Foreword

The fifth annual Latina/o critical legal theory ("LatCrit") conference was held on May 4-7, 2000 in Breckenridge, Colorado. The mountain resorts of Colorado present an almost metaphorical location for a critical theory meeting. The majesty and apparent harmony of the natural environment contrast so vividly with the cotidian conflicts in the human environment, and the elites exhibit a banal n1 oblivion to the vicious racial and classbased violence that provide the grist for critical theorists. These resort locations dedicated to a lifestyle of money, recreation and pampering and infused with the invisible oxygen of privilege offer a space for theoretical work that is rich with conflicting histories, untold stories and inequalities, both obvious and subtle. As with all academic meetings, fiscal considerations influence the choice of meeting location, but with LatCrit conferences great care goes into making the decision about where to hold the conference because of the relationship between the place/space and the interactions that will occur during the meeting.

I. The Process of "Constructing" a LatCrit Conference

Within the LatCrit scholarly movement, there is a planned continuity from one year's program to the next. For example, the Planning Committees over a span of years intentionally have some of the same [468] participants. Professors Roberto Corrada and Nancy Ehrenreich helped to plan the LatCrit IV conference before they undertook a central role in organizing the LatCrit V meeting in Colorado. The planning process is also systematized through a set of organizational practices that have been developed over several years and that have become emblematic of the LatCrit community of scholars. These organizational practices are compiled in a LatCrit conference manual developed for use by the Planning Committees. These practices include 1) a rigorous group interaction that results in a substantive outline detailing the themes and dimensions of each plenary panel or roundtable; 2) the careful consideration that is given to the identity characteristics and the perspective of each panel or roundtable participant; and 3) the collaborations that occur initially between the Planning Committee and the conference speakers and later between the editors of the symposium volume and the authors of the written works.

The process of planning the intellectual program begins with extended conversations among the Planning Committee about the connection of the chosen theme to those of prior conferences, i.e., why is the chosen theme of specific importance to the further growth of the LatCrit intellectual enterprise and the scholarly community? What cross-disciplinary or intergroup or transnational opportunities does the theme offer? What are the links between the theme and the local region and the concerns of the local Latina/o
II. Constructing a LatCrit Meeting with a Focus on Class and Colorado communities in which the meeting is planned? Such queries insure that there will be continuity over time. Thus, each conference develops a central theme while at the same time creating space for presentations by scholars and activists from the area who are able to connect the struggles of the local Latina/o communities to LatCrit theory.

Because each LatCrit conference seeks to advance the effort of creating an intellectual discourse as well as nurturing a scholarly activist community, the process of planning the conference has been carefully theorized. The techniques for planning the conferences are based on academic work that provides a rationale for the choices that are made in the construction of a LatCrit meeting. These techniques are a conscious attempt to take critical theory seriously by applying it in everyday situations. For example, Professor Robert Chang developed the concept of "subject position" to explain that the perspective, standpoint or approach of an author or theorist regarding the topic or issue being addressed has significance. Consequently, each Planning Committee carefully considers the "subject position" of panel participants to try to ensure discussions from a range of diverse, albeit progressive, perspectives. Also, each LatCrit project endeavors to bring new voices into the discussions and to explore issues from fresh perspectives.

Early each year the Planning Committee mails out registration materials for the upcoming meeting usually held in early May to coincide with the Cinco de Mayo holiday. Like with other conferences, the materials provide information on the timing, location and travel arrangements for the meeting. Unlike other conferences, the Substantive Outline articulates a highly detailed conceptualization of the objectives for each portion of the program. Each participant is encouraged to read the Outline in order to prepare in advance for the discussions that are to take place.

The process by which a LatCrit conference is planned also involves a close collaboration between the Planning Committee and each of the plenary panels. One or more members of the Planning Committee will have a series of conference calls with each panel to discuss the overall theme of the meeting and the planned presentations. Finally, meeting participants, whether they have been invited speakers or not, are asked to submit essays for publication in a symposium volume. This collaboration over many months and involving dozens of people, all paying attention to LatCrit theory and past practices, results in the written work that you are now holding.

II. Constructing a LatCrit Meeting with a Focus on Class and Colorado

The title of this Foreword "Class in LatCrit: Theory and Praxis in a World of Economic Inequality" borrows the theme of the program for the Colorado conference. The Planning Committee's purposes in focusing on the issue of class were 1) to deepen prior conversations about the economic inequalities and the material deprivations that are experienced by the Latina/o communities and other subordinated groups, and 2) "to begin new explorations of social and legal issues relevant to Latinas/os in intergroup and transnational contexts." While economic issues have been theorized, discussed and written about in past LatCrit conferences and the resulting symposia that have appeared in various law reviews, the year 2000 meeting sought to center the topic of class in each of the plenary panels and encouraged all presenters to consider the economic dimensions of the particular topics being analyzed. The main objective of this Foreword is to draw attention to the sustained discussion of the issue of class and the ramifications of wealth and income inequalities in the written contributions in this symposium volume. A related objective of this Foreword is to echo Professor Kevin Johnson whose Introduction to the symposium volume for LatCrit IV exhorted future participants to "seriously engage the existing scholarship, study the literature and acknowledge previous contributions." This Foreword concludes with a description of a new project called "Maestros" that seeks to develop a collaboration between professors and students in law schools and schools of education with K-12 teachers, students and community activists. As a founder and participant in Maestros, I am attempting to create mechanisms by which we make LatCrit Theory and Practices accessible to a wider audience, particularly K-12 teachers of Latina/o students.

A. Political Economies of Subordination in LatCrit Perspective: "Piercing the Veils" of Class and Identity in Traditional Curricula

A focus on class issues creates the opportunity to broaden LatCrit Theory to areas of law such as tax law and policy that have not been subjected to an intensive analysis from the multiple points of view of the Latina/o communities and other subordinated communities. A focus on class also allows us to reflect on one of the questions that Professor Guadalupe Luna obliquely poses in her article, "La Causa Chicana" and Communicative Praxis, namely, whether LatCrit is sufficiently grounded in its professed objective of producing transformative knowledge--knowledge that improves the material conditions of Latina/o communities and other impoverished peoples.
Professor Luna's article is a fine example of what Professor Johnson is encouraging other LatCrit scholars to do. Specifically, she takes his suggestion about reading, studying and citing other LatCrit works and provides us with a construct that she borrows from another discipline called "communicative praxis" referring to "the construction of meaning, projects, visions, values, styles, strategies, and identities through the interaction with and against another." Professor Luna then proceeds to give us an example of communicative praxis by reading LatCrit texts against Chicana/o Studies and, more particularly, by reading LatCrit against the history of Chicana/o Studies in Colorado. She counsels LatCrit theorists to learn from the experiences of Chicana/o scholars who organized NACCS, the National Association of Chicana/o Studies, and to be aware of those scholars and activists who came before and who have faced some of the same challenges that LatCrit currently faces, especially the need to make scholarship transformative.

Professor Alice Abreu provides a superb example of weaving traditional legal analysis with LatCrit perspectives and methodologies. In her article, Tax Counts: Including the Money Areas of the Law, Professor Abreu convincingly demonstrates why it is important for LatCrit and other progressive theorists to develop what she terms "a second generation of critical analysis" -the areas associated with business, tax policy, money, and economic wellbeing. Her paper, written in an accessible style for tax novices, examines how power is allocated (and how hierarchies are reproduced) through the design of taxation systems. Her analysis of income and tax burden distributions provides the type of data that inform and particularize a critical analysis of class hierarchies in the US.

Professor Alfredo Mirande also employs personal narrative in his essay, Alfredo's Mountain Adventure: The Second Chronicle on Law, Lawyering and Love. Professor Mirande uses an epistolary format for his series of chronicles--letters to an imaginary colleague named Fermina Gabriel. He uses his letters to Fermina to reflect on the Colorado conference--raising meaningful, class-conscious questions about the locations in which LatCrit conferences are held and he opines about the isolation of the meetings from Latina/o communities. He also examines other aspects of the meeting but his chronicles leave this reader with more questions than answers and with a sense of disquietude rather than clarity.

One of the most exciting developments in this cluster of articles is the interest in LatCrit Theory being shown by students and scholars in graduate schools of education. The essays contributed by Anita Revilla, a graduate student at the UCLA Graduate School of Education and Information Studies and by Professor Daniel Solorzano and Tara Yosso, also a UCLA graduate student, accelerate a process of disciplinary cross-fertilization with ideas, vocabularies, and bibliographical sources flowing in several directions.

Anita Revilla's article A Theoretical Dialogue Between Two Friends: Critical Race Theory, Critical Pedagogy, and the Move Toward LatCrit brings the concerns of educators to the attention of the LatCrit community. Employing the device of a colloquy between two fictional friends, a Latina and a Latino, Revilla draws a comparison between the approaches...
Critical pedagogy has also been highly influenced by the work of Paulo Freire and other South American activist intellectuals and their work often draws on examples from that region of the world. This is a different but equally compelling reason for LatCrit with its geographic orientation towards Latin America to form academic alliances with those working in critical pedagogy.

I reach the conclusion from Revilla's title that, with the publication of this essay, her future work will move towards LatCrit. Her article, like of Professors Solorzano and Yosso, draws on work produced within Critical Race Theory although there is some overlap with LatCrit Theory in that Richard Delgado, Ian Haney Lopez and many others have connections with both genres of critical theory. This distinction is important because LatCrit's roots within Critical Race Theory have been rigorously traced and the differences in their respective approaches carefully theorized. Although it is likely that these historical differences are of great moment to those of us who have been part of this process and who see LatCrit as our academic home but of considerably less urgency, even when apparent, draws to scholars in other disciplines.

Professors Solorzano and Yosso's article refers to LatCrit Theory although most of the work cited is from Critical Race Theory. Because I think their fusion of critical pedagogy with Critical Race Theory is so successful, my hope is that more LatCrit scholarship will be woven into their analyses in future work.

The work by Professors Solorzano and Yosso points the direction for using our classrooms and our roles as educators as locations for theoretical inquiry. Like Anita Revilla, Professors Solorzano and Dr. Yosso bring the tensions of academic work and the ambiguities associated with testing, grading and competing for tenured positions into the field of critical analysis. Also, the task of developing a critical consciousness in their students, most of whom will become K-12 teachers, appears to be a more urgent preoccupation for critical pedagogues. It may be the case that many of us who work in law schools can opt out of this aspect of teaching, especially when we are assigned to the traditional first year courses.

As I describe in the third section of this Introduction, I am currently working with a group of critical pedagogues including Dr. Marcos Pizarro, another of Professor Solorzano's students, to address the educational needs of Latina/o youth and, from my perspective, make LatCrit Theory more accessible to K-12 teachers and students.

B. Comparative Racializations

The name for this cluster of articles is taken from the first plenary panel of the Conference and calls our attention to the ways in which the social construction that is race takes different forms among different groups during different historical periods. This cluster of articles invites the reader to make comparisons in the way that the boundaries of different racial categories are drawn with respect to the normative category of Whiteness and the ways in which the dominant society engineers its race relations with the different subgroups, especially Latinas/os. These articles prompt us to ask: What does it mean for South Asians to be "Aryan" or "white"? Is it equivalent to the "white" category that applies to Latinas/os under federal regulations? How do we understanding the vocabulary of the Model Minority when applied to South Asians and to Cubanos/as under very different conditions? What does the racing of South Asians teach us about the racing of other racial subgroups, including Latinas/os? Are we to interpret the insertion of the ambiguous Latina/o imagery associated with a Ricky Martin or a Cristina Aguilera or the hypersexualized "J-Lo" into mainstream popular culture as a weakening or an emboldening of the racing technologies of a hegemonic dominant culture?
In reviewing The Karma of Brown Folks by Vijay Prashad, n43 Professor Tayyab Mahmud has produced another article n44 that fuses post-colonial theory with a cultural studies approach to demonstrate a truth that has been repeatedly borne out by the inseparability that characterizesLatCrit projects: namely, studying subordination and exclusion in a particular location and in a given historical period elucidates subordination and exclusion in other places and times. In other words, all racial subgroups gain an understanding of the structures, vocabularies, and power-knowledge forces of race, racing and racism by understanding the application of these structures, vocabularies and forces to a specific racial subgroup. And more specifically, Latina/o subgroups can gain a deep understanding of their own race-based subordination through Professor Mahmud's compelling analysis of the engineering of various identities for South Asians by succeeding hegemons—first the British during the Raj and later the U.S. through its labor market and immigration policies. Indeed, our understanding of the racing of any given group is deepened by reading with a consciousness that this particular racing is at once similar and different for other groups. Professor Mahmud invites this dual mindedness by often reminding us of how the racing policies and practices against the South Asians had corresponding effects on other people of color, for example, African Americans with whom South Asians were more favorably compared in their rendering as a Model Minority n45 and on Mexican women who were available as non-white brides for South Asian men within the anti-miscegenist social conventions of the late 1800's. n46 [*477]

Professor Mahmud notes that Professor Prashad emphasizes that the state's engineering of the Model Minority identity for the "desis," a self-chosen term that means "those from the homeland" rests on two images: 1) hardworking high achievers and 2) spiritual and pliant. n47 This imagery is then used as "another weapon to assign degradation of African Americans to their supposedly inherent incapacities and deficiencies." n48 It has also been used against Mexican Americans in the pervasive stereotypes of the lazy, immoral Bandido. n49 One can't help but remark on the self-mocking irony of a whitesupremacist system that subjugates black and brown peoples exploiting them mercilessly in farms, factories, fields, mines, and railroads and they respond with patriotism, economic productivity, and a genuine devotion to God and church. This same system then creates a hierarchy among them by labeling only some as hard-working and spiritual.

