Price for the IMF's Failures, Wall Street J., Apr. 22, 1999, at A22. While the IMF austerity programs did not lead directly to war, they did lead directly to sharply higher unemployment rates, which led to ethnic scapegoating, the political polarization of ethnic groups, and the rise of xenophobic politicians to positions of power. From there it was not a huge leap to violent hostilities.

n85 As a result of the global currency contagion and misguided adjustment programs and austerity policies, the number of people living on less than one dollar per day rose from 1.2 billion to 1.5 billion between 1987 and 1999. See Paul Lewis, World Bank Says Poverty Is Increasing, N.Y. Times, June 3, 1999, at C7.

n86 See Global Financial Crisis Will Trigger Jump in World Unemployment, supra note 55; see also Blagovesta Doncheva, In Bulgaria, 10 Years of Misery, N.Y. Times, Nov. 11, 1999, at A27 (arguing that IMF program has undermined employment, economic activity, and transition to democracy in Bulgaria).

n87 In reading the education budget cutbacks throughout Latin America, I am reminded of similar neoliberal policies that I witnessed nearly a decade ago in New York. I recall the night watchman of the apartment building where I lived in Manhattan: a young, African-American man, who usually could be found at his post very late at night studying engineering texts and complex math problems and quoting scripture. He lived in East New York, a very poor neighborhood that was besieged at the time by drive-by shootings. He was a student at New York Polytechnic University in Brooklyn and was bringing home As and Bs in his courses, working
day and night to pay his bills, care for his aging mother, and stay in school. Through his dedication and work ethic, he demonstrated an abiding faith that through his own efforts he would someday raise himself out of the harshness of his present circumstances and environment. But by 1990-1991, fiscal austerity was the order of the day. New York's governor, Mario Cuomo, once the great political hope and darling of the neoliberal crowd, was forced to raise state tuitions, cut the state's tuition assistance program, and cut financial aid to public and private university students. As a result, the young night watchman could no longer afford to stay in school. See Peter Edelman, The Worst Thing Bill Clinton Has Done, Atlantic Monthly, Mar. 1997 (arguing that we must create opportunities and clear pathways to opportunities to develop our youth and help prevent negative outcomes).


n93 See Carrasco, supra note 89, at 328; see also Carrasco & Kose, supra note 53, at 12-17 (articulating a narrative that blames the nationstate while overlooking the global monetary system's structures of subordination). Carrasco mischaracterizes NIEO demands as crass redistribution while ignoring the NIEO's underlying theoretical bases that were directed at solving the global "transfer" problem (i.e. recycling of surpluses) by designing a more effective, economically efficient, and growth-oriented adjustment mechanism. See generally Dimand, supra note 23, at 50-54 (discussing how architects of original Bretton Woods Agreement sought to redress imbalances between nations to empower countries to pursue progressive social and economic policies at home); John Maynard Keynes, National Self-Sufficiency, in The Collected Writings of John Maynard Keynes 223, 236 (D. Moggridge ed., 1982).

n94 Carrasco's argument against the NIEO rests on his criticism that developing countries failed to remedy domestic income inequalities. See Carrasco & Kose, supra note 53, at 12-17, 41. But this view ignores the role of United States national security agencies in keeping local elites entrenched against popular redistributionist movements throughout the Third World. See William Krehm, Democracies and Tyrannies of the Caribbean (1984). It also fails to appreciate the sea-change that took place in the United States development policy, from 1960s Alliance for Progress assistance that sought social reform to the 1970s IMF-led structural adjustment that sought only market reforms. See Peter Collier & David Horowitz, The Rockefeller Power 220-31 (1974).

n95 See Economics and World Order: From the 1970s to the 1990s (Jagdish N. Bhagwati ed., 1972); Mahbub Ul Haq, The Poverty Curtain: Choices for the Third World 153-68 (1976) (referring to Old Economic Order); North-South: A


n97 See William R. Cline, International Monetary Reform and the Developing Countries 1-8 (1976); North-South: A Program for Survival, supra note 95, at 201-06.

n98 See Cline, supra note 97; North-South: A Program for Survival, supra note 95, at 206-20; Peter B. Kenen, Debt Relief as Development Assistance, in The New International Economic Order, supra note 96, at 50-77; John Williamson, SDRs: The Link, in The New International Economic Order, supra note 96, supra note 96, 81-100.

n99 See Carrasco, supra note 89, at 327.

n100 See Daniel P. Moynihan, The United States in Opposition, Commentary, Mar. 1975 (espousing early justification for backlash). The Reagan administration effectively used the debt crisis to pressure nonaligned nations in Latin American and the Third World to change their politics by abandoning opposition to market reforms. See Solomon, supra note 80, at 223, 240. In the early and mid-1980s, the Reagan administration also accelerated the fall in oil prices with the objective of collapsing the Soviet economy. See Peter Schweizer, Victory (1994); Solomon, supra note 80, at 160-61.

n101 It seems unfair to continue blaming NIEO and import substitution strategies for today’s growing inequalities within the Third World. See Carrasco & Kose, supra note 53, at 14-15, 26. NIEO strategies have been dead for nearly two decades, and replaced by the dominant IMF neoliberal agenda, yet today wealth and income is more inequitably distributed within the Third World than during the hey days of the NIEO. See id. at 2, 29.

n102 Former British Prime Minister Margaret Thatcher used the phrase "there is no alternative" so often that her opponents took to calling her by the acronym "TINA." See Daniel Singer, Whose Millennium? Theirs Or Ours? (1999). TINA lovers may long for a kinder, gentler austerity, but an austerity nonetheless. See Neil Young, Rockin’ in the Free World (Reprise Records 1989) ("We got a thousand points of light/ For the homeless man/ We got a kinder, gentler machine gun hand."). But "We Have Other Alternatives!" (WHOA!). See infra note 41; see also Richard Michael Fischl, The Question That Killed Critical Legal Studies, L. & Soc. Inquiry 779, 820 (1993) (criticizing "the classic liberal division of the realm of the possible into dichotomous choices"); Johnson, supra note 57, at 140 (arguing for consideration of other alternatives to promote economic development in Mexico as means to reduce immigration pressures and anti-immigration backlash).


n105 See Canova, supra note 12, at 1594-95, 1622-45.

n106 According to Carrasco, opposition to the IMF's neoliberal tide would pose the risk that "policymakers would not take our work seriously." See Carrasco, supra note 89, at 328.


n108 Cf. Enrique R. Carrasco, Collective Recognition as a Communitarian Device: Or, Of Course We Want to be Role Models!, 9 La Raza L.J. 81, 95-96 (1996) (observing that "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'"); Richard Delgado, Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model?, 89 Mich. L. Rev. 1222 (1991) (warning that assimilation is incompatible with role of cultural or economic nationalist, separatist, or radical reformer).

n109 See Carrasco, supra note 89, at 330; see also Carrasco & Kose, supra note 53, at 4, 31 (repeating IMF line that it takes account of distributional issues when dispensing policy advice, while downplaying adverse effects of IMF structural adjustment policy on distribution); see also Robinson, supra note 32, at 1, 25 (arguing that orthodox economics serves as "a vehicle for the ruling ideology . . . that limps along with one foot in untested hypotheses and the other in untestable slogans").

n110 See Carrasco, supra note 89, at 331.

n111 See id.

n112 Carrasco's call for "radically rigorous monitoring" would be easier to embrace if such monitoring also included criticism of the fundamental direction of neoliberal economic reforms, including both the liberalization of hot money capital flows and IMF-imposed asymmetrical burdens of adjustment. Unfortunately, such critiques are too often prematurely dismissed as hopeless "frontal attacks on neoliberalism." See Elizabeth M. Iglesias, Foreword: International Law, Human Rights, and LatCrit Theory, 28 U. Miami Inter-Am. L. Rev. 177, 200 n.24 (1997) (recognizing that Carrasco's lessons are not entirely uncontestable, and arguing for reconfiguration of power relations to lead to real redistribution of economic resources).

n113 See Iglesias, supra note 91.

n114 See id.

n115 See id. (arguing that structural adjustment policies "are driven by the self-serving ideology of the rich, which proclaims . . . that unregulated private markets will produce higher standards of living in the long run, despite abundant evidence that the 'long run' has come and
gone, leaving only an increasing concentration of wealth among elites across the globe, the further immiseration of the poor and the degradation of their standards of living and the spaces they inhabit).

n116 Carrasco has showed an admirable willingness to question the pace of liberalization of hot money capital flows by endorsing the idea of long-term "relational investment" and the specific approaches of Chile and Thailand in restricting capital inflows. See Carrasco & Thomas, supra note 27, at 597, 605 (calling for alterations to pace, but not direction, of neoliberal policy reform). Chile's experiment with such "prudential" capital controls is emblematic of the country's transition from a radical neoliberalism to a soft or pragmatic neoliberalism. But even this softer strain of neoliberalism has failed to seriously question the fundamental assumptions that impede social progress and more equitable distributions of income and economic opportunity. Eduardo Silva, The State and Capital in Chile: Business Elites, Technocrats, and Market Economics 234-35 (1996) (arguing that Chile's neoliberal democracy "places constraints on anything but a mildly reformist path that reinforces liberal welfare statism," and necessarily fails to address basic issues such as "a highly skewed income distribution," low wages, and lack of affordable education, medical services, and housing).


n121 See Louis Uchitelle, World Bank Economist Felt He Had to Silence His Criticism or Quit, N.Y. Times, Dec. 2, 1999, at C1. According to Stiglitz, when dealing with policies "as misguided as I believe these policies were, you have to either speak out or resign." See id. at C6.

n122 See id. at C6.

n123 United States Treasury Secretary Lawrence Summers may have pressed World Bank President James Wolfensohn to silence Stiglitz. Wolfensohn began to publicly criticize his chief economist in October 1999, little more than a month before Stiglitz chose to resign. See id. at C1, C6.

n124 See id. at C6.

n125 Likewise, in The General Theory of Employment, Interest, and Money, which swept aside the laissez-faire orthodoxy of his own day, Keynes reflected and was often responding to the increasingly prevalent criticism of other economists. See Lynn Turgeon, Bastard Keynesianism xi, xv (1996); Robert A. Black, Cambridge Circus, in An Encyclopedia of Keynesian Economics 87, 89 (Thomas Cate ed., 1997).
For instance, LatCrits would not accept the argument that we should support Propositions 187 or 209, or English-only proposals to maintain our credibility with policymakers; or that if we lacked a particular expertise in constitutional or immigration law, then we should form no opinion on such Propositions and instead accommodate those regressive policy initiatives. See, e.g., Kevin R. Johnson, Immigration Politics, Popular Democracy, and California's Proposition 187, in The Latino/a Condition: A Critical Reader, supra note 4, at 110-16 (refusing to support initiative that will further subordinate immigrants despite fact that it was passed by majority of voters). Likewise, we would not expect LatCrit scholars to temper their resistance to the English-only views of Linda Chavez, the director of the United States Commission on Civil Rights during the Reagan administration, or risk Chavez not taking their work seriously. See Linda Chavez, A Long Standing Commitment, in The Latino/a Condition: A Critical Reader, supra note 4, at 491, 492 (opposing implementation of regulations to mandate bilingual education).

Citizens are socialized to believe that they are not capable of understanding the complexities of banking and finance, and that they must trust the experts on public issues concerning matters of money and finance. See William Greider, Secrets of the Temple: How the Federal Reserve Runs the Country 267 (1987); Henwood, supra note 29, at 97, 102. The self-proclaimed experts are often dramatically wrong. For instance, in 1997 Myron Scholes and Robert Merton were awarded the Nobel Prize in economics for making possible "more efficient risk management in society." A year later, their option pricing methods drove the Long-Term Capital Management hedge fund to the brink of insolvency, thereby spreading increased risk throughout the United States and global financial markets, and necessitating a Federal Reserve-brokered bailout of the hedge fund. See Edward Tenner, The Icarus Complex, N.Y. Times, Oct. 13, 1998, at A23 (mentioning this hedge fund as example of how brilliance "tempts those who have it to pronouncements that outrun experience and common sense").