Both Professors Mahmud and Hernandez-Truyol explore this Model Minority discourse to expose its utility in advancing the interests of the dominant White society and its inconsistencies and unevenness even when being applied to racial subgroups that fall in and out of favor, such as South Asians or Cubans. In On Becoming the Other: Cubans, Castro, and Elian--LatCritical Analysis, n50 Professor Berta Esperanza Hernandez-Truyol examines the treatment of Cubanas/os as a result of the Elian Gonzalez episode. Professor Hernandez-Truyol is also analyzing "desis," to borrowing Professor Mahmud's vocabulary for those who yearn for the homeland, if we think of Cubanas/os as a different group of displaced homelanders who like South Asians are treated as a Model Minority. Both Professor Mahmud and Professor Hernandez-Truyol are explicit about the class valences of this label of Model Minority; n51 the purported over-achievement that the label implies masks the economically discriminatory immigration policies that the U.S. government has employed for South Asians and Cubanas/os. U.S. immigration permitted educated professionals to leave India, Pakistan, Cuba and other impoverished lands, yielding benefits to the selected emigres and to the U.S. But unlike the South Asians, Cubanos/as merit the label as they primarily advance the political interests of the dominant society and its racial interests only secondarily. In this way, these two articles illustrate the rationale for placing the articles within a named cluster (e.g., "Comparative Racializations") within the symposium volume: the reader gains insight process [*478] by reading them separately and comparatively. Employing a tone of irony, Professor Hernandez-Truyol argues that the favorable treatment of Cubanos/as based on their usefulness as an anti-Communist symbol during the Cold War and the perception of Cubanas/os as adhering to the rule of law, having strong family values, and professing conservative political leanings n52 was not stable enough to withstand public dissent with the US government. Their Model Minority status was quickly jeopardized once the majority of Cubanos/as (and the differences within the community become obvious with Professor Hernandez-Truyol's interviews with other Cubano/a law professors) took an unpopular political stance with respect to the immigration rights of Elian, an unaccompanied minor within the U.S. borders. n53 The result, she asserts, is the Otherizing of the Cubana/o community by the majority and its attendant distancing once the political interests of the White majority were not aligned with respect to the Castro regime. n54 Specifically, the politico-legal system of the Congress, Courts, INS and President were willing to allow Castro to win the tug-of-war over Elian while the larger Cubana/o community was committed to keeping the child in the U.S.
Professor Hernandez-Truyol provides us with a thorough analysis of the Elian Gonzalez incident, including the case's treatment by the Eleventh Circuit Court, and in doing so, she makes at least two points of relevance to LatCrit analysis. One, the narrative that the larger Cuban/o community was acting consistently in advocating for Elian to remain in the U.S. and that the U.S. government through the INS was acting inconsistently, especially with respect to Cuban/o immigrants, in seeking his prompt return did not receive prominent exposure in the media. Two, this case is yet another demonstration of the indeterminability of legal disputes and the malleability of rule of law rationales. n55 The Cuban/o emigre community and the U.S. government have long considered the Castro regime to be an unlawful and non-democratic government and have marshaled considerable resources for its overthrow. n56 Professor Hernandez-Truyol posits that the Otherizing and essentializing of the larger Cuban/o community gained momentum once the legal system acted to return Elian to Cuba against the wishes of the community. [*479]

The next three articles in this cluster, The Accidental Crit II: Culture and the Looking Glass of Exile by Professor Pedro A. Malavet, n57 Will the Wolf Survive: Latino/a Pop Music in the Cultural Mainstream by Professor Steven W. Bender, n58 and Confessions of a White Salsa Dancer: Appropriation, Identity, and the "Latin Music Craze" by Professor Nancy Ehrenreich n59 examine the multiple ways that the majority culture uses and misuses the cultural capital of the Latina/o subgroups. An important aspect of being subordinated within a society is to be seen as belonging to an inferior culture--the language, literature, food and other identifying characteristics including the music are seen as vulgar, common and unworthy of emulation. Being subordinated can also be experienced when the majority alternatively rejects and/or appropriates the cultural production of a subgroup that is largely powerless to affect these taste preferences or to benefit on a large scale from the concomitant economic transactions. These three articles provide an in-depth analysis of this phenomenon with respect to contemporary Latina/o music.

Professor Malavet begins in a paradigmatic LatCrit way by interrogating his own positionality as a certain type of Puertoriqueno: an exile, a Ponceno, an educated man of color, a denizen of the island and the mainland, hijo de patisucio y, al fin, un patisucio racial. n60 Clearly, in choosing the term patisucio, encoded with racial and class meaning, he is signaling the interconnectedness of these two characteristics. Without using Professor Mahmud's term, Professor Malavet is also a desis, n61 a U.S. resident who yearns for his Puerto Rico homeland. This personal interrogation of identity is coupled with a careful explanation of the labels (gringo, isleno, niuyorican) that are used within various localities for and by Puertoriquenos/as both in Puerto Rico and here in the U.S. It is within that context of the personal and collective as experienced by the teller of the story that the analysis about the colonial process can be fully appreciated for its nuance and complexity. Out of this complexity comes the justification for the assertion that the current Latin music craze typified by Ricky Martin or Jennifer Lopez does not represent Professor Malavet's own musical preferences. n62 He emphasizes that music represents identity and, more particularly, popular music represents Puerto Rican identity (and identities), n63 given that different musical forms are [*480] associated with different racial subgroups within the larger Puerto Rican community.

Professor Malavet engages the work of Professors Bender and Ehrenreich, the two other authors in this cluster, and by doing so makes this notion of "comparative racializations" n64 explicit. By drawing attention to the problem (as analyzed by the three authors in this cluster) of the commodification of identities and images in the narratives of the new Latin music, Professor Malavet helps the reader understand how "the structure of [the entertainment] industry restricts the production and dissemination of authentically transformative cultural forms and events" n65 while "promoting the production of homogenized MacCulture or of hegemonic cultural stereotypes." n66

In his article Will the Wolf Survive: Latino/a Music in the Cultural Mainstream, n67 Professor Steven Bender also takes up the issue of the cultural hegemony of mainstream music but does so by focusing on the language of commercial success. n68 He carefully examines the linguistic choices by recording artists, comparing the English and Spanish language music produced by some of the leading Latina/o pop musicians. He concludes that English is necessarily the language of choice as artists become mainstream musicians. He also takes up the issue of the cultural hegemony of mainstream music but does so by focusing on the language of commercial success. n68 He carefully examines the linguistic choices by recording artists, comparing the English and Spanish language music produced by some of the leading Latina/o pop musicians. He concludes that English is necessarily the language of choice as artists become mainstream because of "the unwillingness of the American public to accept Spanish as a legitimate language of mainstream communication." n69 For this reason, commercial success becomes cultural hegemony as cultural appropriation. n70

Commercial constraints limit what can be sung about. Thus, Professor Bender interprets popular Latino music as a particularized mis/representation of Latina/o culture with its emphasis on artists who are "bilingual, young, attractive ('eye candy'), light-skinned, middle to upper class and heterosexual." n71
They partake of "the good life," n72 which means the identities and entitlements available to the elites of the upper middle class. Only Selena and Santana acknowledge the widespread poverty that afflicts Latina/o communities. n73

Professor Bender takes us through an analysis of the specific ways that Latina/o artists construct their identities (and, by extension, the identities of their respective communities) n74 through their artistry—e.g., the sexist and hetero-normative content of the lyrics, the use of English in place of Spanish, etc. We are moved to ask whether this mainstreaming of Latina/o music isn't another, perhaps more seductive, cultural intervention that further subordinates the Latina/o communities. As much of LatCrit analysis demonstrates, this mainstreaming of Latina/o pop music is not liberatory or subjurgatory; it is not one or the other, rather it is both at once. It represents a weakening of stereotypes, an acceptance of cultural differences even as it enforces linguistic and lyrical conformity as the price for success.

Professor Nancy Ehrenreich begins her article by acknowledging her positionality as an Angla "into salsa." n75 She engages the same issue being examined by Professors Malavet and Bender from their perspective as Latinos, namely, cultural appropriation. n76 She also joins Professors Mahmud and Hernandez-Truyol in bringing a concern about "orientalizing exploitation, n77 a concern about the Otherization of Latinas/os, a concern about exoticized stereotypes, n78 to her analysis of salsa dancing.

Professor Ehrenreich's article exemplifies LatCrit analysis that rejects either/or thinking in favor of more variegated and complex conclusions. For example, she posits choices as binary: is it appreciation or is it appropriation? n79 She then rejects such thinking as reductionist and essentializing.

She carefully shows us why the mass marketing of Latina/o music is appropriation, an unfair taking of the cultural capital of the powerless which is then rendered as something smoother, less risky, and less different—what she terms a McDonaldization. n80 Then she just as convincingly shows how the mass marketing is also cross-cultural appreciation with ancillary benefits, economic ones for the artists and, at least, modest social transformation for the larger White society. n81 Professor Ehrenreich then offers us an extended personally revealing narrative about her own experiences with salsa dancing as evidence of the transformative possibilities of cultural borrowings. n82 We are inclined to agree with her about this potential; however, Professor Ehrenreich begins her narrative by telling us that she was unusual among her circle of White friends in frequenting Latin dance clubs. n83 We can assume that even fewer Whites, unlike Professor Ehrenreich who, after all, shares LatCrit sensibilities, are likely to avail themselves of the opportunity to learn about Caribbean racial tensions, the Mexican political system, or immigrant conditions while salsa dancing. n84 On balance, the potential for social transformation is, unfortunately, largely inchoate. Nonetheless, Professor Ehrenreich's article makes a strong and convincing argument that having exposure to marginalized cultural experiences, in her case Latin dance, can provide a window into another set of experiences that define aspects of social hierarchy.

C. Post-colonial Relationships and LatCrit

If the conquest of peoples and nations in the last century was accomplished and maintained through militaristic force, the conquest during this first part of the next millennium is being extended through transnational capitalism and other forms of globalization. n85 The United States now occupies unchallenged domination in every part of the globe through its control of capital, munitions, information and technology. The articles in this cluster examine different aspects of the post/colonial relationship by asking some probing questions: can the most subordinated and impoverished subjects exercise choice and agency when deciding to use their sexuality as an economic resource? Do LatCrit academics play any role in supporting the agency of the sexual subaltern, "a market actor who understands the economic and other opportunities available to her in other parts of the world"? n86 If certain classes have acquired control of the mechanisms of state violence for their own colonial and imperial ends and have thereby distorted the purposes of the nation, what role do LatCrit theorists have in dismantling the power of these violence-prone classes? More specifically, if LatCrit theory fails to link cultural and racial tensions with the political and economic relations imposed by transnational corporate capitalism, doesn't LatCrit risk "remaining abstract and consequently trivializing and obscuring the reality and effect of material inequities." n87 What is the relation of LatCrit theory to revolutionary theories that do not eschew violence, such as those propounded by Marx or Fanon, or, more recently, by Walter Benjamin or Charles Taylor? n88 What is the relation of postcolonial theory to LatCrit theory about the U.S. colonies, such as Puerto Rico? In other words, are the discursive and analytical tools of the postcolonial theorists different from those of the LatCrit theorists? Are postcolonial theory and LatCrit theory about U.S. colonies, such as Puerto Rico, similar in their focus on space/place as linked to structures of subordination and exclusion within socio-legal systems?
In Post Colonial Economies of Desire: Legal Representations of the Sexual Subaltern, n89 Professor Ratna Kapur uses the narrative and imagery in the Indian film "India Cabaret" to introduce her bold analysis of the ways in which Indian sex workers are represented in cultural images and how such images are used to justify the need for legal regulation, especially in antitrafficking legislation proposed by Western feminists. n90 Professor Kapur uses both postcolonial and feminist theory to shatter our stereotypical and moralistic perceptions of sex workers both in past historical and contemporary periods. Her discussion of "home" and "family" as privileged and uncontaminated ("uncontaminated by the colonial encounter") n91 cultural spaces n92 offers some provocative insights into the ways that women's work raising families and homemaking can be put into the service of those who would restrict women's rights, in and out of the home. While her focus is India and the Hindu Right, her analysis has applicability outside of India and should be of interest to those of us who see similar manipulation of Latinas by organized churches n93 and the political Right in the U.S. The policing that the global HIV/AIDS crisis is foisting on many communities of color, in and out of India, increases the criminalization of certain behaviors (e.g., those that place people "at risk") and increases the surveillance of certain populations (e.g., sex workers). n94 The challenge for feminists is to promote treatment and prevention programs for substance abuse and HIV/AIDS without falling into the grasp of religious and ideological zealots.

This article is particularly appropriate in a symposium that is dedicated to issues of class in LatCrit theory and practice. Professor Kapur clearly [*484] demonstrates that the immigration policies of the U.S. as articulated in antitrafficking legislation closes the borders to workers other than the most strictly defined victims. n95 Anti-trafficking legislation must be understood as a labor market control benefiting the interests of labor importing countries. For example, the U.S. excluded from protection the large number of women "who are in or know that they will be going into the sex industry, but are not accurately informed about the conditions of work or the amount of money they will receive." n96 Through this careful analysis, Professor Kapur brings us to the most stereotype-shattering portion of her article from my point of view, namely, the reconstitution of the sex worker as a willing traveler, a border crosser, who "migrates, including for sex work, in search of increased autonomy and economic independence." n97

Many of us in critical theory have been using borders, literal and metaphorical, in our work, n98 and our understanding of this diasporic traveler must be informed and, when necessary, re-framed in light of Professor Kapur's compelling analysis. She respects the agency and informed self-interest being exercised by these women, even when they travel in order to work in the sex industries. n99 Professor Kapur does not accept that economic deprivation robs women of their ability to choose; instead, she argues that women, some without education and some with graduate degrees, can decide to leave their country of birth and travel to other parts of the world to improve their economic conditions. n100

Professor Kapur concludes by rejecting what she terms "sexual negativity, which perpetually addresses sex and sexuality, especially in the third world in the language of pain, anguish, abuse and exploitation." n101 This "recuperation of desire offers the possibility of a more liberatory and emancipatory politics within the third world." n102 The challenge for LatCrit scholars is to extend Professor Kapur's superb analysis to the particularities of Latina/o communities because, in my opinion, their sexual repression by church and state ideologies and the resulting suppression of sexual desire has been under-analyzed in LatCrit theory.