We often think of ourselves as more sophisticated than those who lived a generation or a century ago. But for much of the nation's history, prior to the delegation of money issues to the Federal Reserve, millions of people "knew that money was politics and that democracy depended on it." See Greider, supra note 127, at 242-67 (discussing history of First and Second Banks of United States, rise of Populism, Greenback Party, Free Silver, and other mass movements concerned with money questions); see also John Kenneth Galbraith, Money: Whence It Came, Where It Went 44 (1995) (arguing that challenge to monied class "was to dominate politics for the first century and a half" of United States history and that "only the politics of slavery would divide people more angrily than the politics of money").

See Canova, supra note 12.

For instance, the IMF-backed neoliberalization of short-term speculative capital flows provided the mechanism for the currency contagion to transmit similar suffering on a global scale: the Mexican peso crash led to the so-called "Tequila Effect" which brought on the Asian flu, felled the Russian bear, and is once again knocking on the door of Latin America. See Canova, supra note 12.

See supra notes 60-75, 81-86, 118-119 and accompanying text.

See Fact Sheet: LatCrit, in LatCrit Primer (unpublished materials distributed to participants at LatCrit IV, 1999) ("LatCrit includes Chicanas/os, Cubanas/os, Puertorriquenas/os, mestizas/os, Central and South Americans as well as significant numbers of African Americans, Asian Americans, and some native/indigenous peoples.").

See Angel Oquendo, Comments by Angel Oquendo, 9 La Raza L.J. 43 (1996).

See Johnson, supra note 4, at 131-34 (discussing intra-Latina/o ideological and political differences); Celina Romany, Gender, Race/ethnicity and Language, 9 La Raza L.J. 1, 17 (1996) (urging that we
"seize commonalities among Latinas while respecting the differences"); Iglesias, supra note 112, at 198 (suggesting that realization of fundamental economic, political, and cultural rights has been "captive to a profoundly ideological debate").


n136 See Edward L. Rubin, The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions, 109 Harv. L. Rev. 1393 (1996); see also infra note 6 and accompanying text (urging synthesis of critical voices to include the original class-based focus of the Critical Legal Studies movement within a more complex and culturally textured context).

n137 See Plenary Panel, Centering Class: Farmworkers, Land and Agribusiness, LatCrit IV Conference, supra note 13; see also Iglesias & Valdes, supra note 104, at 555-56.

n138 See Iglesias & Valdes, supra note 104.

n139 See Antoinette Sedillo Lopez, A Comparative Analysis of Women's Issues: Toward a Contextualized Methodology, 10 Hastings Women's L.J. 347, 352 (1999) (discussing possibility that "American middle-class feminists may support policies aimed to keep wages low for women of color and those of the Third World" while women in Mexico, owing to social and demographic conditions of widespread poverty, may be more concerned with "social and economic justice for the poor rather than more middle-class concerns").

n140 See Iglesias, supra note 112, at 200 (calling on LatCrit to get "real stories from development victims and using this knowledge to reveal the structural discrimination neoliberal policies produce").

n141 See Iglesias & Valdes, supra note 104 (discussing work of coalition building).

n142 See Nancy Ehrenreich, Life After Identity Theory, LatCrit IV Conference, supra note 13.

n143 See Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 Cal. L. Rev. 741 (1994).


n145 See supra note 18.

n146 See Romany, supra note 134.

n147 This takes the form of declining terms of trade for submerging market economies, resulting in deeper debt levels, heightened political vulnerability and financial dependence. Once such countries have fallen into a debt or payments crisis, the neoliberal surveillance mechanism ensures that their living standards will fall further. This, again, is called the adjustment process, by which the weak must forego social goods such as education, jobs, real incomes to pay back the old debt and prevent incurring new debt. See supra notes 38-40 and accompanying text.


n149 See The Words of Martin Luther King (1960).
GLOBALIZATION OR GLOBAL SUBORDINATION?: HOW LATCRIT LINKS THE LOCAL TO GLOBAL AND THE GLOBAL TO THE LOCAL: Race, Reason, and Representation

Tayyab Mahmud *

BIO:

* Associate Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. I would like to thank Sheldon Gelman and Ratna Kapur for their thoughtful comments on earlier drafts. Any remaining errors are, of course, my own.

SUMMARY: ... Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought. ... Author E. P. Thompson succinctly articulated the question: how did ideas of equality, liberty and fraternity lead to empire, libertinicide, and fracticide? What is the source of the disjunction between the theory of liberalism and its history? Is the gulf between the two inevitable or incidental? Is it rooted in epistemological posture of modern thought, theoretical lacunas of liberalism or theorists' visions distorted by the racism of their milieu? Uday Singh Mehta's Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought is a timely and thoughtful attempt to examine these questions. ... Mehta's project is to examine British liberal thought in the eighteenth and nineteenth centuries "by viewing it through the mirror that reflects its association with the British Empire." ... Liberal justifications of colonial subjugation are ironic given the foundations of liberal thought. ... On the one hand, it gives to liberal thought about India "an assertive expansiveness, a confidence of judgment, an unqualified energy, and often an acute sense of urgency and mission." He first notes that liberal thought seldom gives theoretical attention to the monumental spatial size of empire. ...

[*1581]


"All men are created equal," proclaimed the drafters of the American Declaration of Independence while taking slavery for granted. n1 Champions of the French Revolution deemed Haitian Blacks and Creoles not worthy of liberty, equality and fraternity. n2 Liberalism, which claims universality and prides itself for its politically inclusionary character, furnished justifications for European tutelage of colonial subjects. n3 Britain, following the reform bills of the nineteenth century, in its self-image was a democracy, yet it held a vast empire that was undemocratic in its acquisition and governance. n4 Following Locke, exercise of political power was [*1582] deemed linked with rights of citizens, and yet in the colonies power was overwhelmingly exercised over subjects rather than citizens. Liberals recognized good government as intimately linked with self-government, and yet repudiated this linkage in the colonies.

These anomalies of modern history have vexed many as they raise intriguing questions about the past, present and future of modernity's promise of freedom, autonomy and dignity for all. Author E. P. Thompson succinctly articulated the question: how did ideas of equality, liberty and fraternity lead to empire, libertinicide, and fracticide? n5 What is the source of the disjunction between the theory of liberalism and its history? Is the gulf between the two inevitable or incidental? Is it rooted in epistemological posture of modern thought, theoretical lacunas of liberalism or theorists' visions distorted by the racism of their milieu? Uday Singh Mehta's Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought is a timely and thoughtful attempt to examine these questions. n6

Mehta's project is to examine British liberal thought in the eighteenth and nineteenth centuries "by viewing it through the mirror that reflects its association with the British Empire." n7 He wants to understand how liberal theorists "responded to parts of the world with which they were largely unfamiliar but which also intensely preoccupied them." n8 The derivative query that informs the book is "the liberal justification of the empire." n9 An accomplished scholar of liberal thought, n10 Mehta explores why liberals endorsed empire as a legitimate form of political governance, justified its undemocratic and nonrepresentative structure, invoked categories of history, civilizational hierarchies, and race and blood to fashion arguments for the empire's necessity and prolongation.
Furthermore, Mehta wants to contrast this with the posture of Edmund Burke, by common acknowledgement a leading modern conservative, who retained a sustained skepticism towards colonial rule and voiced moral and political indignation against injustices, cruelty, caprice, and exploitation of empire. Mehta subscribes to Harold Laski's view that on "Ireland, America, and India Burke was at every point upon the side of the future" and that "he was the first English statesman to fully understand the moral import of the problem of subject races." n11

Liberal justifications of colonial subjugation are ironic given the foundations of liberal thought. Liberalism professes an abiding commitment to securing individual liberty and human dignity through a political cast that typically involves democratic and representative institutions, the guaranty of individual rights of property, the freedom of expression, association, and conscience, all of which are taken to limit the authority of the state. But the liberal involvement with the British Empire is broadly coeval with liberalism itself. This leads Mehta to explore the chronological correspondence in the development of liberal thought and empire, and the clear though complex link between the ideas that are central to liberalism and those that undergirded practices of imperialism.

Mehta's method is to examine the writings of a small though significant group of liberal political thinkers as they reflected on British rule in India, viewing the latter as "the promised land of liberal ideas -a kind of test case laboratory." n12 Importantly, Mehta insists that the claims he makes about liberalism are "integral to its political vision and not peculiar amendments or modifications im [*1584] posed on it by the attention to India." n13 His primary motivation is to study "how liberal theorists responded to the challenge of a world marked by unmistakably different ways of organizing social and political life, molding and expressing individuality and freedom: in a word, an unfamiliar world marked by different ways of being in it." n14 Mehta argues that the primary factor conditioning the liberal response to empire was "the awareness of the inequality of power." n15 Furthermore, he discerns a two-fold effect of this background condition. On the one hand, it gives to liberal thought about India "an assertive expansiveness, a confidence of judgment, an unqualified energy, and often an acute sense of urgency and mission." n16 On the other, it "lends to the disagreements within British thoughts on India a tone of doubt, diplomatic discomfort, and heightened and contentious acrimony." n17

Mehta finds the inequality of power implicated in the question of race, a question he notes is "conspicuous in its absence" n18 in British liberals' writings on India. The surprising exception is John Stuart Mill, who elaborates the term through the biological notion of "blood," and draws what he takes to be the crucial distinction in terms of readiness for representative institutions by reference to "of our own blood" and those not of our blood. n19 Mehta wonders if the relative absence of race in this discourse is symptomatic of a deeper denial, that of not wishing to acknowledge the unfamiliar, or whether for the liberals "race is a visible mark of the unfamiliar, so that to allow it to stand for that alterity and the plethora of differences that lie behind it might limit the very constructive enterprise through which it can be molded to become, or at least appear, familiar." n20 This is where imperial pedagogy comes in, whereby race "operates in the malleable and concealed space be [*1585] hind the starkness of blood and color to reproduce the familiar, even if somatically refracted, category of being English." n21 Mehta notes here Macaulay's agenda for colonial education targeted at producing a "class of persons, Indian in blood and color, but English in taste, in opinions, in morals, and in intellect." n22 Entry into representative politics, thus, is not open to all, with race deemed a mark of eligibility and lesser races obligated to undergo a process of tutelage by the higher race in order to acquire the requisite certifications of eligibility.

Mehta also locates the issue of power in the very stance and the point of view that particular ideas assume with respect to other ideas and forms of life. This he sees not as a matter of choice but determined by epistemological foundations of any particular set of ideas. He locates the liberal gaze in a judgmental rationality whereby the strange and the unfamiliar have meaning only within the general structure of what it would mean for facts to hang together rationally, and by their placement along the presumed linear trajectory of history.

For Mehta, "liberal imperialism is impossible without this epistemological commitment -- which by the nineteenth century supports both the paternalism and progressivism -- that is, the main theoretical justifications -- of the empire." n23 Rooted in Western philosophical tradition's posture towards correspondence between language and objects, the conditions for intelligibility forwarded by rationality render the singular intelligible only by reference to the general. This is predicated on the assumption that the strange is just a variation of what is already familiar, because both the familiar and the strange are deemed to be merely specific instances of a familiar structure of generality.
Highlighting the inextricable linkage between knowledge and power, Mehta argues that "the epistemological perspective that articulates that structure also undergirds an elaborate vision of how [1586] politically to assimilate things, even when those things are thoroughly unfamiliar." n24 This he terms "the cosmopolitanism of reason." n25 When faced with the unfamiliar, then, liberals can do no more than repeat and assert the familiar structures of generalities, which "in a single glance and without having experienced any of it, . . . make it possible to compare and classify the world." n26 Mehta finds in this glance the urge to dominate the world because "the language of those comparisons is not neutral and cannot avoid notions of superiority and inferiority, backward and progressive, and higher and lower." n27 As some liberals did resist this urge, Mehta's claim is not "that liberalism must be imperialistic, only that the urge is internal to it." n28

For Mehta, what is denied in the rational assertions of familiarity of the unfamiliar is the archaic, the premodern, the religious, along with sentiments, feelings, sense of location, and forms of life which they are a part. Here, again, he finds Burke's posture a salutary one, not because he has a more realistic epistemology, but rather because his thought is pitched at a level that takes seriously the sentiments, feelings, and attachments through which peoples are, and aspire to be, at home. This posture of thought acknowledges that the integrity of experience is tied to its locality and Burke does not presume to understand the unfamiliar simply on account of his being rational, modern, or British.