In Postcolonialism and the Question of Nation-State Violence, n103 Professor San Juan proffers an analysis of violence that poses a challenge for [*485] LatCrit theorists. In examining the link that is often made between nationalism and state violence, Professor San Juan provides a spirited critique of postcolonialist thinking by such icons as Homi Bhabha who "resort to a questionable use of the discursive perforativity of language to ascribe a semiotic indeterminacy to the nation, reducing to a formula of hybridity and liminality n104 the multifarious narratives of nations/peoples." n105 If so, doesn't this criticism also apply to LatCrit theory, especially given the way in which such linguistic jingles as "One nation under God," "manifest destiny" and "America" have come to be used ideologically to mask the conquest and domination of land and peoples that has been the nation-building project of the U.S. But Professor San Juan would answer that while such debunking is necessary, it doesn't go far enough because it fails completely in undermining the violent power of the nation-state. n106 He goes on, "the source of political violence . . . is the competitive drive for the accumulation in the world market system where the propertied class is the key actor mobilizing its symbolic capital made up of ethnic loyalties and nationalist imaginaries." n107

Professor San Juan is particularly disparaging of culturalist theorists for producing analyses that are abstract and trivial. n108 I fear, though, that the charge he makes against postcolonialists is one that he would
also apply to much of LatCrit theory that also fails to expose the workings of corporate capitalism and its corresponding political effects. n109 Professor San Juan's project is the revivification of a Marxist/Fanonian approach to liberation theory that fuses social justice with class struggle. n110 Using the work of Walter Benjamin, he brings the analysis into the sphere of law by linking justice and communication as the antidote to state violence as differentiated from nation-related violence n111 but questions the efficacy of "the reconciling charisma of language" in the face of internecine conflicts throughout the world. n112 Professor San Juan concludes by using Charles Taylor's formulation of violence as a struggle for recognition and the recovery of dignity. n113 Warriors are locked in an embrace of mortal danger to both. "In this struggle, the possibility of violence mediates the individual's discovery of his finite and limited existence, his vulnerability, and his need for community." n114 However, appealing this [*486] image might be, Professor San Juan also rejects it given the reality of nuclear weapons in the hands of the possessive/acquisitive classes which he identifies as the origin and locus of state violence. n115

With History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896-1900 n116, Professor Sylvia R. Lazos Vargas has made another important contribution to the LatCrit project. Professor Lazos has undertaken a complex task, viz., using original documents she has set out to excavate the racial motivations of the diplomats who negotiated the Treaty of Paris of 1898 ending the Spanish American War. This historical excavation is embedded within a larger project of using the analytical tools of LatCrit theory and Critical Race Theory to examine the possibilities and limitations of cross-disciplinary scholarship.

Professor Lazos accomplishes a number of things with this article. First and foremost, her historical account of the events surrounding the Treaty of Paris of 1898 and the expansion of the U.S empire to include Hawai‘i, Philippines, Guam, Puerto Rico and Cuba is an excellent example of traditional legal research with extensive documentation from original sources. n117 She also demonstrates why it is important to have scholars in the academy who are able to bring their personal experiences to bear on their research. In fact, I would assert that this article is evidence of why it is important to have Latinas in the legal academy to produce this kind of positioned analysis. Professor Lazos enacts a rationale for this contested assertion as she examines the historical accounts of this period from a racialized perspective. n118

Professor Lazos is particularly effective, for purposes of this symposium, in providing an analysis that is explicitly grounded in LatCrit methodology and sources. For example, she is careful to show that the Spanish American War teaches us important lessons on about a number of LatCrit themes: anti-subordination, interracial coalition-building, the racialization of specific populations of Latinas/os, and racial and disciplinary positionality. n119 Finally, using a positionality analysis, she examines her hypotheses going into this research and explains why she rejects the central premise of her original inquiry about the racial motivations of the Treaty of Paris negotiators. n120 [*487]

Both Professors Lazos and Venator's articles have been included in this cluster on post-colonial relationships, but their articles should be differentiated from those written by Professors Kapur and San Juan. These latter articles fall within the genre that is referred to as Postcolonial Theory, with its shared vocabulary (i.e., subaltern, third space, settler societies, etc.) and established scholars (Gayatri Spivak, Edward Said, Homi Bhabha). Professors Lazos and Venator, on the other hand, do not write within this genre but do write about the subject of post/colonial relationships, specifically looking at the mechanisms, legal and political, that were used to acquire sovereignty over Puerto Rico's land and peoples. n121

In Race, Space, and the Puerto Rican Citizenship, n122 Professor Charles R. Venator Santiago, while agreeing that citizenship for Puerto Ricans was purposely obfuscated by racist ideologies, contends that this particular citizenship must be understood within the liminality of space and geography. n123 He rejects the analysis of Rogers M. Smith n124 that the ambiguities of Puerto Rican citizenship resulted exclusively from the racism of the justices at the turn of the century. From the Foraker Act of 1900 forward, this variety of Puerto Rican citizenship, he argues, was neither that of colonial subjects nor that of second class citizens, such as women who could not vote; neither a citizen with rights nor an alien with specific constitutional protections. n125

Professor Santiago asserts that the decisions from the early 1900's when the Congress and the Courts were defining the boundaries of Puerto Rican citizenship must be understood within a notion of spacial specificity--that persons with connections to different places would be treated differently. For example, under Article IX of the Treaty of Paris, n126 the document that formalizes Puerto Rico as a U.S. Colony, persons from Spain would be treated differently than those from Puerto Rico. n127 Professor Santiago, however, is not talking only about geography; he is also using
The legal categories (citizen, alien) had to be deformed (not-citizen and not-alien) in order to allow for this ambiguous status to be imposed on Puerto Ricans, and this deformation creates what he calls this "liminal juridical space." n129

The articles in this cluster, while not centered on issues of class and economic inequality, elucidate the manner in which the U.S. has acquired and maintained colonial relationships with the Philippines, Hawaii, Puerto Rico, and other countries such as Panama and Cuba. Colonial histories are crucial to our understanding of regional and global economic patterns and trends, such as the neo-colonial effects and the hyper-concentration of economic resources within multinational corporations under NAFTA and other free trade arrangements. The subversion of constitutional freedoms represented by the arbitral decisions protecting corporate capital, especially through the use of the "takings" doctrine, is only one example of the re-distribution of wealth upward from the most impoverished to the obscenely wealthy. n130

D. Border Crossings

Borders with their geopolitical and/or metaphorical meanings have become a signature theme in Chicana/o Studies n131, Latina/o Studies n132 and with this group of articles now in LatCrit Legal Theory. My own work has examined the geographic, n133 pedagogical, n134 linguistic and cultural, n135 racial and gendered n136 meanings of borders.

Professor Carmen Gonzalez, Maria Pabon Lopez and Juan Velasco stake out different aspects of this common theme. n137 Professor Gonzalez's article deals with geopolitical borders, and specifically with the regulation of the environment, in the free trade regime that has developed in the Bush-Clinton-Bush decades. n138 Trade liberalization or "free trade" has become the bipartisan mechanism by which borders are made porous to expedite the movement of capital, know-how, products and jobs and to lessen the movement of persons from one country to another. n139 Professor Pabon Lopez's article deals with the innovative public policy responses by one Texas community to the linguistic and cultural needs of the population that resides in the U.S.-Mexico borderlands. n140 Finally, Professor Velasco's paper interprets the cinematic treatment that is given to the border and analyzes how the border as an imaginary and symbolic space can be configured either as menacing and contaminated or as nurturing and fertile with cultural potential. n141

Thus, this group of articles has several sub-themes in common. First, in reflecting on the treatment of "border people," these articles deal with those who have little political clout as people who resist in a variety of ways. The resistance is evident in their fashioning of new strategies to expose the environmental degradation caused by the West's consumption patterns. Their resistance is seen in the Ceniza, Texas legislation protecting the right to speak Spanish as a public language. Resistance is both narrative and method for Lourdes Portillo as she cinematically portrays migrants as complex and resourceful in their search for identities that capture the ambiguities of their diaspora. A second sub-theme that the three articles have in common is nature of the hegemony exerted by the United States whether in its environmental politics vis-a-vis Mexico, in the dominance of English even in regions in which the majority of the population speaks a language other than English, or in its control over cultural symbols (the dangerous and sexualized Mexican) that become the visual text of movies and other art forms. Finally, a third subtheme is the economic impoverishment of the border and its people. This is a land that is resource starved. The people who inhabit the borderlands experience the lack of job security, poor nutrition, contaminated air and water systems, with the corresponding diseases and illnesses. This sub-theme connects these articles to the larger themes of this symposium exploring LatCrit theory and praxis in the worlds of economic inequality. n144

In Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade, n142 Professor Carmen G. Gonzalez exposes how skewed most environmental analyses of trade liberalization policies, such as NAFTA, are in failing to focus on the "North's systematic and ongoing appropriation of the South's natural resources." n143 Professor Gonzalez's purpose is to reframe the arguments against free trade by taking the perspective of those who are most adversely impacted by the over-consumption of the wealthy nations; to do so, she uses the "North-South" designation that has become common in the environmentalist debates. n144 Professor Gonzalez introduces us to a vast set of resources and scholars working in this area and arguing against the ecoimperialism of the North. Her footnotes are an impressive display of scholarship and argumentation. n145

The WTO and GATT have become symbols of the global inequities and misappropriations of resources and products. The mass rallies that have been organized to oppose the WTO in Seattle, Genoa, and Washington, D.C. give testimony to the strength of the arguments against the quick passage of the free trade
legislation (the so-called "fast track" approval) pending before Congress. Professor Gonzalez's article adds to the work that has been done by LatCrits in earlier symposia on globalization and international monetary policies that are related to trade liberalization laws and practices. n146

In The Phoenix Rises from El Cenizo: A Community Creates and Affirms Latino/a Border Cultural Citizenship through its Language and Safe Haven Ordinances, n147 Professor Maria Pabon Lopez's article expands the LatCrit analysis of language-based issues by focusing on the Texas border town "that adopted an ordinance which makes Spanish its 'predominant language.'" n148 Other LatCrit articles have analyzed aspects of language regulation, and most often language prohibition, from the [*491] perspective of Spanish-speaking communities, n149 or that of the Chinese n150 and Japanese n151 communities, or with cross-disciplinary tools. n152 Professor Pabon Lopez, however, uses the Ceniza ordinance as an opportunity to consider how a predominantly Spanish-speaking community can protect its linguistic heritage by requiring that city business--its meetings and notices--be in Spanish, the language that is used by most of the people in the community. n153 This community of Mexican immigrants also enacted a Safe Haven ordinance "prohibiting the City's elected officials and employees from disclosing, investigating or requesting information concerning a resident's immigration status." n154

Here we have an example of a small border town with few public services; a community of workers who must travel daily to find low wage jobs; citizens with mostly elementary school educations. n155 Yet, these marginalized citizens are able to use the mechanisms of local government to carve a niche of safety for themselves and their families. Their ordinances are courageous acts of citizenship that preserve their ability to participate in their own governance and simultaneously to safeguard their language and cultural heritage. These ordinances are acts of praxis, collective acts of resistance by some of the least powerful members of our society. We in the LatCrit community with our economic and educational advantages have much to learn from the town of El Cenizo.

In Making Evil: Crime Thrillers and Chicana Cinema, n156 Professor Velasco asks us to consider the crossing of the U.S.-Mexico border as an act filled with metaphorical meanings. In contrasting the manipulation of the border as symbol by Orsen Welles with that of the Chicana filmmaker Lourdes Portillo, he shows how Welles infuses the border and Mexicans/MexicanAmericans with a dark, evil subtext. Welles is aware of the racist stereotypes of the day and of the region and he plays on the [*492] fears shared by his audience to give his movie its depth. n157 The audience is assumed to be complicit with Welles in the perception that the wife (played by Janet Leigh) is in danger--from her Mexican-American husband and the brooding Mexican characters on the streets of the border town. n158 Some thirty years later, the camera and the script are in the hands of the Chicana border crosser and she inverts the imagery of the border. n159 For Lourdes Portillo, "since her identity is of both lands and cultures[,] . . . the space in-between is . . . a nurturing space where ritual, tradition and culture meet." n160

Professor Velasco's article is an excellent example of the fusion of cultural studies with LatCrit theory where the tools of textual analysis (in this case cinema) are woven with the experiences and sensibilities of the Latina/o communities. n161 He is asking us to read these cinematic texts for their encoded messages about race, gender, sexual orientation, and place and space. Professor Velasco's article is enhanced because, even though he is an accomplished writer, his English has some of the irregularities of those who use English as a second language. His article is, thus, a linguistic enactment of the multiple border crossings of which he writes.

E. LatCrit and Criminal Justice

In a symposium volume that focuses on Class in LatCrit Theory and Praxis, it is particularly appropriate to feature articles on the over-policing of Latino/a youth in schools and the criminalization of Latina/o youth behavior. Such practices contribute to the excessively high drop-out rates among Latinos. Not finishing high school or pursuing vocational or post-graduate studies are the leading predictors for low socio-economic outcomes, such as low wage jobs, inadequate housing, higher incidence of divorce, poor health, etc. The 1998 high school completion rate for Latinos/as aged 25 and over was 55.5% versus the rate of 83.7% for whites. n162 Equally disturbing is the fact that 40% of Latinos/as who drop out of school do so before the eighth grade. n163 [*493]

In Police in School: The Struggle for Student and Parent Rights, n164 Professor Norberto Valdez and his colleagues Marcia Fitzhorn, Cheryl Matsumoto, and Tracey Emslie provide a case study of the police practices in Northern Colorado schools. Specifically, they provide specific examples of "high school children being questioned by the [law enforcement] officers without another adult present and without notification of parents." n165 According to the article, such practices violate federal laws, international standards, and the law of Colorado and yet go
unchecked because there is no one who is responsible for ensuring that the rights of the students (and the applicable Colorado statute extends the rights to the parents). n166 This blatant disregard of the constitutional and statutory rights of students and parents can end in tragic results. According to the authors, sometimes the students land in jail; sometimes they drop out of school in frustration with the "system;" and occasionally they take their own lives. n167

In State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Members, n168 Professor Mary Romero demonstrates that the construction of identities can have life and death consequences. As long as Latino youth are portrayed (and often self-portrayed) in newspapers, movies, hip-hop lyrics and in conventional wisdom as pachucos, chelos, n169 or gang members, they will continue to be at risk of being killed by poorly trained police.