This openness to the possibility that the unfamiliar may remain unfamiliar, Mehta finds undergirded by humility. He argues that Burke "shatters the philosophical underpinnings of the project of the empire by making it no more than a conversation between two strangers." n29 This Mehta terms "the cosmopolitanism of sentiments." n30 It holds out the possibility of wider bonds of sympathy and understanding of sentiments through an open-ended conversation, not guided by any authorizing regime of reason or teleology. In this acknowledgement of the unfamiliar remaining so, [1587] Mehta discerns "the possibility of mutual understanding, mutual influence, and mutual recognition." n31

In the liberal discourse on empire, Mehta discerns pervasive deployment of the metaphor of childhood as a fixed point underlying the various imperial projects of education, governance and progress. Indians, for example, are characterized as being in the infancy of the "progress of civilization." n32 necessitating that the British rule like fathers who are "just and unjust, moderate and rapacious," n33 as a means of "gradually training the people to walk alone," n34 and enabling them to "grow to man's estate." n35 For liberals, then, Indians are children for whom the empire offers the prospect of legitimate and progressive parentage and towards which Britain, as a parent, is similarly obligated and competent. n36 This point is the basis for the justification of denying democratic rights and representative institutions to Indians.

Mehta traces the pedigree of this idea in the liberal tradition that originates in Locke's characterization of tutelage as a necessary stage through which children must be trained before they can acquire the reason requisite for expressing contractual consent. Mehta focuses on the exclusionary effect of the distinction between universal anthropological capacities and the necessary conditions for their political actualization posited by liberalism. He sees the exclusionary basis of liberalism "deriving from its theoretical core . . . because behind the capacities ascribed to all human beings exists a thicker set of social credentials that constitute the real bases of political inclusion." n37 Liberalism claims to be trans-historical, transcultural, and transracial. The universality claims rest on certain minimal anthropological characteristics posited as being common to all human beings. Central among these are that everyone is naturally free, that all are, in the relevant moral respects, equal, and finally that they are rational. Not only are all, by [1588] their natures, perfectly free, this condition itself allows each to give to one's persons, one's possessions, and one's actions strikingly extreme expressions. It is this individual that becomes the subject of the contractual agreement from which liberal political institutions derive.

This elaboration of the natural condition by Locke provokes an obvious question: what ensures that this condition of perfect freedom will not result in a state of license and anarchy? Locke's classic answer is the bounds of the law of nature, accessible through natural human reason. Mehta argues that Locke's minimalist anthropology, while serving as the foundation of his institutional claims, also exposes the vulnerability of those institutions because "the potentialities of the Lockean individual reside as a constant internal threat to the regularities requisite for Lockean institutions." n38 This necessitates mechanisms to ensure constancy and moderation in the expression of interests and desires of the citizens of the commonwealth. The means of doing so are positing conditions of political inclusion.

While C. B. Macperson and Carol Pateman rest their wellknown arguments of political exclusions in Locke on the revealing silences of his texts, n39 Mehta
builds his case on the very language of those texts. Here, Locke's views on children are deemed critical. Along with lunatics and idiots, children are explicitly and unambiguously excluded from Lockean consensual politics. For Locke, consent is the fundamental ground for the legitimacy of political authority. Consent requires acting in view of certain constraints that Locke broadly designates as the laws of nature. To know these laws requires reason. Those who are unable to exercise reason either permanently (e.g., madmen) or temporarily (e.g., children) do not meet a necessary requisite for the expression of consent. By implication, therefore, they are excluded from the political constituency, or what amounts to the same thing, to be governed without their consent. Political inclusion is thus contingent upon a qualified capacity to reason. [*1589]

What then is involved in developing the requisite capacities and credentials to be able to reason? Mehta focuses on Locke's answer detailed in Thoughts Concerning Education. n40 Here, Locke suspends the anthropological guarantee that natural human reason gives us a preconventional access to the precepts of natural law. Instead, the emphasis is wholly on the precise and detailed processes through which this rationality must get inculcated. Capacity to reason becomes a question of breeding an understanding of rationality must get inculcated. Capacity to reason becomes a question of breeding an understanding of social and hierarchical distinctions. Education becomes an initiation into the enormously significant specifications of time, place and social status. Of course, "a Prince, a Nobleman and an ordinary Gentleman's son, should have different ways of breeding," n41 so they learn Christianity, the laws of England, obedience, respect for property and "civility in their language . . . towards their inferiors and the meaner sort of people, particularly servants." n42 Mehta finds that the terms Locke uses and norms he advocates "draw on and encourage conceptions of human beings that are far from abstract and universal, and in which the anthropological minimum is buried under a thick set of social inscriptions and signals." n43 The actual subject of Lockean politics turns out to be propertied, white, Christian and male.

Mehta then moves to uncover strategies of exclusion deployed by liberals to exclude Indian colonial subjects from the primary promise of liberalism, representative government. The first, exemplified by James Mill, is the maneuver to characterize India as impenetrable, resistant to logical inquiry and inscrutable. For Mehta, the distinction between something that resists comprehension and something that is inscrutable is critical. The former description permits of a future change in which the object may, finally, become comprehensible. It also places the onus on the comprehending subject and not on the studied object. It suggests a limitation on one's knowledge without predicating this on any essentiality of the object.

In contrast, inscrutability designates an unfathomable limit to the object of inquiry without implicating either the process of inquiry or the inquirer. Here the object is made to appear on its own reckoning as something that defies description and, hence, reception. Inscrutability places a limit on political possibilities by closing off the prospect that the object satisfies the conditions requisite for political inclusion. Lacking in Locke's reason, or, for that matter, Rawl's reasonableness, n44 the inscrutable stands akin to inanimate objects that Hobbes claimed must be represented precisely because they cannot give authority on their own behalf. n45

If the exclusionary effect of inscrutability is achieved by the crude descriptive fiat in refusing to engage in the particulars of India, the next strategy Mehta explores represents an almost total reversal. This involves delving into the arcane details of India's ancient theological, cultural and historical particulars, and through them, exposing the deficiencies of Indian political and psychological endowments. Here, the universal anthropological minimum yields to a complex set of individual and social indexes as the prerequisites of political inclusion. Mehta terms this "the strategy of civilizational infantilism." n46

To ground his argument, Mehta examines the writings of John Stuart Mill, and finds his chapter on "The Government of Dependencies by a Free State," "a revealing document on the increasing relevance of cultural, civilizational, linguistic, and racial categories in defining the constituency of Mill's liberalism." n47 Mill divides colonized countries into two classes. The first is composed of countries "of similar civilization to the ruling country; capable of, and ripe for, representative government: such as the British possessions in America and Australia." n48 The other class includes "others, like India, that are still at a great distance from that state." n49 Mill finds the practice of English colonialism towards those who "were of her [England's] own blood and language" variously "vicious," economically ill advised, and a betrayal of a "fixed principle . . . professed in theory" regarding free and democratic governance. n50

Regarding the second class of countries -- countries whose race, language and culture were different from the British -- Mill's rec [*1591]ommendations are strikingly different. Not only is he opposed to dismantling colonialism, he strongly recommends that colonial rule be authoritarian. Absolute rule "guaranteed by irresistible force . . . is the ideal rule of a free people over a barbarous or semi-barbarous one."
n51 To govern a people different from one's self only allows for "a choice of despotisms," n52 precluding the possibility of representative governance.

As for the principle of liberty, for Mill "it is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties." n53 The group of such human beings excludes not only children but also "those backward states of societies in which the race itself may be considered as in its nonage." n54 Having classified human beings in immutably distinct hierarchical categories, Mill is constrained to acknowledge that he had "ceased to consider representative democracy as an absolute principle, and regarded it as a question of time, place, and circumstance." n55

For classical liberalism, then, political institutions such as representative democracy are dependent on society having reached a particular historical maturation or level of civilization. But such maturation is seen as differentially achieved. Hence those societies in which higher accomplishments of civilization have not occurred do not satisfy the conditions for representative government. Under such conditions liberalism in the form of empire services the deficiencies of the past for societies that have been stunted through history. This is the kernel of liberal justifications for empire. Mehta likens empire validated by liberalism to "an engine that tows societies stalled in their past into contemporary time and history." n56 And this reading of progress and history "derives centrally from premises about reason and history." n57

For Mehta, "the central axis on which nineteenth-century liberal justifications of the empire operate is time, and its cognate, [*1592] patience." n58 Rooted in global orientation of modern European historiography, nineteenth century liberals saw politics and history as only different aspects of the same study. Backwardness gets coded as a remnant of the past, a temporal deficit, which can be remedied by political intervention turning colonizers' present into the natives' future. While this past and future are the sources of liberalism's colonial agenda of reform, they limit the ability of the liberals to understand unfamiliar life forms. Mehta argues that "the contemporaneity of these unfamiliar life forms cannot be spoken of in the register of historical time, for that register translates them into the linearity of backwardness and thus immediately conceives of them in terms of an already known future." n59 Extant forms of living are then taken as only provisional and experience of these forms is either exoticized or denied.

The discourse of a progressive history and the notion of a single and continuous time "naturalizes what in fact were often aggressive and violent efforts to suppress multiple and extant temporalities and corresponding life forms." n60 This vision of history and time also forces liberalism in its colonial career to jettison its commitment to the primacy of the individual. The colonized subject is spoken for by the society of which she is a member, and that society is spoken for by the historiography that determined the stage of development that society is deemed to have achieved. n61

Mehta then examines liberal positions towards territorial space as a clue to its complicity with empire. He first notes that liberal thought seldom gives theoretical attention to the monumental spatial size of empire. He finds that theoretical assumptions of liberalism do not readily comport with the considerations that give territory its political salience. Mehta finds Locke's theory of private property resting on two claims: first, that nature in itself is all but worthless, and second, that individual labor is the source of value. For Locke, even though the earth was given and held in common, [*1593] prior to appropriation through labor, neither the reception from God, the holding, nor the fact of its being common has any individual, social, or political significance.

For Mehta, by divesting a nature given and held in common of any emotive force, classical liberalism blocks an important moment of commonness from furnishing a sense of collectivity, and thus being a collective experience. The rendering of nature, and the encounter with it, sentimentally inert, denies locational attachments as having any significance in relation to political identity. Imagining nature as a physically and emotionally vacant space, with no binding potential, makes it conceptually difficult to articulate the origins and continued existence of distinct political societies having territorial boundaries.

This posture lends itself to the denial of any distinct political community of the colonized on account of their living in a distinct physical space. Mehta's position is that territorial boundaries of societies "reflect a distinct cognitive or emotional reality of their members in which the physical considerations demarcate a positive collective identification." n62 The liberal inability to acknowledge a mutually constitutive relationship between bounded territory and polity precludes recognition of Indians as a distinct political community; a recognition that would open up questions of autonomy and self-governance, thus challenging the validity of imperialism.

Mehta compares liberalism's engagement with imperialism to the posture adopted by Burke. He
shows how Burke saw through the abusive distortions of civilization hierarchies, racial superiority, and assumptions of cultural impoverishment by which British power justified its empire. Burke's consciousness that racial prejudice always lurked around the colonial question is evidenced by his comment about his unremitting intensity on Indian matters, that "I know what I am doing; whether the white people like it or not." n63 For Burke, the existence of political society does not turn exclusively on such individual capacities as reason, will, and the ability to choose, but also on the presence of a certain order on the ground. Rejecting the centrality of consent, Burke contends that inheritances are in some crucial measure involuntary and that they bind [*1594] us through the inescapable mediation of location and past. This permits him to see political society and order in India, not just the prospect of it through tutored development. This leads Mehta to argue that "India's potential nationhood was evident to Burke centuries before it was to most Indians." n64

Mehta notes that Burke was not only concerned with the destructive impact of colonialism on the colonies but also its corrosive and corrupting effect on Britain itself. Here Mehta fails to explore the extent to which Burke prefigures an increasing focus of post-colonial studies to examine the extent to which modern Europe itself is a product of the colonial encounter between the West and the rest. Mehta also leaves unexplored the question as to what extent Burke's position on colonialism was shaped by his Catholic and Irish background. n65 Mehta also compares liberal postulates of time space with those of Mahatama Gandhi and nationalist forces in the colonies. For Gandhi the question of civilization is purely individualistic, turning on how human beings are able to follow the dictates of their duty and morality. This conception of civilization precludes reliance on stages of history or the tutelage of one people by the other.

Nationalism in the colonies repudiates the developmental chronology of imperialism, and displaces history by making culture and geography the grounds for claims of political community and selfgovernance. Mehta's exposition of Gandhi's thought and the nationalist challenge to liberalism is too brief to be satisfying. But given his primary agenda in this book, this brevity is understandable.

In the end, Mehta comes back to the central question of why champions of liberalism so enthusiastically endorsed colonialism. According to him, the key to this question is the response of liberal theorists as they cast their gaze on an unfamiliar world whereby they saw those experiences and forms of life as provisional. The empire as liberals conceived it was premised on the idea that in the face of this provisionality it was right, even obligatory, to seek to complete that which was incomplete, and guide it to a higher plane of reason and purposefulness. For Mehta, "that judgment of [*1595] other peoples' experiences as provisional - - and the interventions in their lives that it permits -- is the conceptual and normative core of the liberal justification of empire." n66 This posture Mehta finds ultimately rooted in a fundamental orientation of modern Western thought, "namely a desire to master and possess nature, where nature was understood in the broadest sense as that which was external to the mind." n67 Mehta finds liberalism to be a derivative discourse of this broader orientation, in which,

being part of that orientation is to share in a project, which projects itself by anticipation onto an unbounded future. As an implication of this, every "present," whether individual or collective, is judged and acquires its meaning by reference to the projection of which it is understood to be a part. The primacy of the projection subsumes both judgment and understanding. Whatever is the freedom of thought or the internal freedom that the projection stems from gets carried over into its conception of what is involved in understanding that which is, only nominally, still external. In this sense of the term, understanding is tied to the project from the outset. It therefore, in a strict sense, lacks the potential to surprise. Similarly, the projection subsumes the "present" as a specific, and not as a singular, halting moment, in which the "present is not a transition, but one in which time stands still and has come to a stop," where, as it were, the "state of emergency' in which we live is not the exception but the rule." In this project the experiences of those who are, or remain, unfamiliar -of those whose "present," whose life forms, are not deemed to be already aligned along the anticipated axis of the projection -- must necessarily be viewed as provisional; provisionality being the term through which an uncertain and unfamiliar encounter gets mapped onto a plain of temporal and categorical familiarity. For those in that condition there is no Fetz-Zeit, no time of the present, no singular experience in which the Day of Judgment is the normal condition of history -- only an infinite future. Within this project man was made for the infinite. n68

In contrast to the liberal posture, Mehta articulates an attitude, one he assigns to Burke, for "a conversation across boundaries of [*1596] strangeness," and terms it "a posture of imaginative humility." n69 This posture "accepts that there is no shortcut around the messiness of communication, no immanent truth on which words can fix, no easy glossaries of translation; instead, just the richness or paucity of the vocabularies we use to describe ourselves and those we are trying to
understand." n70 As critical legal scholars negotiate traces of past oppressions in legal terrains of today in search of peace, justice and dignity, this posture of imaginative humility may come in very handy. In sites of post-colonial displacements and multicultural hybridities, we must find modes of conversation and deliberation in which the boundaries of what can be articulated are never firmly established prior to the conversation. Only in such a conversation, as Mehta contends, "power is denied space, and in this sense the empire becomes an impossibility." n71

Mehta's book would be very useful for a number of lines of inquiry in critical legal scholarship. It suggests fruitful lines of inquiry with regards to the relative exclusion or marginalization of groups based on gender, race, class, sexuality or culture in formally liberal democratic legal orders. It alerts us to possible contradictions at the very heart of apparently coherent worldviews and prescriptions for sustainable collective life. Most importantly, by highlighting the intersections of modernity and the colonial encounter, Mehta underscores the need to situate and examine modern legal history on a global plane. This should encourage us to uncover traces of time, place and circumstances in the modern construction of the reasonable person as the only legitimate legal subject.

Imaginative humility would warrant against taking the history of the world as an appendage to the history of modern Europe. Instead, we should endeavor to recover voices and choices erased by the colonial encounter. Colonialism brought into sharp relief many fundamental contradictions inherent in projects of modernity and the way universal claims are often bound up in particularistic assertions. And as postcolonial studies teaches us, the colonial encounter is not simply a thing of the past; it remains embedded in the conceptual constructs, disciplinary regimes and prejudices it engendered. As legal scholars our contribution to antisubordination struggles must include unveiling the colonial lineage of [*1597] many hegemonic legal ideas and practices of today. Bringing this lineage in sharper relief will give us a better purchase over strategies of resistance, recovery and representation. As global projects of neo-liberal restructuring, "humanitarian" intervention, harmonization of legal regimes and delegation of sovereignty march ahead amid assertions of the end of history and triumph of liberalism, we would do well to remember the disjunction between the theory and history of liberalism. Mehta's book should help us do just that.

FOOTNOTE-1:


n5 See E.P. Thompson, The Romantics: England in a Revolutionary Age 65-66 (1997). Other authors have provided useful studies of the evolution and content of

n6 See Uday Singh Mehta, Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought (1999) [hereinafter Mehta, Liberalism and Empire].

n7 Id. at 1.

n8 Id.

n9 Id. at 2. Other studies examine the relationship between utilitarianism and British colonialism of India. See, e.g., Thomas R. Metcalf, The New Cambridge History of India: Ideologies of the Raj (1994); Eric S. Stokes, The English Utilitarians and India (1959); Raghavan Iyer, Utilitarianism and Empire in India, in Modern India: An Interpretive Anthology (Thomas Metcalf ed., 1971).

n10 See, e.g., Uday Singh Mehta, The Anxiety of Freedom: Imagination and Individuality in Locke's Political Thought (1992); Uday S. Mehta, Liberal Strategies of Exclusion, in Tensions of Empire: Colonial Cultures in a Bourgeois World 59 (Frederick Cooper & Ann Laura Stoler eds., 1997).

n11 Harold J. Laski, Political Thought in England from Locke to Bentham 149, 153 (1950).

n12 Mehta, Liberalism and Empire, supra note 6, at 9.

n13 Id. at 9.

n14 Id. at 11.

n15 Id.

n16 Id.

n17 Id. at 13.

n18 Id. at 15.


n20 Mehta, Liberalism and Empire, supra note 6, at 15.

n21 Id.


n23 Mehta, Liberalism and Empire, supra note 6, at 18.

n24 Id. at 20.

n25 Id.

n26 Id.

n27 Id.

n28 Id.

n29 Id. at 22.

n30 Id.

n31 Id. at 23.

n32 Id. at 31 (quoting James Mill's multivolume The History of British India).
n33 Id. (quoting Thomas B. Macaulay, Warren Hastings, in Critical and Historical Essays 86 (1903)).
n34 See Mill, supra note 19, at 175-76.
n37 Mehta, Liberalism and Empire, supra note 6, at 48-49.

n38 Id. at 55.
n40 John Locke, Some Thoughts Concerning Education (Cambridge Univ. Press 1934) (1693).
n41 Id. at 187.
n42 Id. at 102.
n43 Mehta, Liberalism and Empire, supra note 6, at 63.
n44 See John Rawls, Kantian Constructivism in Moral Theory, 77 J. Phil. 515, 525-28 (1980).
n46 Mehta, Liberalism and Empire, supra note 6, at 69-70.

n47 Id. at 70.
n48 Mill, supra note 19, at 402.
n49 Id.
n50 Id. at 402-03.
n51 Id. at 409.

n52 Id. at 410.
n54 Id.
n56 Mehta, Liberalism and Empire, supra note 6, at 82.
n57 Id.

n58 Id. at 106.
n59 Id. at 108.

n60 Id. at 109.


n62 Mehta, Liberalism and Empire, supra note 6, at 131.


n64 Mehta, Liberalism and Empire, supra note 6, at 163.

n65 For a compelling discussion of the link between Burke's background and his ideas, see Isaac Kramnick, The Rage of Edmund Burke: Portrait of an Ambivalent Conservative (1977).

n66 Mehta, Liberalism and Empire, supra note 6, at 191.

n67 Id. at 208.
n68 Id. at 209-10 (internal citations omitted).

n69 Id. at 216.

n70 Id.

n71 Id. at 217.

Mary Romero *

BIO:

* Professor, School of Social Justice, College of Public Programs, Arizona State University. B.A., Regis College, Ph.D. University of Colorado at Boulder. I am indebted to Kevin R. Johnson, Christopher Ruiz Cameron, and George A. Martinez for inviting me to participate in LatCrit and who continue to support my increasing involvement. The warm welcome I received from Frank Valdes, Elizabeth M. Iglesias, Guadalupe Luna, Laura Gomez, Sumi K. Cho, Sylvia Lazos, Elvia Arriola, Adrienne Davis, and others has truly been inspiring and uplifting. I am honored that Frank Valdes invited me to write the Afterword to LatCrit IV Symposium. I thank the symposium authors for their challenging articles and their significant contributions to LatCrit social justice agendas. I am grateful for the critical feedback I received from Eric Margolis and the insightful comments I received from Kevin R. Johnson, Sumi Cho and Chris Cameron. Mike Soldatenko and Maria Gutierrez Soldatenko provided me with helpful cites on Chicana/o Studies.

SUMMARY: ... Although groups centering on discrete identities struggled to find a rallying point from which to advocate social justice and coalition building, this has proven to be a difficult project. ... The ways in which race-based movements and racialized communities construct their identities has enormous implications for setting social justice agendas and for coalition building. ... I argue for cooperation and coalition building, for making common linkages, sharing values, and respecting differences. ... A historical analysis of Filipinos in California suggests strategies for coalition building among subordinated groups. ... Each of these works calls into question the legitimacy of certain kinds of historicizing and symbolizing, as well as underscoring the limitations to coalition building that stem from identity construction. ... This type of identity construction has already proven to be an obstacle to coalition building within and outside Chicana/o and Latina/o communities. ... We might take a look at the implications for coalition building with other subordinated groups, what role Latina/o popular culture has in influencing global conversations about contradictions produced by transnational capital, and how popular culture facilitates conversations with other racialized and minoritized people. ...

[*1599]

Introduction

In the late 1960s and 1970s the civil rights and antiwar movements splintered into an array of groups grounded in identity politics. A quarter of a century later, concern for inclusion, diversity, and difference continues to dominate progressive literature. Although groups centering on discrete identities struggled to find a rallying point from which to advocate social justice and coalition building, this has proven to be a difficult project. Self-criticism in the 1980s called attention to falsehoods lurking behind attempts to make universal claims about particular kinds of subordination. In the 1990s, these critiques have extended to problems of essentialism and antiessentialism. Questions about the framing of racial and ethnic identity, the history and symbols evokes, the incorporation of literature and the arts as anti-subordination praxis, and their basis for building coalitions (internationally and domestically) were vigorously discussed and debated at LatCrit IV.