Professor Romero's titling of her article suggests her analysis might agree with the distinction between state-driven violence and nation-driven violence drawn by Professor San Juan n170 (and emphasized by Professor Gott in his introduction to the cluster of articles on post-colonialism in this symposium). In Professor Gott's words,

San Juan distinguishes state-from nation-driven violence. The state, in this sense, is a uniquely modern institution that exists by, for, and of capital, and violence, which the state orchestrates, directly and/or indirectly serves capital's interests. Meanwhile, San Juan sees violence on behalf of the people or nation as potentially anti-imperial and anti-capitalist in its origins and effects. n172

To whatever extent there is barrio gang violence, much of it intercine, where does it fit in this dichotomy? Can the low-end violence (violence directed at those without power or capital) of the Latina/o gangs be thought of as nation-driven violence, is it not potentially anti-imperial and anti-capitalist in its origins and effects? Or is it?

I concede that I may be misreading and/or misunderstanding both Professors San Juan and Gott in their deployment of this conceptualization of violence. Nation-driven violence may be limited to situations in which the colonizer-colonized relationship is more sharply drawn (as in the Fanonian environment) than in the Latino-youth-versus-police paradigm. On the other hand, isn't Professor Romero suggesting that the disaffection and anomie of Latino youth is knowingly ignited by the state into self-annihilating violence? Isn't this violence counted on and expected by the state in its deliberate engineering of bandido/bad guy identities, in ways that are consistent with Professor Romero's analysis of the construction on the Latino criminal stereotype? n173

Professor Romero's article also accomplishes a number of other objectives that are consistent with the LatCrit project: it's an interdisciplinary fusion of the legal (interrogating policing and criminality) with history, sociology and cultural studies; a nuanced analysis of identity formation; and a fine example of theory positioned within the historical experiences of the Chicana/o communities. In examining how and why Julio Valerio was killed by the Phoenix police, Professor Romero exposes how language, immigration, poverty, alcohol, family violence and police racism intertwined with lethal consequences. n175

F. Gender, Class and LatCrit

From the beginning, LatCrit conferences have endeavored to incorporate a strong female and feminist perspective. I remember the call for a Latina caucus at the first LatCrit meeting when some of us realized that the discussion was male-dominated. When we convened, we sat in a circle, introduced ourselves and reflected on the fact that here we were--some seventeen or so Latina law professors in one room at one time. It was a magic moment. After all, we had all experienced most of our professional lives as a "Society of One." There has been an uneven record of including issues of gender and hearing the Latina voice in LatCrit projects. Therefore, this has emerged as an important reason for the attention that is paid to the makeup of each panel and program at a LatCrit meeting.

The theme of the Colorado conference focused on the connections between LatCrit Theory and issues of class. Re-considering the concept of the "feminization of poverty," a topic at the center of a gender-based analysis of class, presented the opportunity to explore the intersections and disjunctions between LatCrit Theory and feminist theory. "Feminization of poverty" is one of those phrases that enter into academic parlance and capture our attention by refracting and focusing some previously overlooked aspect of reality. Over time, however, the term itself is revealed to contribute to obfuscation. The substantive outline for the conference informs us that this discursive construct was deployed to mobilize shame and outrage against the conservative public policies and corporate greed that produced new levels of unprecedented poverty, as well as to draw attention to the way the structure of rights and obligations in American family law regimes inflicted substantial...
economic disadvantages on divorced women and the children over whom they often retained primary custody. n180

As this concept gained currency, however, it became clear that it failed to encompass the ways in which women of color experience poverty. This cluster of articles explains why the concept "feminization of poverty" should be abandoned or, as Professor Mutua explains, n181 already has been abandoned.

Engaging the concept directly, Professor Kendal Broad analyzes it from the point of view of transgendered persons, n182 Professor Park looks at its effect on low income immigrant women n183 and Professor Mutua explores the multiple ways in which poverty is gendered for women and for men. n184 Professor Padilla, on the other hand, looks at the issue of gendered politics more generally and asks us to consider why Mexican American women are absent from the debates on law, public policy and religion and how they might be included in the future. n185 [*497]

With Critical Borderlands, n186 Professor Broad advances the development of LatCrit Theory and particularly in its engagement with issues of sexual identity and its continuing experimentation with various disciplinary perspectives. n187 She situates herself as "a white, non-Latino/a, middle class, U.S.-born-and-raised, gender-bending, dyke" n188 and interrogates her ability to mitigate her race and class privileges by naming and acknowledging them. She does this in an act of coalition with groups she does not belong to (namely women of color and impoverished women) and to avoid "reproducing hegemonic discourse" n189 by "creating interdisciplinary borderlands." n190 She is, in my opinion, successful in modeling how to link LatCrit with other schools of Outsider discourse.

Professor Broad is familiar with earlier LatCrit work that raises questions of heteronormativity, such as the work by Frank Valdes and Berta Hernandez-Truyol. n191 Thus, having linked with this foundational work, Professor Broad then proceeds to have us consider the partial analysis represented by the concept of the feminization of poverty, a concept that leaves out Latinas and lesbians as well as other sexual minorities even though their poverty can be more extreme and more intractable. n192

Professor Broad's work is particularly powerful because it brings the issue of transgendered persons into our field of analysis. Even though LatCrit has struggled to avoid or at least to attenuate heteronormativity, thanks in large measure to the groundbreaking work of Frank Valdes and his leadership in the development of many LatCrit projects, much of the discussion has focused on gays, lesbians and occasionally bisexuals. Professor Broad is insistent that the experience of transgendered persons is of special importance because it disrupts binary gender norms. n193 Professor Broad's analysis reinforces the performance art presentation by Kim Coco Iwamoto, a transgendered person, who participated in the discussion held at LatCrit V entitled "Queering LatCrit Discourse: Confronting Latina/o Homophobia. n194 Coco Iwamoto conducted a live conversation [*498] with herself by alternating between Coco-male and Cocofemale, talking about a variety of subjects.

Professor Broad's carefully analyzes whether the discursive tool of "situated standpoints" can help us move beyond identity politics to a more textured theory that incorporates difference. n195 Professor Broad provides the theoretical impetus for seeking out the experiences and the voices of lower class women because they have something to teach us. She explains, the assumption that 'one's everyday life has epistemological consequences and implications--the disadvantaged have the potential to be more knowledgeable, in a way, than the dominant group' is an important mean by which we can create and legitimate subjugated knowledges. n196

In short, Professor Broad has made an excellent contribution to this symposium: she has woven the core topics of LatCrit Theory such as intersectionality, transformative knowledges, difference as voice and as politics with her sociological perspectives while focusing the discussion on the theme of the symposium. Her critical theory--a queered LatCrit--improves our understanding of LatCrit Theory, and of Queer Theory and the marginality of impoverished sexual minorities. Thus, we are provided with a better analysis of gendered poverty.

In Perpetuation of Poverty through "Public Charge," n197 Professor Lisa Sun-Hee Park provides a crossdisciplinary analysis of gendered poverty. Although this analysis involves legal materials, namely the 1996 Immigration Act (the Illegal Immigration Reform and Immigration Responsibility Act of 1996) n198 and the so-called Welfare Reform Act (the Personal Responsibility and Work Opportunity Reform Act of 1996), n199 the approach is more sociological than legal. It is for that reason and because Professor Park's degree is a Ph.D. rather than a J.D., that I am concluding that this is a crossdisciplinary contribution to LatCrit Theory.

One of the strengths of this paper is that Professor Park is explicitly engaged in a dialogue with Professor Mutua, one of the other authors in this cluster of
In her critique of the Feminization of Poverty notion, Professor Park provides specific reasons as to why this concept fails to reflect the experiences of low-income immigrant women, especially undocumented pregnant Latinas in need of prenatal medical care. Thus, we have a better understanding as to why this Feminization of Poverty concept is flawed and why class-analyses must expand to include structural poverty, race, patterns of relational privilege and the frame that capitalism provides to other social relations.

Professor Park provides a detailed case study of how these two statutes "have created a chilling effect that has discouraged use of Medicaid by immigrants who are legally eligible in California." Consequently, these low-income women receive inadequate prenatal care and have poorer birth outcomes. Professor Park demonstrates that the federal government was slow in clarifying whether those who received certain benefits including Medicaid would be prevented from obtaining legal permanent residency because of the "Public Charge" policy of the INS. The government was so slow, in fact, that it took the INS some three years to exclude these benefits as income maintenance and to discontinue the repayment demands that were being made illegally by the California Department of Health Services.

With her article, Why Retire the "Feminization of Poverty" Construct, Professor Mutua completes this cluster of three articles that critique the concept of the Feminization of Poverty from different perspectives. Professor Mutua's article examines this concept historically and concludes that it is seriously flawed and deserves to be withdrawn from use. She concedes that it may have served a useful purpose at one time but by now it has become clear that the concept masks the reality of poverty for whole communities for whom poverty is the norm, for women of color, for sexual minorities and for impoverished men, some of whom are in poverty for the same reasons as women.

Professor Mutua's article is written as a dialogue with Professors Park and Broad. Her article, more than others in this symposium, evinces that she had a thesis that she presented as a short talk at the conference and that thesis has now undergone a change. Her analysis is deepened and broadened by the observations and analyses of her co-presenters. This technique works particularly well for this topic on gendered poverty because of its nexus to the theme of the conference, i.e., LatCrit Theory and Class. The readers benefit from the interactions at the conference once the authors incorporate those insights into their articles. I would hope that this technique would be used more frequently in future LatCrit symposia.

In Reforming and Influencing Public Policy, Law and Religion: Missing from the Table, Professor Laura M. Padilla explores the reasons why Mexican American women are absent from the spheres of influence. Professor Padilla's important contribution is to insist that, for Mexican American women, these spheres are both secular and religious.

Professor Padilla begins her analysis by situating the Mexican American woman historically. She posits that the colonization of the Mexican American communities has produced women (and men but they are not her focus) who are "powerless [and have] a lack of control over those institutions which have a direct impact on them, such as schools, the political system, and businesses." She further observes that many Mexican Americans internalize "feelings of inferiority, lack of self-worth, hostility, apathy, apparent indifference, passivity, and a lack of motivation in relation to the goals of the dominant society," This internalization, she opines, "explains an oblique sense of inevitability about oppressive living conditions." I don't disagree with Professor Padilla that we Mexican American women experience powerlessness and have internalized negative impressions of ourselves, and may, at times, feel that change is nearly impossible. However, too many Mexican American women live lives that belie these statements (and others that are equally unqualified). Professor Padilla's article is at odds with this introduction as it offers a more variegated analysis. The powerful stories that she includes provide examples of Mexican American women who exercise power, overcome any internalized doubts they have about themselves and create change in the face of great odds.

Professor Padilla's article is important for another reason. She has become an important voice in LatCrit Theory for those who are linking critical theory, especially from the perspective of discrete racial/ethnic communities, with progressive religious theory and practices. There is a split among critical theorists, including LatCritters, about the possibility of organized religions being progressive. Yet, organized religions continue to be an important force in Latina/o communities and to ignore them places our theoretical project at the risk of being irrelevant to the very communities we strive to serve.

III. Moving LatCrit Theory and Praxis into Latina/o Communities

In July 1999 Professor Danny Solarzano introduced me to Professor Marcos Pizzaro, who
teaches Chicana/o Studies at San Jose State University in California. Prof. Pizarro was organizing a group of educators and community activists to work with K-12 teachers involved with Latina/o youth. Over the next two years a group formed, calling itself MAESTROS, and sponsored a series of workshops and a Summer Institute in June, 2001. While each of the workshops included presentations on curriculum and pedagogy, the purpose of the group has evolved into one that focuses on process not on a product per se.

As the LatCrit scholar and law professor in the group, I have attempted to share lessons learned through LatCrit projects with the MAESTROS group. Much of what I have contributed to the group has been an outgrowth of the theory developed within LatCrit; it has been my attempt, borrowing Sumi Cho and Robert Westley's evocative phrase, to "perform the theory." n215 Thus, we in MAESTROS, have been attentive to the issue of anti/essentialism choosing to call ourselves "raza" instead of either Chicanas/os or the more inclusive Latinas/os. Raza has the advantage of linking us to our mixed linguistic roots and to emphasize our racialized identities. MAESTROS, like LatCrit, is also committed to anti-subordination--we are cautious about issues of differences based on race, gender, sexual orientation, language, religion, etc. We intervene to insure that we are not unthinkingly reproducing power inequities. We have consciously involved, mostly through Prof. Pizarro's networks and outreach, educators, activists, and organizers from California, Arizona and New Mexico, all of whom are involved with low-income Raza communities. Our workshops have experimented with several of the core issues thematized and theorized by LatCrit scholars, such as bi-linguality, voice and silence, identity, religion, and class. The pedagogical workshops have incorporated hip-hop music, plays about farmworkers, humor and gang subcultures.

At the Summer Institute, I demonstrated the work that had been developed by my law students for K-12 teachers in a seminar I taught last spring. In a loose collaboration with Professor Juan Velasco's class on Chicana/o literature at Santa Clara University, my four students developed PowerPoint presentations on NAFTA and the WTO, the Chicano/a youth movement, stereotyping of indigenous populations and the drug war. My purpose is to give importance to the writing by law students by making their work product available to K-12 teachers. This is an experiment in raza literacy on several levels--to teach law students to write for lay audiences as well as to make race-based and other progressive materials available to teachers.