LatCrit IV raised number of challenging and provocative issues, particularly those arising from the apparently uneasy union between the theory and praxis of identity. As I reflected on the issues that arose in the symposium stressing commonalities and respect for difference in coalition building, I recalled a troubling incident that occurred recently where I teach at Arizona State University. Following the Supreme Court decision on the Boy Scout hiring practices that allowed the Boy Scouts to discriminate against gays, the campus newspaper published a cartoon...
depicting a gay scout master handing a badge to a Boy Scout saying, "Ok Boyth, Who wants to earn their First AIDS merit badge?" During this time, a graduate student in my seminar reported her research findings on student involvement. One of the students she interviewed used this incident as an example of the lack of university-wide support for gay activists. This interviewee remarked that a similar attack on the Chicano community would [*1601] have generated hundreds of letters to the editor, and Movimiento Estudiantil Chicano de Aztlan ("MEChA") would have responded by rallying Chicano students and holding demonstrations. My student selected this interviewee for the study because he had helped to develop a public service component for a new Hispanic fraternity on campus. What I found revealing and alarming about the account was the way he constructed the issues around boundaries or turfs. First, the student did not comprehend how a cartoon attacking gays was "his" issue. He did not perceive that it had anything to do with the narrow range of topics and activities he had defined as "service." Second, he did not consider "activism" within the range of activities that his group participated in. Instead, he perceived Chicano and Latino issues to be narrowly constructed the mission statement of the student organization MEChA. Similarly, MEChA did not voice opposition to the cartoon because they defined political activism within a cultural nationalistic agenda, one that does not include gays or the general category of human rights.

I reflected on this story as I began this Afterword because it captures the tunnel vision inherent in constructing racialized ethnicities that ignore intersectionality and frequently narrow the terrain for coalition building, or make it impossible. The ways in which race-based movements and racialized communities construct their identities has enormous implications for setting social justice agendas and for coalition building. n9 Racialized ethnicities were forged out of centuries of colonialism, conquest, slavery, capitalism, racism, sexism, classism, and the politics of appropriation and co-optation. Consequently, all forms of resistance and struggle pose extremely complex questions. In order to resist effectively, we must constantly reconsider and reconstruct identity. n10 This Afterword reflects on a number of identity issues that emerged in LatCrit IV, paying particularly attention to three objectives: (1) the commitment to the production of both knowledge and community specifically as a means toward an end the [*1602] attainment of social justice; (2) elucidating intra- and inter-group diversities across multiple identity axes, including those based on perspective and discipline, and; (3) ensuring that African American, Asian American, Native American, Feminist, Queer, and other OutCrit subjectivities are brought to bear on Latinas/os places and prospects under the Anglocentric and heteropatriarchal rule of the United States. n11

I hope to add to ongoing dialogues and critiques of problems in identity politics, particularly the distinctions between identity constructions based on a mythical past, imagined communities stemming from lived and shared experiences, claims of authenticity and cultural nationalism. I begin by discussing reflections on historicizing and symbolizing Latina/o identity in terms of agency in the struggle for social justice. Here, I want to engage questions of commonalities and differences involving both intra- and inter-group diversities. I note several essays that offer lessons for building coalitions that draw upon commonalities. Next, I consider writings that highlight cultural controversies that arise when we assume commonalities that do not lead to coalition building but rather splinter organizing efforts. I draw lessons on how to ground LatCrit in theory and material reality from historical and contemporary cases analyzed throughout the symposium. I end with a review of lessons learned by discussing the critical intersections and transformative potential that culture offers in the struggles for social justice.

I. Historicizing and Symbolizing Latina/o Identity: Questions of Commonalities and Differences

There is a disturbing parable that I first heard when I taught Chicana/o Studies, I had never heard it growing up: A young child asks a fisherman why he didn't put a lid on a basket of crabs. The fisherman says, "Because the basket contains Mexican crabs. As soon as one of them gets near the top the others drag him back down. They are so busy fighting among themselves that I don't have to worry about any of them reaching the top and getting out." This story has two meanings: the first is the familiar [*1603] ideology of capitalism: the only path to success is individual effort, and attempts at organizing only drag the hard worker back into the bucket. The second is a message of cultural-hatred -- this behavior is peculiar to Mexicans. The story frequently is told with a coda; pointing to another bucket with a lid, the fisherman completes the story by saying, "This basket has Jewish crabs. They help each other get to the top. I have to keep a lid on here because they will help each other get out of the basket." Each time I heard this story from a Chicana or Chicano undergraduate it was offered as an explanation for why collective action on campus or in the community failed. The ethnicity of the crabs changed in later tellings, but the parable always evokes the same two underlying assumptions: that organizing is counter-productive and that culture explains why some groups have difficulty establishing common
ground and helping members get ahead. The "disfunction" of Mexican, black, or Indian crabs was explained by the essential qualities of culture and ancestry, as was the "function" of Jewish, Korean, or West Indian crabs.

I counter the myth by explaining that neither conflict nor organizational ability are essential cultural characteristics, and are no more inherent to Chicanas/os than any other group. I argue for cooperation and coalition building, for making common linkages, sharing values, and respecting differences. I argue for overturning the basket. Although the social constructions of race in the U.S. present identity as fixed and stagnant, ideologies of race are anything but consistent. n12 Political strategies aimed at establishing interracial justice cannot assume that commonalities and differences articulated in multiple identities are devoid of racist ideology and history, and, therefore, necessarily constructive for coalition building. Interracial justice requires recognition of the fluidity of racism n13 and exposing the underlying assumptions in particular constructions of identity that create opportunities or establish barriers to coalition building. Constructing the ground between negotiated commonalities and respected differences is key to building the extremely delicate path toward coalition and [*1604] antisubordination praxis. n14 In the following section, I begin to identify the lessons offered in LatCrit V concerning historicizing and symbolizing Latina/o identity and the limits or opportunities for progressive coalition building.

A. Lessons for Building and Constructing Common Ground

A historical analysis of Filipinos in California suggests strategies for coalition building among subordinated groups. Professor Leti Volpp's study of the neglected history of Filipinos and the pattern of antimiscegenation laws and enforcement raises questions about the different ways that race has been sexualized and gendered and the ways these characterizations govern marriage contracts, inheritance, and cultural/social legitimacy. n15 Volpp's questions about the implications of legal distinctions made within identity categories of "Asian American" and "Pacific Asian American" is particularly relevant to similar internal hierarchies within the identity category of Latina/o that need further consideration. n16 Linking examples of antimiscegenation laws and Filipinos to Proposition 187, Professor Victor Romero introduces the concept "minority on minority oppression" to explain inter-and intragroup action that "help perpetuate racial stereotypes that separate us rather than unify our communities." n17 He persuasively argues that responses to racism that fail to build bridges with other racially subordinated groups are likely to promote "minority on minority oppression." In addition, Romero illustrates how identity can be constructed and symbolized to include "perceived notions of commonality" that create opportunities for coalition building in everyday encounters -- even when they are based on stereotypes. n18 However, the limits of such a beginning are questionable and probably need to be qualified. It is necessary to move beyond stereotypes towards the development of concrete [*1605] commonalities in social, political and/or economic circumstances.

Bringing the lessons closer to home, three essays offer cautionary appraisals of "both the creation of scholarship through community and community through scholarship." n19 Professors Sumi K. Cho and Robert Westley suggest ways of facilitating coalitions among the generations of race crits and avoiding competing paradigms. They recount "an obscured history that was central to the development of Critical Race Theory ("CRT")" "the history of student activism for diversity in higher education from the 1960s to the 1990s." n20 Documenting the history of law students at Boalt, Cho and Westley challenge the commonly held perception that CRT was born at Harvard, and point out that the movement has heterogenous roots. Grounding critical theory in the historical context from which it emerged ties together CRT, LatCrit, APA Crit, Fem Crits, CLS, and NAIL. This grounding also constructs an egalitarian basis for developing and building coalitions to incorporate diverse communities in common struggles and acknowledges "symbiotic relationship between intellectual activists and activist intellectuals." n21 In his panel presentation, Professor Devon Carbado added to growing commentaries on "the old and tired" critiques of the black/white paradigm. n22 He added a caution against continuing critiques that offer no strategic direction methods, or that fail identify the political misuses of the paradigm. He offers concrete suggestions to move dialogues on the various paradigms in directions that offer a basis for coalition building. The importance of community building among scholars of color is particularly salient to the experiences of young legal scholars whose "contributions to legal academia were disrespected, devalued and denigrated" by their home institutions. Professor Pamela Smith's essay provides a number of lessons for tenured and tenure track professors, stressing the need to make [*1606] connections with professors of color across the disciplines, that experience silencing tactics and hostile academic environments, and to senior colleagues that can provide mentoring.
In the third essay, Professor Tanya K. Hernandez explores the socialist Cuban context of affirmative action to pose difficult questions concerning the case of Afro-Latinas/os that are frequently ignored in LatCrit critiques of the white/black binary. n23 This case study poses a distinction between color, class, and ethnicity that has largely been ignored in the analysis of racial and cultural discrimination. While social research has documented differences among Latinas/os based on color and class, n24 writings on intersectionality are primarily theoretical and narrative. n25 A related issue emerging from Hernandez's work is the question of the comfort zone among Latinas/os dissecting race: Are we more likely to engage in theoretical explorations of our mestizo roots rather than our multiracial roots? More specifically, have we ignored our African roots -- both the Moorish connections from Spain and African heritage from slavery? I will return to these issues of identity construction and the assumption of commonality and difference.

B. Lessons About Assuming Commonalities and Similarities

The most obvious incident of assumed and fictitious commonality was presented in the case study written by Dean Cameron. n26 He analyzes the fight over banning gas-powered leaf blowers, in which Hollywood celebrities often supported the ban under the guise of caring for safer environment and the health and spirituality of the Latino gardeners. Defining the ban as benign guidance was not an attempt to build a coalition but to appropriate the voice of the workers. It served to keep Latino gardeners invisible as workers. The social and class differences between the gardeners and Hollywood celebrities was exacerbated by these attempts to couch their relationship as that of allies rather than of adversaries; no attempt was made to find a common ground to define the issue.

Salient issues that distinguish racialized communities in the U.S. are highlighted in Professor Eric Yamamoto's article. n27 He demonstrates how questions of identity situate groups' political status, historical consciousness, self-determination, human rights and colonialism. n28 These specific questions of identity are closely related to the underlying the conflicts described in Professor Hernandez's essay. n29 Each of these works calls into question the legitimacy of certain kinds of historicizing and symbolizing, as well as underscoring the limitations to coalition building that stem from identity construction. While these essays are primarily aimed at inter-and intra-groups within the U.S., I suggest that they raise serious implications for international coalition building as well.

In her comments on the Native Cultures, Comparative Values and Critical Intersections Panel, Professor Tsosie challenged constructions of Chicana/o identity that claim "indigenous" status and rejects similar claims to ancestral land implied in the concepts of Aztlan and la frontera. While I largely agree with her critique, I do think it is important to note that there are numerous constructions of Chicana/o and Mexican American identity. And while some of these identities are grounded in indigenous ancestry, they do not claim the same political status as Native Americans or Native Hawaiians.

On the one hand, I appreciate Professor Tsosie's comments because they address the underlying problem with the moviemento indigenista and the growing cultural nationalism in our communities and universities today. On the other hand, her critique has the unfortunate consequence of erasing the basis for one hundred and fifty years of land and water rights struggles in Southern Colorado and Northern New Mexico. n30 Before addressing the specific identity constructions of the moviemento indigenista, I think it is critical to recall that the construction of racial, ethnic and national identity is inexorably tied to myth-making and is highly selective, n31 particularly when the identity is a gloss of two to five hundred years of conquest, occupation, the destruction and creation of nation states, transitions from feudalism to capitalism, and shifting boundaries of citizenship status. n32

Given the acceptance of the term Chicano and the concept of Aztlan among academicians and writers, the Chicano Movement was extremely successful in unifying a population that had not previously owned its history or culture. n33 While Chicanos are unlikely to distinguish themselves as mestizo or non-mestizo, they do make regional classifications such as Tejanos, n34 Californios, n35 and manitos, n36 and they differentiate between Mexicano and Chicano, immigrant and nonimmigrant. n37 We also make generational distinctions. n38 Comparisons between rural and urban experience are extremely significant to families who migrated from the countryside of Texas, New Mexico, and California to find employment in Chicago, Detroit, Denver, and Los Angeles. n39 Prior to the commercial homogenization of culture, regional distinctions were observed in linguistic differences and a host of cultural practices including food, music, traditional medicine, santos, shrines, and other religious customs.