The educational model we are developing through MAESTROS includes several components: participant input, welcoming & parting rituals, work circles, and curricular & pedagogical workshops. But what we are endeavoring to create is not a model as such; instead, we are engaged in producing an educational ethic that has relevance for any level of education. That ethic is based on these values and commitments: love and respect for students, trust, a foundation of familia and historia, and an appreciation for the power of palabras, vocabularies and truth.

What follows is an excerpt from an article n216 describing the work of the MAESTROS group and a poem, both written by Professor Pizarro.

Living Educational Revolution

We have attempted to define our work, encapsulating our approach and ethic, as Raza Studies. We adopted this label because some of our members were using this as a way of acknowledging that they were not doing the typical Chicana/o Studies work and that they were working with diverse populations that also included other Latinas/os. We use this term as a way of symbolizing these realities (and have no affiliation with the programs who use this label in their titles or courses). We provide this definition now because it reinforces the ideas introduced earlier and allows readers another opportunity to understand our work.

For MAESTROS, Raza Studies transcends pedagogy and curriculum, going beyond approaches to learning and toward approaches to living. The whole person (students and teachers) enters the classroom and that is who must teach and who must learn.

Raza Studies is holistic education [emphasizing mind, body, spirit, and heart] in which we meld methods, content, identity issues, policy/political struggles, family and history, via student-centered (context-specific), spiritually-principled, problem-posing that is based on community service learning/collaboration and develops organizing skills. This is grounded in raza ways of knowing and seeks a new form of literacy--raza literacy. [*503]

Note: We look at history in unique ways. It is not the westernized construct of the past. We are history as we live with ancestors, descendants, and living families simultaneously. We refer to this as raza wisdom. Finally, we assert our moral authority to transform education!

The daily lives of Raza youth demand that we transform our work in education. They need researchers who engage in social justice work. They need researchers who use their publications and research to move toward concretely addressing the problems they regularly face. This work, therefore, ends with a call for researchers and journals to use...
their work to engage in social justice, acknowledging that the blind belief in the need for their objectivity in fact typically reaffirms and supports a status quo that is waging war against raza youth and other working class students of color.

Our goal is to help teachers adapt our work in MAESTROS to their own classrooms. The ethic we describe as well as the process itself is one that can be done in any educational setting.

For now, our work focuses on exposing raza and our allies to the MAESTROS ethic and process.

Revolution begins with breaking people's consciousness. When they are able to liberate their minds from the constrictions imposed by the norms of schooling, then they can be creative and will know how to begin to look for and tap into the resources and people who will help them develop this approach in their own work. In the end, MAESTROS is simply an idea, lived.

[*504]

For Miguel
By Marcos Pizzaro

For Miguel

i'm a 6th grade teacher, it's 1991, and Miguel Sanchez is going down.

He's going down brothers and sisters.

going down.

dan dallape,

the Vice Principal of Oak Street Elementary School on the West Side of Inglewood, CA,
a working-class community of Raza,

has made it his personal mission to take Miguel Sanchez down:

because Miguel is learning his own power

because Miguel scares him

because the only way to stop the revolution is to suffocate the spirits of our youth

and so Miguel Sanchez is going down.

He's going down and

we feel it; we complain about the schools
we see it; we complain about teachers
we smell it; we complain about counselors
we hear it; we complain about administrators
we taste it; we complain about "the system"

and Miguel Sanchez is going down.

He's going down,

and we watch,

all of us, watch,

and He's going down.

10 years later, too long, MAESTROS asks us: What are we going to do about it?

concretely, what are we going to do about it?

everyday, what are we going to do about it?

we are a pro-active effort to make sure [*505]

Miguel Sanchez does not go down!

because if He does, if She does

-> they do assault our young women just as forcefully, but in different ways

if They go down,

We all go down brothers and sisters

We're all going down...

wake up

[Note: the names have not been changed because we must speak truth]

FOOTNOTE-1:

n1 See generally Hannah Arendt, Eichmann in Jerusalem; A Report on the Banality of Evil (Hannah Arendt ed., Viking Press 1964) (referring to Hannah Arendt's exploration of the banality of evil during the Holocaust). See also Sherrilyn Ifill, Ordinary Complicity, Balt. Sun, June 17, 2001, for a more contemporary analysis linking racial violence to the everyday actions and inaction by ordinary white citizens.

n2 These dual objectives have been at the heart of the LatCrit movement since its inception. See Francisco Valdes, Under Construction: LatCrit Consciousness, Community, and Theory, 85 Cal. L. Rev. 1087, 1094-95 (1997); 10 La Raza L.J. 1, 8-9 (1998) [hereinafter Valdes, LatCrit Consciousness].

n3 See Robert S. Chang, Essays The End of Innocence or Politics After the Fall of the Essential Subject, 45 Am. U. L. Rev. 687, 690-91 (1996).
n4 The process of moving issues from the margin to the core and considering ideas from the perspective of the subordinated (or what Professor Mari Matsuda has called "looking to the bottom") has been termed a practice of rotating centers and shifting bottoms. See Athena D. Mutua, Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm, 53 U. Miami L. Rev. 1177 (1999).

n5 Cover Letter of LatCrit V Program Materials, Feb. 25, 2000, p. 3.


n7 See Kevin R. Johnson, Celebrating LatCrit Theory: What Do we Do When the Music Stops?, 33 U.C. Davis L. Rev. 753, 784 (2000).


n9 See Valdes, LatCrit Consciousness, supra note 2.

n10 See Luna, supra note 8.

n11 Id. at 555 (citing Markus S. Schulz, Collective Action Across Borders: Opportunity Structures, Network Capacities and Communicative Praxis in the Age of Advanced Globalization, 41 Soc. Persp. 587 (1998)).


n13 See Luna, supra note 8, at 560.

n14 Id. at 567.


n16 Id. at 577.

n17 Id. at 585-93. In a comparison by race, the distribution of wealth is even more concentrated than that of income. The median Black household's net worth [difference between assets and debts] is 12 percent of the median White's, but Latina/o household's net worth is only 4 percent of the median White's. When one looks at what economists call financial wealth, which eliminates the family home as an asset and the mortgage as a liability, the more liquid assets are even more concentrated in the hands of Whites with Blacks owning only 3 percent and Latinas/os, 0 percent. See Doug Henwood, The Nation Indicators: Wealth Report, The Nation, April 9, 2001, at 8.
Professor Mirande's chronicles differ from those constructed by Professors Bell or Delgado in that the reader hears only one side of the colloquy and it's therefore a monologue. The power of the dialogue is that the author is engaged in an interrogation of the propositions s/he posits. Professor Mirande leaves us wondering what Fermina would have responded. For Professor Bell's dialogues with Geneva Crenshaw, see Derrick A. Bell, And we Are Not Saved: The Elusive Quest for Racial Justice (Derrick Bell ed., Basic Books 1987). For Professor Delgado's dialogues with Rodrigo Crenshaw, see Richard Delgado, The Rodrigo Chronicles: Conversations About America and Race (Richard Delgado ed., New York University Press 1995).


The teachers and activists in the Maestros project would never use such high-falutin' language to refer to ourselves. One of our objectives is to use plain English/Spanish in our teaching materials.

I am borrowing Professor Mahmud's term "engineer" to emphasize the role of state power in the formation and regulation of racial boundaries.

The teachers and activists in the Maestros project would never use such high-falutin' language to refer to ourselves. One of our objectives is to use plain English/Spanish in our teaching materials.

I am borrowing Professor Mahmud's term "engineer" to emphasize the role of state power in the formation and regulation of racial boundaries.

The teachers and activists in the Maestros project would never use such high-falutin' language to refer to ourselves. One of our objectives is to use plain English/Spanish in our teaching materials.
population in a subordinated position, with the positioning assigned to 'natural,' pre-political deficiencies. This insight can furnish a very productive point of departure for the critical projects of antiesentialism and anti-subordination: when you want to see racism, look for racing not race).


n44 See, e.g., Tayyab Mahmud, Colonialism and Modern Constructions of Race: A Preliminary Inquiry, 53 U. Miami L. Rev. 1219 (1999), in which he interrelates three ideas: the colony is a space in which the rule of law is saturated with the illegalities of the racial regime; the instability of racial categories are supported by pseudo science; and, other differences based on religious belief, tribal affiliations, or regional loyalties are contaminated with a racialized hegemony.

n45 See Mahmud, supra note 38, at 658, 669.

n46 Id. at 669, 674.

n47 Id. at 678-79. For an analysis of MexicanAmerican women as religiously submissive, see Laura M. Padilla, Re/Formering and Influencing Public Policy, Law and Religion: Missing from the Table, 78 Denv. U. L. Rev. 1223 (2001).

n48 See Mahmud, supra note 38, at 658-59.


n51 See Mahmud, supra note 38, at 678 et seq.; Hernandez-Truyol, supra note 50, at 693.

n52 See Hernandez-Truyol, supra note 50, at 688-90.

n53 The number of immigrant children being detained by the INS has soared to 4,600 per year. On any given day, the INS cares for over 500 children. Many remain in detention for months and sometimes years awaiting resolution of their claims. See Eric Schmitt, I.N.S. Both Jailer and Parent to Children Without Nation, http://www.nytimes.com/2001/06/24/national/24DETA.html (last visited on June 23, 2001).

n54 See Hernandez-Truyol, supra note 50, at 708-11.

n55 Id. at 711-17.

n56 Id. at 709.


n58 See Bender, supra note 42.


n60 See Malavet, supra note 57, at 759-61 where Hijo de patisucio literally means "son of someone with dirty feet." Professor Malavet uses the expression both literally to describe his father's poverty and metaphorically to name his own racializing within the US borderlands.

n61 See Mahmud, supra note 38.

n62 Id. at 767-71.

n63 Id.

n64 Id. at 787-92.

n65 See LatCrit V Conference Substantive Outline at 9.

n66 Id.

n67 See Bender, supra note 42.

n68 Id. at 722.

n69 Id. at 724

n70 See id.; see also Ehrenreich, supra note 59, at 796, n.9 (defining appropriation to mean "use for economic benefit, use that misunderstands or misrepresents, and use without appropriation").
n71 See Bender, supra note 42, at 731.
n72 Id. at 732.
n73 Id. fn 62.
n74 See Romero, supra note 49, at 1105, for more on the relation between individual and collective identities.
n75 See Ehrenreich, supra note 77, at 795.
n76 Id. at 796, n.9.
n77 Id.
n78 Id. at 799.
n79 Id. at 798.
n80 Id. at 798-02.
n81 Id. at 801-03.
n82 Id. at 802-06.
n83 Id. at 795.
n84 Id. at 802-03.
n85 The New War that is currently being waged against the Taliban and Afghanistan as a result of the attacks on the World Trade Center and the Pentagon on September 11, 2001 now make this statement written before these events seem curiously misplaced. Force has again become the principal tool of foreign policy.
n88 Id. at 904-05; see also Gil Gott, Identity and Crisis: The Critical Race Project and Postmodern Political Theory, 78 Denv. U. L. Rev. 817 (2001), in which he interrogates the efficacy of the legal and its step-child, critical legal theory by reconfiguring responses to the weakening of the nation-state and the concomitant realignments of power and authority. Where, he asks, is the political, or more precisely, where is the emancipatory in the minor transgressions of modernity (hybridity, mobility, diasporas, indeterminacy, etc.)? To this important question, I would respond that these transgressions are both emancipatory and subordinating, sometimes in a serial way, where the emancipation can be experienced and savored; but too often in a simultaneous way, where the gain is immediately illusive.
n89 See Kapur, supra note 86.
n90 Id. at 857-58.
n91 Id. at 862.
n92 Id.
n93 See, e.g., Padilla, supra note 47.
n94 Kapur, supra note 86, at 864-66.
n95 Id. at 876-77.
n96 Id. at 879-80.
n97 Id. at 882-84.
n98 See e.g., fns. 131-37, infra.
n99 Kapur, supra note 86, at 881-83.
n100 Id.
n101 Id. at 887.
n102 Id.
n103 See San Juan, supra note 87.
n104 For an analysis employing hybridity and liminality as discursive tools, see Juan Velasco, Making Evil: Crime Thrillers and Chicana Cinema, infra note 156.
n105 San Juan, supra note 87, at 891.
n106 Id. at 891-92.
n107 Id. at 895.
n108 Id. at 896-97.
n109 Id. This charge is appropriate and resonates with Professor Guadalupe Luna's exhortation to produce transformative knowledge. See Luna, supra note 8.
n110 San Juan, supra note 87, at 890.
n111 See text accompanying fn. 170, infra.
n112 San Juan, supra note 87, at 906-07.
n113 See id. at 907.
n114 See id.
n115 Id. at 907-09.
n116 See Silvia Lazos Vargas, History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa

n117 Id. at 929-44.
n118 Id. at 944-46.
n119 Id.

n120 See id. at 952-65.
n121 See id.


n123 Id. at 910.

n124 Id. at fn 7, citing Rogers M. Smith, Civic Ideals: Conflicting Visions of Citizenship in U.S. History (1997).

n125 Santiago, supra note 122, at 911.

n126 Id. at fn 22.

n127 Id. at 913.

n128 See id. at 914.

n129 Id. at 921.


n139 See id.


n142 See Gonzales, supra note 138.

n143 Id. at 983.

n144 See id. at 984-86.

n145 See Gonzales, supra note 138.

n146 See e.g., Sylvia R. Lazos Vargas, Globalization or Global Subordination?: How LatCrit Links the Local to the Global and the Global to the Local, 33 U.C. Davis L. Rev. 1429 (2000); Chantal Thomas,

n147 See Pabon Lopez, supra note 140.

n148 Id. at 1019, citing El Cenizo, TX, Predominant Language Ordinance, No. 1999-8-3(a) (August 3, 1999).


n152 See Keith Aoki, Introduction: Language is a Virus, 53 Miami L. Rev.

n153 See Pabon Lopez, supra note 140.

n154 Id. at 1023.

n155 Id. at 1025-27.

n156 See Velasco, supra note 141.

n157 See id. at 1054.

n158 See id. at 1055.

n159 See id. at 1058.

n160 Id. at 1059.

n161 For other examples of LatCrit-type analyses that employ textual analysis, see Elvia Arriola, Lone Star and the Faces of Despair in INS Raids, 28 U. Miami Inter-Am. L. Rev. 245 (1997); Montoya, Review of John Sayles' Lone Star, supra, note 135; and Nicholas A. Gunia, Half the Story Has Never Been Told: Popular Jamaican Music as Antisubordination Praxis, 33 U.C. Davis L. Rev. 1333 (2000). See also, the articles by Pedro A. Malavet, Steven W. Bender, and Nancy Ehrenreich in this symposium.


n163 Id, citing the ERIC Clearinghouse on Urban Education, 1995.


n165 Id. at 1070.

n166 Id. at 1075, referring to Colo. Rev. Stat., § 19-2511.

n167 Id. at 1070, et seq.


n169 The words pachucos and cholos are Mexicano/Chicano slang for "homeboys"
denoting gang members. The word pachuco dates from the 1940's and was popularized by the LA Times in referring to Mexican-American youth. The word cholo has acquired more recent usage.

n170 See San Juan, supra note 87.

n171 See Gott, supra note 88.

n172 Id. at 820.

n173 See Romero, supra note 168, at text accompanying fn 33 et seq.

n174 See id. at 1107.

n175 See id. at 1112 et seq.

n176 As I write this, I am aware of the antiessentialism that is supposed to define LatCrit Theory and I wonder how to describe this memory and reminiscence without contravening this ideal. When we convened as a circle of Latinas, it was because we formed a loose coalition, sharing common cultural, racial/ethnic and gendered experiences while recognizing and valuing that there were differences among us. We also recognized that we were in coalition with men, other women of color, white women, . . . but for that short time, we were giving emphasis to what it meant to be Latinas (and more specifically Chicanas, Cubanas, Puertorriqueñas, etc.)--the ways in which race/ethnicity and gender have imprinted us as we move through our personal and academic lives. I write that anti-essentialism is supposed to define LatCrit because I have always been of two minds about this ideal. I came to critical theory through my activism in the Chicano/o movement. My racial/ethnic identity was not formed through my theoretical work as a law professor although my identities have been refined and deepened through that work. Since the 1960’s, I have been active in a variety of community-based, Chicana/o-identified projects--United Farm Worker boycotts, voter registrations, prison/jail tutoring, etc. as well as MECHA (the student organization for Chicanas/os) and Chicano/a Studies projects. During this period, my father was also active in local Chicano-identified work as a social worker. At the same time, I was at the edge of the woman's movement. I remember devouring each issue of Ms. Magazine, marveling at the barriers that were falling, and knowing that my horizons were expanding, but I was not a participant in that movement. Let me offer a personal narrative: around 1986, I joined NY NOW and attended a conference that had been organized by Phyllis Chesler and others. During the meeting and later in a face to face confrontation, I objected to the fact that there were no brown women or poor women as panel participants or as subjects of study. Ms. Chesler later called me at home and was very angry that I had raised this objection. When she calmed down and conceded that there could have been more diversity on the panel (I am sure she didn't read me as a woman of color), she offered to have me participate in some other activity; I declined. (Forgive my faux pas for foisting these stories on you, but it is context that I cannot ignore. See, Sumi Cho and Robert Westley, Critical Race Coalitions: Key Movements that Performed the Theory, 33 U.C. Davis L. Rev. 1377, fn 75 and accompanying text.)

In my opinion LatCrit's anti-essentialism ideal has, at times and for me, made it harder to understand how the law impacts Latinas or Chicanas. Expanding the viewpoints and the participants in order to understand the complexity of identities is critically important and LatCrit's work on developing mechanisms for doing so is a significant accomplishment. The LatCrit project can rightly take credit for this innovation, insight and intervention. However, I think it's a serious mistake not to allow time and space for Latinas (with or without other women, of color and white) to meet and interact at LatCrit meetings. The Chicana/Cubana/Puertoriquena voice is still muted at the meetings, and many of our stories are still untold. But perhaps I feel this need and desire to meet as Latinas (and sometimes as Chicanas/as within LatCrit) because of my age and my memories from another time. It is ironic to me that, from my perspective, the LatCrit anti-essentialism ideal has isolated us within a discursive space where we can see one another and hear our common realities analyzed but where we don't connect through our group identities--as Latinas or as Chicanas/os. Moreover, I think that
recovering a gendered time/space or ethnicized time/space within LatCrit could not be easily done. When Latinas have met, there is an awkwardness fostered by the group norm against essentialism that impedes cohesion and comfort.


n178 I will offer only one example. At the meeting with the editors of the California Law Review that resulted in a highly prized LatCrit symposium, several of us argued that the proposed deadlines were unrealistic, especially for those of us who had child care responsibilities. We were told the deadlines were fixed and nothing could be done. Most of the Latinas opted out. Later I learned that the deadlines had been largely ignored.

One lesson we in LatCrit have learned and relearned is that hearing marginalized voices takes effort. We must occasionally quiet the dominant voices so that the muted ones come through. We must scan the room to see who hasn't spoken and make time for them. We must occasionally consider the effect of deadlines and other rules.

n179 See fn 3 and 4 and accompanying text, infra.

n180 See LatCrit V, Substantive Outline at 8.


n184 See Mutua, supra note 181.


n186 See Broad, supra note 182.

n187 See id. at 1152.

n188 See id.

n189 See id.

n190 Id.

n191 See id. at 1149-50.

n192 See id. at 1150-51.

n193 See id. at 1159. This disruption of binary categories should be of special interest to Latinas/os who have historically been caught between the white/non-white racial categories of the dominant U.S. racial scheme.

n194 At this time, Coco Iwamoto was a third year law student at the University of New Mexico School of Law and had taken several of my courses. I met Coco during her second year when she staged an intervention to force the law school to create unisex bathrooms by circulating a brochure that artfully disclosed her transgendered identity and asked which bathroom s/he should or could use. The Dean resisted making a change for about twenty-four hours when it was clear that Coco was not to be silenced or appeased. She was a paradigm-shattering experience for many of us. She taught students and faculty to work in coalition by recognizing differences and valuing them.

n195 Broad, supra note 182.

n196 Id. at 1165.

n197 See Park, supra note 183.


n200 See Park, supra note 183.

n201 See id. at 1209-14.

n202 See text accompanying fn. 42.

n203 See text accompanying fn. 47.

n204 See text accompanying fn. 50.

n205 See Mutua, supra note 181.

n206 See id. at 1171-72.
n207 See id. at 1172-73.
n208 See Padilla, supra note 185.
n209 See id. at 1225.
n210 Id. at 1226.
n212 See Padilla, supra note 185.
n214 See, Solarzano & Yasso, supra note 31 et seq.
n215 See, Cho & Westley, supra note 32.
n216 See, Marcos Pizarro, Seeking Educational SelfDetermination: Raza Studies for Revolution.
LatCrit conferences always make me feel like I've come home. I wrote of this sentiment in my foreword to the Second Annual Symposium for LatCrit--on that feeling of "familia" that was generated by my witnessing a multi-racial/ethnic and gendered spectrum of people having the conversations that would become "LatCrit I." I also reflected on how un-alone I felt in that setting, unlike so many other conferences I had been in during my career as a law professor. Like brothers and sisters in a family, however, we can and are very different, not just in personalities but in looks, and not just in physical identity but in approaches we take with the meaning of "LatCrit theory and praxis."

We Latina/os know well that our indigenous, African and white European roots may produce all within the same family variegated skin tones, phenotype and hair textures that bear witness to our origins in conquest, slavery, colonialism, genocide and mestizaje, the physical and metaphoric blending of race and culture. Depending how far or close we are from our "roots," whether physical, emotional or spiritual, the experience of migration, diaspora or exile may also play either a negligible or prominent role in our professional commitments to social justice theory and practice. And as the LatCrit conferences constantly demonstrate, the wide diversity of who we are based on our class, race, language, sex, gender, religion, citizenship, culture and education makes it very challenging to centralize the concept of Latina/os into a body of scholarship and thought and convince others that in fact we do unite strongly around some experiences (e.g., Spanish language), even while we diverge far from each other in others (e.g., the Mexican migrant's constant dream of going home versus the Cuban exile's sense of homelessness versus the Puerto Rican's sense of colonialism).

What better illustration of our differences than how we engage in the meaning of LatCrit theory and praxis. Some of the articles within grapple with the issue by exploring the connections we have to Critical race theory, others join both in a joint venture for application--LatCrit theory and Critical race theory--to the discipline of education theory and practice, or pedagogy. Yet others only pay lip service to the need for an "intersectional" perspective, mentioning the need for an analysis that uses gender, race and class, while never really examining how the differences between the sexes and gender can be used as a category for examining the conditions of the indigent, working poor (immigrant) and working class members of our communities. Others focus on the relationship between a presumed "body" of LatCrit theory to a presumed "body" of text in critical race theory (CRT) that appears to make race salient over gender or class, ironically for a conference that was themed around a more intense focus on class analysis. Nor is there any article that really presses any new analysis or context for examining the conditions of our Latina/os who are oppressed for being machotas, jotos, patos, gays y transgeneros, although one contributor mentions the supposed ample space we have given to the subject at LatCrit conferences. We are obviously still struggling to define the meaning of LatCrit theory and praxis.

I hardly mean to minimize the contributions of these articles to the project of advancing a LatCrit theory and praxis. I only mean to convey first impressions--overall it is a collection of very insightful pieces that struggles to define what it means to use a LatCrit perspective, but largely seeks to find that meaning in the ways in which LatCrit embraces and moves beyond CRT. Unfortunately that focus often comes across as "LatCrit" being only about racial analysis, which it is not.1 Even though the earliest of the CRT writings were those of women of color n2 who argued that it is impossible to examine gender without a race and class perspective or any of the latter without the former.

It is interesting that this cluster of articles is titled exploring LatCrit Theory "in New Contexts" because a
number of them flow directly from the panel at Breckenridge that initiated a conversation about the contributions made by Chicana/o scholarship and activism to the project known as LatCrit. Also, a number of the authors appear influenced by their exposure to Chicana/o Studies in the Southwest. But new contexts are offered herein for both Chicano studies and for LatCrit generally. One essay especially seeks to bridge the foundations of Chicano/a Studies with those of LatCrit, while a Cuban scholar encourages us to reach beyond the discourse of oppression into the world of money and tax. *509*

How one views whether the cluster of essays is to innovate, extend or reaffirm the need for LatCrit theory, may depend on the order in which the articles are read. The writings that either explore the connections between LatCrit theory and Chicano Studies, or were written by Chicano Studies folks, whether professors or grad students (who might have been attending their first LatCrit conference at Breckenridge), seem to continue a conversation from the conference. That conversation was initiated by a set of speakers who were exclusively of Mexican descent. Ideally they were those who either knew enough about or were involved with Chicano Studies as to be able to connect its foundations to the origins of a "LatCrit" project in the legal academy. Rumor had it that the configuration of speakers for the panel posed a thorny problem for the conference organizers. This is because LatCrit organizers have tried to maintain the outward identity of an inclusive scholarship movement. Therefore the "mono-racial/ethnic character" (i.e., no Asians, no Blacks, no Queers) of the panel seemed at odds with one of LatCrit's formative organizing principles—that each year's organizers assemble panels for every plenary and concurrent session that is racially and sexually diverse. In the end the panel was staffed by Chicanas and Chicanos and did interrogate the relationship between LatCrit and Chicano scholars, some of whom have made important contributions to the growing body of LatCrit scholarship.