I draw attention to these distinctions, not merely to celebrate diversity and acknowledge difference, but to focus on the importance of historical events in
shaping social processes and creating and maintaining unique or similar cultures. There is an extensive literature of historical and sociological studies that documents significant regional differences generated by the various religious, government, n45 and labor n46 practices used "to win the [*1610] West." Each of these institutions contributed to shaping the process of "becoming Mexican American," "becoming Chicoano," "becoming Latino," and "becoming Hispanic." n47 These concrete historical, social and cultural processes went beyond individual choice to construct specific but fluid group identities created from group experiences and struggle. The construction of identity involved imagining community and establishing the basis for collective action. Today's (so-called postmodern) identity construction based on personal choice or idiosyncrasy is quite different from one based on a concrete, lived experienced. Furthermore, the ways in which identity is historicized and symbolized creates boundaries that do not necessarily promote coalition building in antisu

One of the first references to identity politics that I can recall reading was by Carey McWilliams. Writing in the 1940s, he critiqued the identity politics of the elite in Los Angeles in a chapter entitled, "The Fantasy Heritage." n49 At the time Mexicans were excluded from "restaurants, dance halls, swimming pools, and theaters." But, claiming to be direct descendants of "Spanish grandees and caballeros," and building a "Spain-away-from-Spain," they referred to "a quarter acre and twenty chickens" as a rancho. McWilliams followed with a racial description of Los Angeles' first settlers:

Pablo Rodriguez, Jose Variegas, Jose Moreno, Felix Villavicencio, Jose de Lara, Antonio Mesa, Basilio Rosas, Alejandro Rosas, Antonio Navarro, and Manuel Camero. All "Spanish" [*1611] names, all good "Spanish" except "Pablo Rodriguez" who was an Indian; Jose Variegas, first alcalde of the pueblo, also an Indian; Jose Moreno, a mulatto; Felix Villavicencio, a Spaniard married to an Indian; Jose de Lara, also married to an Indian; Antonio Mesa, who was a Negro; Basilio Rosas, an Indian married to a mulatto; Alejandro Rosas, an Indian married to an Indian; Antonio Navarro, a mestizo with a mulatto wife; and Manuel Camero, a mulatto. The twelfth settler is merely listed as "a Chino" and was probably of Chinese descent. n50

What is most telling is that such references to "Spanish" in our fin de siecle imagination translates into White. This translation is distorted given that Spain's history includes eight hundred years of Moorish domination prior to the colonization of Mexico and the expulsion of Jews in 1492. Clearly, myth making is not the exclusive property of any one group. n51 Early writings of the Chicano Movement claimed Chicanos as the direct descendants of Aztecs and the Southwest as Aztlan, thereby establishing essentialist notions of culture and the nature of mestizos n52 that were later popularized in poetry, art, literature, and dance. n53 In the late [*1612] 1970s and 1980s, Chicana/o writings began to critique aspects of "Aztlan" ideology and challenge certain assumptions, particularly those depicting gender and sexuality. For instance, Mexican n54 and Chicana n55 feminists revisited the portrayal of Malintzin Tepal or Dona Marina as "La Malinche," the Mexican Eve. n56 In a mytho-symbolic language, they argued that Tepal could not be traitor of the Mexican people because Mexico was not a nation state at the time and Aztecs had subordinated surrounding tribes. n57 Revisionists argued that Malintzin Tepal was a heroine that united the tribes in their quest to overthrow the tyranny of the Aztec empire. The most popularized Chicana writings strived to replace the macho representations of Yo Soy Joaquin or Chicano Manifesto with feminist versions of spirituality drawn from MesoAmerica, that (1) replaced the male deities Quetzacoatl or Huxilopochtli, with the female deities, Tonatzin and Coatlicue, n58 and (2) feminized indigenous identities claiming that "la Raza Comica comes of the union of the Indian mother and the European father." n59 This genre did not directly challenge Chicanismo but merely packaged cultural nationalism in a feminist voice. The symbolizing used to construct indigenous and mestiza/o identity as the true identity of Chicanas/os in the U.S. had several politi [*1613] cal consequences that limited its usefulness and hobbled its ability for coalition building that: (1) it lacks historical specificity, n60 (2) it equates biology [the hybrid represented in the concept of mestizo] to a common culture, history and ancestry, (3) it erases 500 hundred years of material reality; n61 (4) it ignores the central importance of social class, n62 (5) it creates dualistic thinking about racial justice, n63 and (6) it centers spirituality while marginalizing concrete historical and sociological analysis. n64 [*1614]

A contemporary version of the "the fantasy heritage" may well include many aspects of cultural nationalism, particularly the movimiento indigenista. n65 Primarily structured around dance troupes known as Danzantes, the movement claims a Mexica nation and proclaims cultural nationalism -- frequently expressed in sexist, homophobia, anti-Semitic, racist, and militarist ideology. Ignoring Mexico's complex ethnic, race and class history, as well as the existing
indigenous communities still struggling to survive, they claim a distinctive indigenous identity based on a MesoAmerica heritage and culture as members of a Mexica nation. n66 In spite of the obvious contradiction, indigenous and mestizo identity is being claimed as a collective spiritual link. Such an ideology requires a highly selective and distorted vision of Mexico's past. n67 In the romantic imagination, indigenous and mestizo identity becomes highly symbolic and ritualized, ungrounded in the lived experience, cultural competence or struggle that unifies specific communities. n68 Nonetheless, Mexistas burn sage, built sweat lodges, and claim a position at international conferences on indigenous rights and struggles. n69 This produces, not coalition, but increased tension and strains surrounding their claims of an identity as "a people/a tribe." In his critique of Anzaldua's identity [*1615] construction of the new mestiza, Benjamin Alire Saenz captured the embedded contradictions in appropriation of indigenous identity:  

In wanting to distance herself from dominant European discourses, which she views as dualistic, oppressive, and racist, Anzaldua gestures toward mythologies and cultures that I cannot believe are truly her own. Acknowledgment of mixed ancestry is not in itself problematic; it is far better to acknowledge the competing cultures we literally inherit than to base our identities on ridiculous (and dangerous) notions of "purity" and "pedigree" such as those that gave rise to Nazi Germany and the current wars of ethnic cleansing in Eastern Europe. . . . By calling herself a mestiza, she takes herself out of a European mind-set. She refuses to refer to herself as "Hispanic"; to do so would be to embrace an identity that admits no competing discourses, that admits only a European history and erases any indigenous consciousness. Her impulse is to defy that her "Indianness" has been destroyed. But her "Indianness" has been destroyed -- just as mine has. I do not find it productive to build a politics and an identity centered on "loss." n70  

Characterized as a form of oppositional culture or culture of resistance in the face of internal colonialism and institutional racism, the romanticism of pre-Columbian traditional ways, coupled with the appropriation of living indigenous cultures, is inconsistent with the decolonization process that Franz Fanon n71 and Paulo Freire n72 described. Embracing an oppositional culture that substitutes adherence to perceived tradition for assimilationist ideology hampers the progress toward decolonization because it discourages dialectic consciousness-raising or liberating techniques involving self-criticism.  

A serious confrontation with our mestizo heritage is a complex project; one that needs to include accepting historical responsibility and recognizing privileges gained by neither being fullbloods [*1616] nor assimilating into Spanish/Mexican culture. n73 An argument that claims (or mandates) mestizo and indigenous identity as a political identity, but remains centered on pre-Columbian mythology assumes commonalities with indigenous people that is not based on our material existence or historical and current struggles in the U.S. While I recognize that the spirituality gained through the mythology of pre-Columbian gods and goddesses may be inspirational to some individuals, the imagined community is thoroughly exclusionary. This type of identity construction has already proven to be an obstacle to coalition building within and outside Chicana/o and Latina/o communities.  

The problematic politics of an indigenous identity that places tradition above concerns for social justice is an issue that can be shared with Native Americans. Like the manitos that claim the Colorado's San Luis Valley, Mora Country, Tierra Amarilla and other land grant areas of New Mexico as their homeland, n74 and have been forced off their land in search of jobs, many Native Americans were dispossessed of their land and tribal position through various means. Too often the litmus test of "tradition" and "authenticity" is used to deny membership to mixed-bloods, detribalized or nonreservation Indians. n75 Denying the urban Indian experience, their struggles, and cultural production advances the assimilationist project that began under Richard Pratt at the Carlisle Indian school. n76 No community confronted by the racist colonial past of U.S. policies can wrap themselves in traditionalism and be assured of developing and maintaining an anti [*1617] subordination agenda. Nor will such a policy result from the refusal to engage in self-critique or address issues of essentialism.  

The salience of particular kinds of historicizing and symbolizing also appear in the essays that revisit the controversies over religion and coalition theory and praxis. n77 Professor Luna's n78 analysis of the establishment and enforcement of Spanish law by clergy of the Catholic Church in the California missions alerts us to the need to recognize the historical and religious linkages of canon law, statutes, and doctrine to the subordination of Indians and mestizos. Grounding her discussion in a historical context, she avoids the tendency to make the essentialist arguments that appear in more general abstract discussions. n79 At the same time, universalizing the Catholic experience among Latinas/os on the basis of theology is inaccurate because each cultural group had a unique history to the Church. The uniqueness is characterized by the incorporation of specific cultural rituals and icons.
Similarly, the Catholic Church's selective appropriation of indigenous culture provided parishioners with a variety of cultural flavors. n81 Cultural variation within Catholicism is not limited to music, language, rituals, or icons but also includes other ideologies (feminism, nationalism, humanism) n82 and a wide range of beliefs and behaviors. The task, to ascertain how religious praxis may "promote or obstruct the liberation struggles and antisubordination imperatives that have coalesced in and around the LatCrit movement," n83 is most clearly illuminated in Luna's analysis of [*1618] specific struggles of resistance within the Church rather than centering the discussion on theology or the mythology of saints and icons.

C. Historicizing and Symbolizing Material Realities

As the articles in the symposium show, connecting LatCrit theory and praxis to the concrete political struggles of Latino/o communities and other subordinated groups outside the academy, n84 rather than to mythology and theology, promises to bring focus and clarity to the movement. Reclaiming our intellectual history is best achieved by grounding our project in the resistance and struggle of activists. n85 Professor Gil Gott's essay provides an excellent example of locating the roots of the intellectual and political project of critical race theory in the work of "activists such as Ida B. Wells, DuBois, Paul Robeson, Mary McLeod Bethune, Arturo Schomburg, Addie Hunton and Alphaeus Hunton, Jr." n86 Drawing from this rich history of political thought and praxis, we can see how to bridge difference and build coalitions as suggested in Professor Gott's call for a critical race globalism. n87 Recovering our intellectual and political history has been a major project since the fragmenting identity politics of the 1970s and continues today. n88 Shifting our search for roots from the feet of MesoAmerican or Catholic deities to human social activists such as Sara Estela Ramirez, n89 Ricardo Flores Magon, n90 Juan Jose [*1619] Herrera, n91 Lucia Gonzalez Parsons, n92 Teresa Urrea, n93 Emma Tenayca, n94 and Ernesto Galarza n95 has the potential to set us firmly on the path towards antisubordination theory and praxis.