II. Los Ensayos

I read Guadalupe Luna's "La Causa Chicana" and Communicative Praxis n3 as an effort to enhance knowledge of Chicanas/os and to introduce to the LatCrit community the issues posed by those who seek to centralize the Chicana/o in their scholarly inquiry. An example is the scholars who have organized regionally and nationally in the National Association of Chicana/o Studies Scholars (NACCS). Dating back almost thirty years, NACCS has a mission that is compatible with that of LatCrit scholars—to advance critical theory through transformative knowledge. That is the kind of thinking that is critically-based, that is about solving the social, economic, political and legal problems of our (Latina/o) communities. Thus Luna asserts, while LatCrit scholars are producing transformative knowledge, she cautions that we must commit ourselves to an engagement with the text of critical theory. We must also engage in self-critique that produces critically based practice (praxis). This, she argues, is "communicative praxis," the construction of meaning, projects, visions, values, styles, strategies and identities through interaction with and against one another." n4 To illustrate some of those roots of the Chicano movement Luna provides a short historical monograph on the very place where Lat Crit V was held, in the state of Colorado. This *510* history is especially helpful to people like me who in my youth bore no active connections to Chicanismo because of circumstances beyond my control--I had lived in Mexico during my high school years, returned to live briefly in a predominately white suburb, married an Anglo and worked full time while I attended college at night. I often wonder whether I might have become a Chicana identified scholar if my parents had not moved out of central Los Angeles when I was eleven years old and into a then predominately white suburb (which ironically a generation later is now almost exclusively MexicanAmerican/Chicano). Back then what I knew of "Chicano politics" I associated with the privilege of full-time students, and I wasn't one of them. So it was enlightening for me to read Luna's portrayal of a lived history for certain Chicano/a community activists, academic, students, union members and community folk challenging, inter alia, racialized segregation, police brutality, poverty and land theft during a period when I was coming into my politicized consciousness by rebelling against my strict Catholic upbringing in a boarding school and hanging out with white middle class "hippie" college students protesting the Vietnam War. But in the end I especially find Luna's message to LatCrit scholars of the need for a criticism of the law that is engaged with the struggles of our communities as vital to any goal of LatCrit to be truly connected to our communities. In the world of social justice activists, we progressive scholars are unfortunately stigmatized by the well-earned reputation of being talking heads that work in ivory towers, climb the social ladders of success and disconnect from the communities we in theory represent through our lofty "radical ideals." So, the more we can expose in a practical way the connections between LatCrit and Chicanismo—as having the common goal of challenging the notions of "neutrality" in Western thought, politics, economics and legal systems that have betrayed our communities, the better. It's a good message from Luna's essay.
As noted above, I have never identified myself as a Chicana scholar, nor one who even knew what it meant to be involved in Chicana/o politics. And yet I comfortably understand myself to be Chicana when I reflect on Ana Castillo's definition of a Chicana as a Mexic-Amerindian woman who is an activist, and as a "Xicana," that is, someone who is Chicana and feminist. During my post law school graduate studies in history I managed to run into important pathbreaking works by Chicano scholars like Alfredo Mirande. In the 1980s, Mirande's book La Chicana helped me make sense of the social, political, educational, legal and economic conditions of the woman of Mexican descent in the U.S. In that work I first encountered the pieces of history that connected me to my own roots, to the stories of my Abuelita and my mother, to my travels to villages in Mexico whose residents bore remnants of the history of the Mexican revolution or to the continual flow of migrants from the interior to the northern borders of Old Mexico. It was a true pleasure to find out what in fact had happened to the sociologist who left that field in order to enter law school and who is now a law professor. Mirande's "Mountain Adventure", the second in a series called Alfredo's Chronicles, intended to mimic the narrative mode and titles of Richard Delgado's Rodrigo's Chronicles, provides a delightful and candid portrayal of the goings-on at a LatCrit conference, which I imagine to be amusing and confusing to the first-time attendee. I had to laugh at the comments in Mirande's "field reports" that observed the energy, contradictions, and sometimes frustrating experiences that depict a LatCrit conference, in this case the one held at the Breckenridge conference center:

The Preliminary Program is interesting, but I, frankly, think you learn more about an organization through the informal networks, the one-on-one placticas, or chats at lunch, dinner, or the various after-hours receptions and informal get-togethers. It is clear that gender and sexual preference are overarching issues for the group.

I found this comment interesting and somewhat annoying. For I wonder what it means to have gender and sexual preference turned into "overarching issues." Is it that so many attendees are really out and really queer as well as being Latina/o, or that the substance of the programming is heavily focused on queer legal theory from a Latina/o perspective? Or to do that is a novelty in critical thought? Hmmm. Mirande doesn't go further with the comment, for his project is one of sharing his ruminations with a fictional character, Fermina, who is a friend, a sounding board, maybe an alter feminine self, or a combination of all of his really smart and strong Chicana friends, colleagues and relatives. His purpose is to note it all--from the absurdities of how the term "Hispanic" just doesn't capture the heterogeneity of the Latina/o experience, to the major differences that make one ask, what is it that "binds us together as Latinos"?

I sit and listen attentively to the speakers, trying to connect with them, despite our differences. I begin to think about Latino identity; about the dualities, and wonder what I have in common with the speakers. If the speaker on this panel is a woman, I am a man. She is Cuban, I am Mexican. She is gay, I am not... She appears to come from an elite background. And in these ruminations I find the comfort of the LatCrit narrative form of analysis and also its frustrations. For sometimes the narratives are just that--streams of thought that are going somewhere, or nowhere, except into the venue of reflecting on how one's identity as a Latina/o is an experience of worldtraveling in and out of the planes of class, culture, gender, sexuality, and race or ethnicity.

But is that what LatCrit theory is about? Is it just a vehicle for ruminating into intersections of identity? Or like Chicano studies, is it a search for frameworks of analysis that are grounded in the struggle for social justice for brown and black peoples whose history has been denied or distorted in a white dominant society where we exist en ausencia, and surface rarely, usually in stereotype. Alejandro Covarrubias' essay Language, Race and Social Justice: Employing LatCrit to Examine the Graduate School Experience of a Chicano certainly asserts that a LatCrit framework offers insights into institutional power relations that can stand in the way of brown, working-class Chicanos. Relying on the critical tool of counterstorytelling he examines the "microaggressions" in academia that targeted a young Chicano student trying to maneuver his way through a doctoral candidacy. I loved this piece. It is honest and it is painful. I could visualize the lone Chicano grad student sitting in the seminar with his classmates, feeling targeted as he tried to convince them that their assigned readings contained alienating theory language, meanwhile experiencing his own social construction into the non-collegial "troublemaker." All because he took the critical challenge at its word by criticizing the "saints" of critical thought (e.g., Freire). The experience sadly reveals how, once conscienticized, the oppressed see their oppression, while the dominant don't see it at all. And particularly don't see the hypocrisy of defending the use of elitist language and discourse to articulate emancipatory thinking on behalf of the oppressed.
The last three articles venture into new areas where LatCrit theory might apply or where it should apply. Because I read first the articles that seemed focused on Chican@o Studies I was first puzzled by the inclusion of Alicia Abreu's piece Tax Counts n15. I thought, she is Cuban and this is not about Chicano Studies and why is it here? Yet her message to Lat [°513] Crits, whose mission is compatible with that of Chicano Studies, as one concerned with the "mechanisms of legal and political oppression . . . .," n16 needs to be included in a set of articles that are grappling with the commonalities and differences of critical theory that seeks to reform the conditions of Latina/os everywhere. The critical theory can only get us so far. As Luna admonishes earlier, we need engagement with the theory, or praxis, n17 and what better venue within which to use our talents for deconstruction, literally for taking apart the structures of power, than to expose the sources of much raw power in this country and in the global economy--the law that benefits those who are wealthy. After all, it is they whom with their money, and a legal system that supports their staying rich, are closing factories that are creating third world black and brown "countries" within the U.S. border, or sending the manufacturing and assembling processes to even poorer countries throughout the world, where as "maquilas" in Mexico or sweatshops in East Asia they will have assembled cheap goods for export back into the U.S. economy, with the cheaply paid labor of mostly Brown, Black and Asian people who will be dehumanized and turned into machine parts that sustain the global economy. Such "benefits" from the expansion of corporate and shareholder wealth flow from the laws and regulations that are part of the intricate tax system that we need to understand, engage with and criticize, argues Professor Abreu. She urges Lat Crit scholars that the analysis of the tax laws, and how or whom they empower in a society where the distribution of resources disfavors Latina/os, is for everyone in LatCrit. I found especially compelling the figures in her essay that dramatically illustrate how the tax laws skew the distribution of the tax burden, so that the rich pay so much less in proportion to those who earn less. The visible sources of poverty in historic patterns of discrimination and segregation are bad enough to deal with. What is shocking is the exposure of the hidden sources of perpetuated poverty in tax laws that indeed illustrate how "the rich get richer while the poor get poorer."

The last two essays both address whether LatCrit theory has anything to offer to the critical scholar concerned with pedagogy. I find it interesting that in the same cluster of articles where one writer found himself castigated for "criticizing" Freire, we have at least one more piece that actively seeks to apply Freirean critical theory to the possibilities for LatCrit pedagogy. The last two essays in this cluster however, join not only theme as they examine the theory of learning and education, but also in adapting the LatCrit/CRT tool of counter-story-telling to accomplish their goals of:

1) envisioning a social justice theory that speaks to the conditions of their lives as either graduate students or professors, while [°514]

2) recognizing the tensions in the academy, where educational institutions operate in "contradictory ways with their potential to oppress and marginalize [even as they have the] potential to emancipate and empower." n18

Daniel Solorzano and Tara Yosso's essay, Maintaining Social Justice Hopes Within Academic Realities, n19 employ a framework adapted from critical race theory to introduce the concept of critical race pedagogy--as basic insights that

a) centralize race and its intersections with other forms of subordination;

b) challenge dominant ideology;

c) are committed to social justice;

d) highlight the importance of experiential knowledge and

e) use an inter-disciplinary perspective.

Solorzano and Yosso's dialogue is between an older professor meeting up with a former student/new professor at an education conference, who share a meal and chat over the possibilities for doing "radical pedagogy" in non-radical, and sometimes elite settings (large universities). The latter ultimately appears as a matter of personal commitment by an instructor to encourage learning from the bottom up. As in Freirean pedagogy, it is a framework that calls upon the teacher constantly to affirm the strengths of the students (against all egotistical urges) while s/he facilitates the strengthening of their insights into how this world oppresses them as the key to self-empowerment. Which of course, isn't always easy in certain academic settings; the community college teacher may have the best population of students on which to practice Freirean methodology, but is too overwhelmed with the course load. The professor in the larger, usually more elite settings, is often challenged by the make-up of the classes, as more white, more elite and less connected to the communities that need empowerment. In some ways, the part of this first dialogue where the one professor tells the other--it's easier when a critical mass of students of color is present in the classroom, n20 helps to prove the point made by the grad student
in the next essay by Anita Revilla, who evaluates in a conversation between two fictional classmates the strengths and weaknesses of either a race or class perspective for engaging in critical pedagogy. n21 Race is extremely important, argues the [*515] friend Apolinar. Yet the obvious differences in the ability to engage effectively in critical pedagogy in a university versus a community college setting, observed in the two professors’ dialogue, also proves the counterpoint of Revilla's hypothetical friend, Delia, who favors the class analysis because it focuses on the empowerment of those most exploited and subordinated (e.g., laborers). While Apolinar, in Revilla's A Theoretical Dialogue Between Two Friends, n22 wants race to be the most important focus in the work of the radical teacher, "because it's "idealistic" to think that a capitalist system that would rather "close down a bank than lay off a worker," n23 Delia fiercely defends her vision of a world in which peaceful revolution takes place through a socialist-feminist multiculturalism that challenges...historically sedimented processes through which race, class and gender identities are produced within a capitalist society." n24

Which I think is one of the best quotes in the whole cluster of articles because it speaks to my concerns for a LatCrit theory and praxis that is holistically based, that speaks to a range of problems we must solve for our communities, as kaleidoscopic as the factors that impact upon and/or define a person's identity. It means still coming up with research models that deconstruct the legal and political structures of power n25 with the deconstructive and multi-dimensional tools of gender, race and class, neither one ever deemed more relevant or important than the other. In this cluster of articles the reader will face the possibilities for examining what it means to be Latina/o, what it means to adopt the Chicana/o lens, or what it means to teach our students with a radical pedagogy; that is, with the goal of promoting social change by making the student understand her/his own oppression or membership in the oppressor class. That, to me is the heart of the "praxis" of LatCrit, an engagement with the tools of analysis, the terms and concepts we so proudly adopt to identify ourselves, without deluding ourselves that all of the terms and concepts might derive ultimately from systemic oppression, and then being willing to test that knowledge in our communities. n26 For example, Luz Guerra once argued at a very early LatCrit conference that the terms "Latina/o" or "Hispanic" or whatever-hyphenated (e.g., Mexican-American) may be construed as an unquestioned acceptance of the construction of our identity [*516] from the perspective of the oppressor n27—the white European/Anglo/White American's notion of identity. By unconsciously using it we ally ourselves with the values of our internalized colonizers. n28 We are then constructing false identities, looking through the eyes of the oppressor. In time who we are, or were, vanishes, like a rare bird becomes extinct; because not knowing, or forgetting, we lose the language capable of preserving our identities. This perspective allowed me to understand the autobiography of the indigenous activist woman, Rigoberta Menchu who spoke of "knowing" that her ways of life and beliefs were critical to maintaining her identity as a Quiche, one of the dozens of oppressed indigenous peoples of Guatemala. What she kept secret to her served as the ultimate weapon against the erasure of her identity as an Indian. ("I'm still keeping secret what I think no-one should know"). n29 When everything from dress ("you mustn't change the way you dress, because you're the same person and you're not going to change from now on") n30 to spirituality, to community rituals, to language and practices affecting family, gender roles, work, power and sexuality is understood as different from "ladino life," knowledge of oneself is the last thing one has to preserve one's ethnic or racial identity.

In the talk of power and pedagogy, LatCrit theorists are moving from the search for self-empowerment in exploring the intricacies of our constructed identities and our self-constructions of identity. It is a refreshing perspective to now be in the mode of taking that knowledge into the possibilities of our theories, dialogues and counter-storytelling methods to create community. And through that immediate social change within the academy to increase the number of "soldiers of that movement" n31 through our students whom, armed with the critical thought that teaches them about oppression, can learn to safeguard their identities and cultures against those who would only know us in stereotype or otherwise marginalize our existence.