The value of historical specificity n96 or employing "a kind of political impact determination" n97 in the investigation of LatCrit theory cannot be overstated. Several of the essays provide evidence of the strength of grounded analysis. A fine example of historical specificity in race identity is found in Professor Ediberto Roman essay. By analyzing the race debate surrounding the Spanish American War and occupation of territories in the Caribbean and the Pacific, Roman demonstrates that the debate is not merely legislative history but has become "part of the United States Supreme Court jurisprudence." Roman thus demonstrates how "race has always been a real but unspoken factor in international policy." n98 Professor Donna Coker's n99 assessment of the actual material resources available in intervention programs takes into consideration conditions that determine different outcomes for Latinas and other poor women of color. Rather than falling back on models of cultural determinism that characterize Latinas as submissive, suffering and fatalistic, n100 Coker emphasized the intersectionality of multiple identity axes and highlighted structural barriers to obtaining services, such as bilingual services, citizenship, unemployment, and police community relations. William Tamayo, Regional Attorney for the Equal Employment Opportunity [*1620] Commission ("EEOC"), draws upon past experience with political asylum applicants and battered immigrant women in "challenging the cultural limits and cultural-based assumption of the staff" in order to investigate the rape and sexual abuse of nonEnglish speaking Latina immigrant farm workers. n101 Analyzing the recent antibilingual education initiatives in California, Professors George Martinez and Kevin Johnson demonstrate concrete ways that persons of Mexican ancestry have been discriminated against in each initiative and argue for using "discrimination by proxy" as a doctrinal tool to strengthen antidiscrimination laws. This is a very important type of analysis that addresses the more subtle and covert forms of racism that are replacing familiar but the previously unmasked forms.

II. Critical Intersections Through Culture

The urgency of Professor Eric Yamamoto's thesis that "cultural performance" is a viable means to influence the cultural frameworks of decisionmakers, became apparent n102 after reading Professor Larry Cata Backer's findings on the limited penetration that outsider scholarship has made in the courts. n103 Using citations in the opinions of courts to measure the degree of acceptance of the legal writings by women and scholars of color, Backer concludes by noting that most successes have been experienced in "the political and cultural life of the states." n104 Yamamoto's powerful account of "a multifaceted hula dance program performed by a multiracial group of law students and faculty during the Jurist-in-Residence program two years ago" shows how cultural performance has the potential to penetrate the individual framework of supreme court justices. Yamamoto imagines the influence that this cultural performance may have in (re)presenting the history of indigenous Hawaiians to members of the Supreme
Court who might not otherwise understand their political status in *Rice v. Cayetano*. Yamamoto challenges legal advocates to go beyond the work of crafting doctrinal arguments by including strategies for cultural transformation. There are brilliant examples from the [*1621] community to draw from, including: CHRLA's use of novelas to organize domestic workers, n105 Nuyorican Poets, n106 Luis Alfaro, n107 Mariela Norte, n108 Culture Clash, El Vez, n109 Coco Fusco, n110 Guillermo Gomez Pena, n111 and many others. The overwhelming enthusiasm in the U.S. over the revival of Cuban music presented in the film and CD of The Buena Vista Club will no doubt play an important role in shaping the American public's cultural framework for expanding diplomatic channels in Cuba.

Critical intersections between the arts and legal commentary are further illuminated in Professor Pedro A. Malavet's essay. Drawing on his extensive experience as the editor of several books on storytelling, he extends "insightful and powerful social, political and legal commentaries" n112 to other art forms of the narrative. Citing examples of popular culture, including such forms as Afro-Cuban Jazz, Salsa, poetry, and dance, he points to the political significance and the potential for re-thinking, refiguring and reproducing narratives of nation, citizenship, class, race, gender and sexuality. Discussing Jamaican popular music as antisubordination praxis, Nicholas A. Guinia's reviews ways that Reggae functions as both a "tool for resisting oppression" and a "vehicle for communicating and promoting values, ideas and beliefs." n113 In much the same way, Professor Lillian Manzor analyzed Camelita Tropicana, a Cuban-American lesbian art performer, to call attention to the power of narratives and story telling in sub [*1622] verting essentialist constructs of race, gender and sexuality. n114 The intersections between LatCrit and narrative story telling found in the arts suggest innovative ways for outsider scholarship to penetrate the cultural frameworks of decision makers and the political process.

Future LatCrit sessions on popular culture might incorporate inquires into the ways that the production and consumption of Latina/o popular culture in the U.S. is being transformed by the transnational flows of capital and people. We might take a look at the implications for coalition building with other subordinated groups, what role Latina/o popular culture has in influencing global conversations about contradictions produced by transnational capital, and how popular culture facilitates conversations with other racialized and minoritized people. The growth of "world music," the easy availability of video technology, and the spread of cultural forms through the Internet, make the issue of popular culture a particularly promising area for critical theory.

**Conclusion: A Cautionary Tale**

When I began my academic career twenty years ago, I was inspired by the transformative potential and political activism shaping Chicana/o Studies. As I look back, I can see many important intellectual and political contributions that my generation has made. However, I am also aware of our shortcomings and the pitfalls we tumbled into. There were originally two linked goals: 1) creation of a political vision linking intellectual production to community activism; 2) the elimination of oppression. However, as faculty and students undertook the process of institutional building, their political strategies of control and autonomy within academia shifted towards efforts to acquire resources and stability within the institution. Establishing journals, building an academic association, and developing curricula lead to the development of characteristics similar to traditional disciplines. Gradually the critical edge and link to community struggle lessened as scholarship and student activity became focused on identity issues and not antiracism praxis. The cultural nationalism that dominates current political discussion and debate within Chicana/o Studies, was largely fueled by an emphasis on arts and [*1623] humanities that was not grounded in a social justice agenda but served narrowly construed identity politics. n115 Even as early as the late 70s, the move towards "doing culture" as a priority of identity politics was apparent. Gomez-Quinones remarked that:

Without class identification and political participation this is at best neutral. At worst, it becomes deceptive, diversionary, and conservative, thus supportive of the status quo. Cultural activity, quo culture, even in groups ostensibly allied to the political movement, retains this conservative character. n116

Building on cultural or racial identity rather than specific antiracism theories and praxis has resulted in the establishment of interdisciplinary programs that provide Latina/o faculty and students with an academic home but frequently bear more similarities to the larger institution than differences. For instance, on my campus, Chicana/o Studies continues to accept funding from Motorola in the face of strong evidence of the company's continued pollution in communities heavily populated by Chicanas/os. Moreover they accepted a substantial grant from Wells Fargo -- the bank that assisted Oregon Steel in surviving a strike at their Colorado Fuel and Iron Company in Pueblo. The CF& I strike consisted largely of Chicano workers. With a growing
number of students majoring in business, efforts are underway to develop an undergraduate bidisciplinary program with the Business School. Needless to say, this program does not emphasize the concerns of workers but rather of employers and corporate interests.

Replicating traditional disciplines also involved institutionalizing norms and values. Arrogance and self-importance crept into daily interaction between faculty. Hypercriticism and personal grievances repackaged as "political" limited intellectual discourse and community participation in the National Association for Chicana and Chicano Studies. Academic cliques emerged around the practice of selective citation, and perceived stars became legitimated through this institutional practice. Meanwhile as jargon intensified and relevance dissipated the applicability of their writings to community struggle waned. In our enthusiasm to produce interdisciplinary knowledge in LatCrit, I hope that the errors made by ethnic and cultural studies will not be uncritically embraced or reproduced.

Identity politics and resurgent nationalism have made coalition building in our demographically changing communities difficult and have made it impossible, in many instances, to undertake common projects with our neighbors in the black, Asian, Native American, and poor white communities. All too often we see ourselves involved in a zero sum game where black political gains are seen as Latina/o losses. This ideology hinders our ability to address the pressing substantive issues of race, gender and class oppression -- locally, nationally, and internationally. Nationalism has slowed our progress in addressing issues of gender and sexuality. Relying on exhausted tropes of ethnic specificity, ethnic solidarity and other essentialized notions of community, we find ourselves with an identity stripped of the national and international struggles for human rights and alone in the fight against racism and class oppression.

Advancing LatCrit's "commitment to the production of both knowledge and community specifically as a means to social justice" involves transforming the crab parable from cultural determinism to a message that organizing is both productive and essential in antisubordination struggle. The LatCrit project has the potential to rebuild misdirected and fragmented ethnic studies discourses. LatCrit discourse has already influenced interdisciplinary writings and revived the link between scholarship and community struggle. The LatCrit web page, LatCrit Primer, and the LatCrit-Student Outreach Listserv will further strengthen links towards antisubordination struggle. All of these efforts will hopefully transform future responses of student activists on campuses and in the community to identify with the larger category of human rights rather than fragmenting along lines of race, ethnicity, sexuality, and other dissected identities.

FOOTNOTE-1:
1 See Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990).
7 See, Gott, supra note 4; Pamela J. Smith, The Tyrannies of Silence of the Untenured Professors of Law, 33 U.C. Davis L. Rev. 1105 (2000); William R. Tamayo, The Role of the EEOC in


n10 These issues are explored in depth in videos by Marlon Riggs. See Black Is, Black ain't: A Personal Journey Through Black Identity (California Newsreel 1995); Tongues Untied (Frameline 1989).


n12 See Volpp, supra note 7. Defining racial identity for Filipinos is addressed in the question of whether to classify as Latinas/os or Asians. The "either/or" nature of the question reflects mainstream society's demand that we all pick and in some cases be assigned a single identity, when in fact many of us have more than one.


n15 See Volpp, supra note 7; see also Tomas Almaguer, Racial Fault Lines: The Historical Origins of White Supremacy in California (1994) (discussing role of intermarriage in establishing upper class relationships between Mexican elite in California and Anglo Americans).

n16 See Volpp, supra note 7.


n18 See id.

n19 See Valdes, supra note 11.

n20 See Cho & Westley, supra note 2.

n21 Id.

n22 See Anthony Paul Farley, All Flesh Shall See It Together, 19 Chicano-Latino L. Rev. 163, 172-74 (1998) (critiquing Gloria Sandrino-Glasser's criticism of black/white paradigm because paradigm makes Latinas/os that are multi-racial invisible). In addition, Farely makes a very important point about the criticism that ignores the extensive writings by blacks that have been inclusive of Latinos, Asians, and Native Americans -- including Frederick Douglas, W.E.B. DuBois, Booker T. Washington, Paul Robeson, and James Baldwin. See id.

n23 See Hernandez, supra note 3.


n27 See Yamamoto, supra note 4. Specifically he discusses: "(a) political status contrasted with racial status (in applying equal protection doctrine); (b) historical acuity versus historical myopia in multiracial settings; (c) legal norms of
self-determination vis-a-vis equality; (d) international human rights rather than domestic civil rights, and; (e) colonialism and conquest vis sovereignty and liberation."

n28 See id.

n29 See Hernandez-Truyol, supra note 3.

n30 Since 1848, Chicanas/os have engaged in political and legal struggles to keep their homeland and have never claimed their homeland as descents of Aztecs or the Mexica nation. Instead, they claim an identity based on a history of two or three hundred years, tracing their ancestry to communal land grants, and to the surrounding Pueblos and/or Spanish colonization. Unless engaged in university campus politics, they are unlikely to refer to the land as Aztlán but as land designated by Spanish and Mexican land grants, such as Tierra Amaro. See Patricia Bell Blawis, Tijerina and the Land Grants, Mexican Americans in Struggle for Their Heritage (1971).


n33 However, there is an overabundance of university examples, particularly among college students in MEChA, that are used in writings claiming an Aztec identity. Consequently, we do not have strong indicators measuring the level of acceptance of ethnic terms and movement symbols that are embraced by the larger Mexican and Mexican American population throughout the U.S.


n37 See David Gutierrez, Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity (1995) (providing overview of history of tensions and cooperation between Mexican Americans and Mexican immigrants in California). Gutierrez provides numerous examples in which Mexican Americans perceived and treated immigrants as not part of their community, and other examples of how Mexican Americans defined their social and political issues as one community. See id.; see also Kevin R. Johnson, Immigration and Latino Identity, 19 Chicano-Latino L. Rev. 197 (1998) (identifying difficulty that legal definitions "citizen" and "alien" create for coalitions in Los Angeles).


n39 Although early writings by anthropologists characterized Mexican Americans as a rural people, some of the oldest urban centers in the Southwest were founded by Mexicans. In other words, the urban experience of El Paso and Los Angeles is just as authentic and Yakama Valley in Washington.


n42 See Fran Leeper Buss, La Partera: Story of a Midwife (1980) (telling life story of Jesusita Aragon, midwife from San Miguel County in northern New Mexico). Buss's book contains descriptions of specific maternal health practices, herbs, and beliefs specific to this region and borrowed from training received in Mexico. See id.

n44 These include distinct settlement histories and government policies. See generally Rodolfo Acuna, Occupied America: A History of Chicanos (1988).

n45 See id. (contrasting states in Southwest after Mexican American War, presented in terms of length of time each experienced before annexation and different role each played in the U.S. economy and capitalist development); Carey McWilliams, North From Mexico (1961).


n47 See Gutierrez, supra note 37 (discussing political struggles and historical incidents in which Mexican Americans identified with Mexican immigrants); Felix M. Padilla, Latino Ethnic Consciousness: The Case of Mexican Americans and Puerto Ricans in Chicago (1983) (exploring ethnic identity and identifying uses and practices of pan-ethnicity); George J. Sanchez, Becoming Mexican American, Ethnicity, Culture and Identity in Chicano Los Angeles, 1900-1945 (1993) (analyzing formal federal and state programs of acculturation aimed at Mexican immigrants and ways that Mexican culture was reconstructed through family networks, religious practices, musical entertainment, work experiences, and consumption patterns).

n48 See Hernandez, supra note 3 (discussing implications of AfroCubans theorizing Latinos as race or as ethnicity and ways that Latinas/os with connections to African ancestry may be excluded from coalition building).

n49 McWilliams, supra note 45, at 43.

n50 Id. at 44.

n51 Of course, the power to write history and establish policy based on one's myth depends on the group's political and economic power. In addition, the less threatening the revisions are, the more likely they will be accepted. I would argue that the incorporation of spiritual and mythical writings into the curriculum is much less threatening that social science research that examines structural inequalities and the impact on the Latina/o community or historical research on labor struggles and organizing.

n52 See generally Armando B. Rendon, Chicano Manifesto (1971) (referring to "People of Aztlan").

We are the people of Aztlan, true descendants of the Fifth Sun, El Quin.to Sol.

In the early morning light of a day thousands of years old now, my forebears set out from Aztlan, a region of deserts, mountains, rivers, and forests, to seek a new home. Where they came from originally is hidden in the sands and riverbeds and only hinted at by the case of eye and skin which we, their sons, now bear.

Id. at 7.

n53 See Rodolfo Gonzales, I am Joaquin 16 (1967).

I am Cuauhtemoc, proud and noble, leader of men, king of an empire civilized beyond the dreams Of the gachupin Cortes, who also is the blood,
The image of myself.
I am the Maya prince.
I am Nexahualcoyotl,
great leader of the Chichimecas.
I am the sword and flame of Cortes
The despot.
And
I am the eagle and serpent of
the Aztec civilization.

n54 Juan Armanda Alegria, Psicologia de las Mexicanas (2d ed. 1995).
n55 See generally Sandra Messinger Cyress, La Malinche in Mexican Literature from History to Myth (1991); Adelaida R. Del Castillo, Malintzin Tenepal: A Preliminary Look into a New Perspective, in Essays on la Mujer (Rosaura Sanchez & Rosa Martinez Cruz eds., 1977).
n58 See Gloria Anzaldua, Borderlands: La Frontera: The New Mestiza (1987), (concluding with belief that la diosa, Aztec goddess figure, will "life us," presumably our salvation from capitalism, heterosexism, sexism and racism).
n59 Guerra, supra note 31, at 357; see also Anzaldua, supra no 58; Cherrie Moraga, Loving in the War Years: Lo que Nunca Paso por Sus Labios (1983).
n60 See Border Theory: The Limits of Cultural Politics (Scott Michaelsen & David E. Johnson eds., 1997) [hereinafter Border Theory] (critiquing Gloria Anzaldua and other writers using border, borderlands and border crossing metaphor in developing theories, and pointing to contradictions embedded in the various applications); Paula M. L. Moya, Chicana Feminism and Postmodernist Theory, in Signs (forthcoming) (arguing that: "If we choose the realist approach, we will work to ground the complex and variable experiences of the women who take on the identity 'Chicana' within the concrete historical and material conditions which they inhabit.") Moya continued:

Rather than a figure for contradiction or oppositionality, the identity 'Chicana' would be a part of a believable and progressive social theory. I would like to suggest that it is only when we have a realist account of Chicana identity, one the refers outward to the world we live in, will we be able to understand what social and political possibilities are open to use, as Chicanas, for the purpose of working to build a better society than the one we currently live in.

n61 The emphasis on a genealogical construction of race in defining mestizo in Chicano literature is based on U.S. racial formation rather than the one developed in most Latin American contexts where constructions were influenced by culture, class, and other social factors. See Clara Rodriguez & Hector Cordero-Guzman, Placing Race in Context, 15 Racial & Ethnic Stud. 523 (1992). In addition, race is often viewed as an "individual marker" in the Caribbean and Latin America, while in the U.S. race is always assumed as a group marker that determines your reference group. See Lawrence Wright, One Drop of Blood, New Yorker, July 25, 1994, at 46-55.

n62 Migration of European men outnumbered the migration of European women and families. This sex ratio may have attributed to the kinds of relations between the races and the conceptions of race that developed in Latin American. The offspring between Indian and black women that served as mates for European men were in some cases recognized as members of the criollo class and inherited all the privileges attached to this racial class. See Elinor C. Burkett, In Dubious Sisterhood: Class and Sex in Spanish Colonial South America, 4 Latin Am. Persp. 18, 18-26 (1977).

n63 See Benjamin Alire Saenz, In the Borderlands of Chicano Identity, in Border Theory, supra note 60, at 86. Saenz noted: "Anzaldua, unfortunately, falls into the
dualistic thinking she so eloquently critiques. To categorize the world into 'European' and 'indigenous' and try to bridge those two worlds under mestizaje is to fall squarely into 'dualistic' thinking that does not do justice to the complex society in which we live." Id.

n64 Id. "The material conditions that give rise to the Aztec's religion no longer exist. Anzaldua's language, her grammar, her talk are ultimately completely mortgaged to a nostalgia . . . ." Id. at 86-87.


n66 There is no acknowledgment of Mexico's history of slavery or the complex hierarchy arising from intermarriage between Spaniards born in Spain to those born in Mexico, between Spaniards and Indians, Spaniards and mestizos, Spaniards and mutalos, Indians and mutalos.

n67 Indigenista is based on a cultural deterministic model much like the one proposed by cultural anthropologists, Florence Kluckhohn and Fred L. Strodbeck, conducting research in a New Mexican village in 1950s. See Florence Rockwood Kluckhohn, Variations in Value Orientations (1961). Although their study consisted of less than fifty individuals, their research findings were applied to Mexican Americans throughout the U.S. The history of Mexico is multicultural and the simplistic claims of indigenous or mestizo roots erases the incredible diversity of the country and denies the existence of a meaningful culture undergoing the daily transformations to meet the material demands of daily life.

n68 See Saenz, supra note 63, at 85.

n69 The movement has only superficially links to American Indians or indigenous communities in Mexico.

n70 Saenz, supra note 63, at 85-86.

n71 Frantz Fanon, The Wretched of the Earth (1963).


n73 The controversy over the commemoration of the Spanish conquest in New Mexico highlights the different legacies left from conquest for Don Juan de Onate and soldiers' descendants and the residents of Acoma Pueblo. Commemorations symbolize an attempt by his descendants and other Spanish-Mexican people to reclaim New Mexico away from the growing number of Anglo influences throughout the state; whereas Onate remains the murder of Indians. See New Mexico Monument Conjures Bitter Legacy, Philadelphia Inquirer, Apr. 17, 1999, at A1; Bridges Needed to Unite Cultures, Denv. Post, Apr. 4, 1999, at G2; Conquistador Statue Stirs Hispanic Pride and Indian Rage, N.Y. Times, Feb. 9, 1998, at A10.


n76 See Richard Henry Pratt, Battlefield and Classroom: Four Decades with the American Indian, 1867-1904 (1964); see also William Heuman, The Indians of Carlisle (1965).

n77 Elizabeth M. Iglesias & Francisco Valdes, Afterword -Religion, Gender,

n78 See Luna, supra note 5.

n79 See Padilla, supra note 5 (portraying Chicanas and Latinas as having specific cultural tendencies "to accept their fate of suffering with dignity").

n80 See Terry Rey, "The Virgin's Slip Is Full of Fireflies": The Multiform Struggle over the Virgin Mary's Legitimierende Macht in Latin America and Its U.S. Diasporic Communities, 33 U.C. Davis L. Rev. 955 (2000).

n81 See id. After the Mexican American War, the archdiocese changed hands and Archbishop Lamy assumed the post. The conflict between the Archbishop and local priests who allowed parishioners to continue their indigenous practice is documented as part of the history of New Mexico. See generally Ray John De Aragon, Padre Martinez and Bishop Lamy (1978).

n82 See Rey, supra note 80.

n83 Iglesias & Valdes, supra note 77, at 509. The case of the Mothers of East L.A. is an example of how a group of Latina activists experienced tension within one Catholic parish; they sought affiliation with another parish and developed a nonprofit community-based component direct by their concerns. See Mary Pardo, Working-Class Mexican American women and "Voluntarism": "We Have to Do It!", in Women and Work: Exploring Race, Ethnicity, and Class 204 (1997).

n84 Iglesias & Valdes, supra note 77, at 582.

n85 See Cho & Westley, supra note 2.

n86 See Gott, supra note 4.

n87 See, Timothy A. Canova, Global Finance and the International Monetary Fund's Neoliberal Agenda: The Threat to the Employment, Ethnic Identity, and Cultural Pluralism of Latina/o Communities, 33 U.C. Davis L. Rev. 1547 (2000) (suggesting areas of application that LatCrit theory may have to the international economic system).

n88 For example, Recovering the U.S. Hispanic Literary Heritage is a national project to search for literary expressions created by Latino in the U.S. from colonial to contemporary times. The project is housed at the University of Houston, and works and collections have been published by the Arte Publico Press.

n89 See Emilio Zamora, Sara Estela Ramirez: Una Rosa Roja En El Movimiento, in Mexican Women in the United States Struggles Past and Present (Magdalena Mora & Adelaida R. Del Catillo eds., 1980).


n93 See Notable Hispanic American Women 405-06 (Diane Telgen & Jim Kamp eds., 1993).

n94 Id. at 398; Matt S. Meier, Mexican American Biographies; A Historical Dictionary 1836-1987, at 218 (1988).

n95 See Ernesto Galarza, Merchants of Labor: The Mexican Bracero Story; An Account of the Managed Migration of Mexican Farm Workers in California, 1942-1960 (1964); Ernesto Galarza, Spiders in the House and Workers in the Field. (1970); Ernesto Galarza, Tragedy at Chualar: El Crucero de las Treinta y Dos Cruces (1977).

n96 Iglesias & Valdes, supra note 77.

The argument against cultural nationalism and identity issues that I make here is not exclusive to Chicano and Chicana Studies or Latina/o Studies for that matter, but dominates the current debates over the direction of ethnic studies. This controversy was featured in a recent New York Times, featuring two spokesmen representing differing perspectives: Manning Marable and Henry Louis Gates. See A Debate on Activism in Black Studies, N.Y. Times, Apr. 4, 1998, at A13, A15. The titles of their individual essays clearly state their position. Manning Marable's essay was entitled A Plea That Scholars Act Upon, Not Just Interpret, Events and Henry Luis Gates' essay was entitled A Call to Protect Academic Integrity From Politics. Gates calls for "the distinction between scholarship that is political and politicized scholarship" whereas Marable makes the distinction between the "intellectual tradition that has generally been 'descriptive,' 'corrective' and 'prescriptive'" and the one he advocates which would continue to link scholarship with the goal of improving the lives of black people. While Manning Marable and Henry Louis Gates are nationally recognized scholars, they are certainly not the first or only ethnic studies scholars and educators to engage in this debate. See Juan Gomez-Quinones, On Culture (1977); The State of Asian America: Activism and Resistance in the 1990s (Karin Aguilar ed., 1994).