FOOTNOTE-1:

n1 Some LatCrit scholars have questioned whether the LatCrit perspective is even about race at all.


n4 Id. at fn 5.

n5 Ana Castillo, Massacre of the Dreamers: Essays on Xicanismo 11 (Plume, 1995).


n10 Mirande, supra note 7 at 523.

n11 Id. at 524

n12 Castillo, supra note 5, at 5.

n13 Alejandro Covarrubias, Language, Race and Social Justice: Employing LatCrit to Examine the Graduate School Experience of a Chicano

n14 I am borrowing from the adaptation of Freire's term for consciousness-raising. In Latin America it has been translated as conscientizacion, and in English, the state of having one's consciousness awakened. See Castillo, supra note 5, at 9.


n16 Luna, supra note 3, at 569.

n17 See id.


n19 Id.

n20 Id. at 618.


n22 Id.

n23 Id. at 631.

n24 Id. at 630 (citing Carlos Alberto Torres, Democracy, Education, and Multiculturalism: Dilemmas of Citizenship in a Global World (Rowman & Littlefield Publishers, 1998)).


n26 Here I know I depart from the model of activism for the intellectual that is confined to "radical teaching." Personally, I think that intellectual activism should have a component of teaching among the radicals and serving as a bridge between academia and the community.


n28 Id. at 355-56; see also Paolo Freire, Pedagogy of the Oppressed (Myra Bergman, trans., NY: Continuum, 1993).

n29 Rigoberta Menchu, I Rigoberta Menchu: An Indian Woman in Guatemala 247 (Elisabeth Burgos-Debray, ed., Ann Wright, trans., Verso, 1984)("Not even anthropologists or intellectuals, no matter how many books they have, can find out all our secrets").

n30 Id. at 211("If you cut your hair, people notice and say that that woman is breaking with many of our things, and they won't respect you as they ought to.").

n31 Revilla, supra note 21.
Backgrounds and Introduction

This is the second in a series of essays focusing on law and LatCrit Theory and which I have termed, for lack of a better name, "Alfredo's Chronicles." Consistent with the practice within Critical Race and LatCrit Theories, the first chronicle, Alfredo's Jungle Cruise n2 sought to utilize narrative as a vehicle for the preparation of students for work with members of subordinated communities. The first chronicle was a case study illustrating how narrative can be used as an effective pedagogical strategy in law teaching and the preparation of students to work as lay advocates seeking to empower members of subordinated groups - groups, in other words, like day laborers, the homeless, and at risk students that normally lack access to law, lawyers, and social justice.

Alfredo's Jungle Cruise reported on my experience teaching a class on "law and subordination" with pre-law students at the University of California, Riverside. Each student in the class was assigned to work in a placement setting with a subordinated group. The placement group consisted of teams of three to five students, and each group worked with a field supervisor. n3 In addition to the field placement, students were assigned five to eight theoretical readings per week. These readings focused on problems, issues, and dilemmas surrounding lawyering and lay advocacy on behalf of subordinated groups. n4

Prior to going into the field, students in each placement were required to participate in skits and simulation exercises that were videotaped and critiqued by the entire class and the instructor. The skits and videotaped exercises served as an effective role-playing technique that allowed students to "test out" their presentation prior to going into the field, and to get valuable feedback from the class. Finally, each student in the class was required to write a weekly field report that was to be a critical evaluation of the readings, the placement, and the class as whole. 

I also, ultimately, decided to prepare my own "field report" on the readings, the class, and the placements. I frankly do not know why I decided to write my own field reports to the class but, at some point, I did. When I introduced the field report requirement, a number of students responded that they were "not sure what I wanted" or "what I was looking for" in the field report. The decision to do my own field report was obviously an easy way to respond to the students' request for examples of field reports. But a second, and perhaps a more compelling, motive for writing the field report, was that the exercise proved to be extremely therapeutic. A couple of weeks into the quarter, I became incredibly frustrated because, unlike my students, I did not have an outlet for my many thoughts and reactions to the class, the student field reports, and the placements. Between classes, I would often find myself thinking about the class and about issues or questions that had arisen during the class discussions or in the readings. And, as I began to write, I experienced an incredible catharsis. I found the field reports provided an outlet for communicating my inner thoughts and concerns with my students. In short, I believe the exercise enabled me to think more creatively about the class, to tackle problems and issues more systematically, and to share things about my background and biography with the class. The field reports, in other words, became a vehicle for sharing things with my students about my background, my family, my children; a way for them to learn more about me as a person and, more importantly, to gain further understanding of how biography shapes conceptions of law, lawyering, and advocacy. My hope was that with time, students would begin to draw on their own biography and experience and apply it to the class and field work with subordinated groups.

However, rather than writing directly to the students, I created a fictional character named Fermina Gabriel. Alfredo's Jungle Cruise consisted of a series of letters to mi amiga, Fermina, a highly educated, intelligent, and beautiful young woman. n5 Fermina and I were ostensibly classmates at Stanford Law School. She was a year ahead of me and completed the joint JD and Ph.D. program in law and sociology.
Unlike other chronicles written by Critical Race Theorists such as Derrick Bell, Richard Delgado, and Patricia Williams, Alfredo's [519] Chronicles are not fictional. Although the field reports were written as letters to the fictional Fermina Gabriel, and although I changed the names of the participants to protect their anonymity, the field reports are based on events that actually transpired. In fact, even my "fictional" amiga, Fermina, is not totally fictional. First, she is real in the sense that she is a composite of several very real women I have known. Second, and more importantly, the more I wrote to her, the more I came to think of Fermina as real. I must admit that Fermina has become not only a convenient sounding board for my thoughts and ideas on law, lawyering, and love, but also an important part of my life.

Fermina is so bright and accomplished that in the First Chronicle, I referred to her as a "Super Chicana," or "Super Latina." But as I reflect on it, I am not sure that she is that unusual. If you look carefully, I believe that you will find many bright, talented, and strong women within communities of color. n6 She is certainly not the only one. Fermina differs from this talented group of women only in the sense that she had the opportunity to get a formal education and to develop her incredible skills and abilities. Fermina is a modern, educated Chicana who graduated from a fancy law school, but her experiences are rooted in the working class. One of the things that I love most about Fermina is that she is smart not only in an academic sense, but also in a practical "in your face," no "BS," street smart sort of way. n7

I have to admit that Fermina reminds me a lot of my mother. n8 Although my mother only had three years of formal education, she was one of the most intelligent persons that I have ever encountered and, like Fermina, she was smart in an intuitive, practical sense. n9 I am sure my mother would have said that Fermina "es muy mujer," meaning she is a strong principled, independent woman who knows how to act like a woman without being subordinate to men, or anyone else for that matter. In other words, she is a strong woman or a woman with a strong character [520] --what African Americans might refer to as a WOMAN, and Filipinos call Gabriela.

This essay seeks to build on Alfredo's Jungle Cruise, but it is different in that the letters in this chronicle were written directly to Fermina, rather than as field reports to my students. I have decided to retain the narrative format because I somehow feel more comfortable sharing my ideas with Fermina--someone I admire, respect, and trust, and, who, I think, understands me.

A guiding theme in the article is that the term Hispanic tends to homogenize and essentialize the experiences of groups that are heterogeneous with regard to nationality, culture, race, education, economic status, citizenship status, generation, and other variables. A related theme is that we need to begin to address the extent to which Latinos themselves may be stereotyped and reified not only within law and in the media, but also within LatCrit Theory itself.

Letters are an integral part of the immigrant experience, even among those with little formal education, n10 and are the principle means of retaining ties to one's family, friends, and country of origin. Letters were certainly an important part of my family background and experience. I was born in Mexico City. My parents split up when I was around six or seven. After the split, we went to live with my dad and his mother. My dad subsequently went to the United States to work as a bracero, or temporary laborer, and we remained with my grandmother. Shortly after my dad went to the United States, my mother remarried. After living with my grandmother for several months, my older brothers, Alejandro ("Alex") and Hector Xavier ("Gordo"), and I were enrolled in a military school in Queretaro, a medium size city north of Mexico City. We were normal children, but I guess we proved to be a "handful" for my grandmother. Her sister, Tia Tere, somehow decided we "would be better off in Queretaro." n11

May 7, 2000

Field Report #1

Querida Fermina: [521]

I really appreciated your response to my letter, the last chronicle in Alfredo's Jungle Cruise. As you know, Alfredo's Jungle Cruise was published as part of the UC Davis Law Review Symposium Issue, which was comprised of articles either presented at LatCrit IV in Lake Tahoe, or inspired by the Conference. Please know that your careful response and thoughtful comments are appreciated. It was definitely worth the wait!

I especially liked your encouraging words and your suggestion that I continue writing Alfredo's Chronicles. It has inspired me to write about the Conference this year. I have decided to call it Alfredo's Mountain Adventure because, as you know, LatCrit V was held at the Breckenridge Lodge in Breckenridge, Colorado, a beautiful ski resort in the Rocky Mountains.

Amiga, I really appreciated your comments, but I would be less than honest if I didn't tell you that I was
a little bit sentido ("hurt") by some of your remarks. I was surprised, and disappointed, that you concluded that "I simply did not understand women" and that some of my beliefs were "antiquated and hopelessly machista." I guess I need to really work at being less sensitive, or more detached from my writing so that I am not as easily offended. After all, I asked for your comments, didn't I? I also know that you have my best interests in mind, and that you gave me your honest response in good faith. I also understand that, as a friend, you intended the comments to be "constructive" and "helpful," rather than gratuitously negative and critical.

I guess a lot of the traditional music appears to be machista because men are often depicted as conquering women and as full of brag and bravado. On the other hand, remember that I was raised on this stuff, and that my mother and her sisters (my aunts) would sit around singing the rancheras. I also believe that you can take the music out of context. If you listen carefully, you will find a lot of strong images of women in the music. The women are hembras with a lot of character and fire, and female counterparts to the men. The women are definitely not passive! In any event, I will work on it.

Although it may be hard for me to accept criticism, please know that I appreciated your comments and encouragement. I hope that you will also respond to this chronicle. Finally, I would like to take this opportunity to thank you for agreeing to read and comment on Alfredo's Mountain Adventure. I hope that you enjoy the adventure.

June 7, 2000

Field Report #2

Querida Fermina:

I wanted to share my response to LatCrit V. You will recall that I attended LatCrit IV in Lake Tahoe last year, so this was my second LatCrit conference. The conference this year was structured in such a way as to center on "issues of class and economic inequality in the articulation of LatCrit theory and discourse." n12 LatCrit V was held during the Cinco de Mayo Weekend. The site for the meeting was the Breckenridge Lodge in beautiful Breckenridge, Colorado. Breckenridge is a fancy ski resort in the Rockies. It was a magnificent setting for the conference and, because it is the off-season, the rates at the lodge were incredibly reasonable.

ALFREDO'S MOUNTAIN ADVENTURE

I flew into Denver and took the shuttle to Breckenridge, which is about 85 miles and less than two hours, from the Denver Airport. Several of the passengers on the shuttle are also going to the conference. One thing is clear from the onset and that is that LatCrit draws a diverse group of people. At LatCrit IV, I noticed right away that this conference wasn't only for Latinos. There were a number of Asians, African Americans, and a few White faculty members at the conference. One of my fellow passengers on the shuttle is a very pleasant African American law professor from the Bay Area. Coincidentally, she was a contributor to the casebook that I used in my Race and Racism class this spring. A second passenger is a young, progressive Anglo professor from Colorado. By the way, although the conference is being held at Breckenridge, the host institution is Denver University Law School, and next year's LatCrit will be hosted by the University of Florida.

It is a very nice group of people, friendly, and not pretentious at all. The driver is also courteous and friendly. On the drive to Breckenridge, the conversation flows seamlessly from topic to topic --the distance to our destination, the majestic view of the area, the conference and various plenaries that look promising, and yes you guessed it, "little Elian!" I think everyone is pretty fed up talking about the little Cuban boy who was found adrift floating on an inner tube, but I guess you can't have a meeting of Latino law professors without talking about "Elian," especially since there is a good representation of Cuban Americans in LatCrit.

The drive through the Rocky Mountains to Breckenridge is breathtaking. There is small talk, but there are also relaxed, quiet moments on the drive where I have an opportunity to reflect on LatCrit V, and to enjoy the magnificent scenery. I am intrigued by the organization. It appears to be made up of people of various races and ethnicities who wish to examine the place of Latinos within law and the society at large. The attendees seem like progressive law scholars and they are exploring important topics that law has been slow to address such as pan-Latino identity. They also seem critical of the binary model of race which has been dominant in law. They are exploring the contours of multi-ethnic and the pan-racial nature of the Latino experience. Finally, at this conference, there is a focus on class and on relating LatCrit Theory to working-class communities of color in a global context.

I have studied the Preliminary Program carefully, seeking to infer the goals of the organization from the thrust of the panels and plenary sessions. The Preliminary Program is interesting, but I, frankly, think you learn more about an organization through the informal networks, the one-on-one placticas, or chats
at lunch, dinner, or the various after-hours receptions and informal gettogethers. It is clear that gender and sexual preference are overarching issues for the group. I would later learn by talking to some of the founders of the group that the LatCrits split off from another group, Critical Race Theorists, who came to be perceived as being somewhat homophobic. The LatCrit II in San Antonio was held at Saint Mary's Law School and some of the sessions apparently got very heated. I guess people felt persecuted not only because of the heated exchange but because the conference was held at Saint Mary's and they were surrounded by all of these saints and religious images. I guess a lot of negativity and homophobic attitudes surfaced and one session, in particular, got totally out of control. I don't know much about this, but I get the sense that these earlier experiences have definitely shaped the direction of the group.

We arrive in the afternoon in time to attend the welcoming wine and cheese reception at Breckenridge Lodge. Immediately after the reception, there is a moderated roundtable discussion on the "Political Economies of Subordination in LatCrit Perspectives: 'Piercing the Veils' of Class and Identity in Traditional Curricula." It is an interesting roundtable discussion, but there is little discussion of political economy or class. This is followed by a plenary with two panelists discussing "Comparative Racializations" and "Constructing InterGroup AntiRacist Frameworks."

The following morning I attend a moderated panel discussion entitled "Queering LatCrit Discourse: Confronting Latina/o Homophobia." The primary focus is on machismo and homophobia specifically in LatCrit and in Latino culture as a whole. The first speaker, a Chicana, points out that LatCrit has promoted heterosexism, noting that "those of us who enjoy heterosexual privilege use it to silence queers." She notes how at LatCrit II in San Antonio, which was held at Saint Mary's, many of the participants exhibited homophobic and heterosexist attitudes, and defended the Catholic Church's stand on homosexuality. A young Asian-American panelist did an interesting performance on being bisexual, shifting back and forth during the performance from a male to a female identity. The next speaker was lesbian from a mixed background as her father was Anglo and her mother was South American. She is carrying out a study of gender, sex, and sexuality, focusing on the meaning of bodies within political movements. She makes reference to the problems of homophobia and racism within the Latino Community.

One of the presenters, I will call Dona Ines, was born in Cuba and raised in Puerto Rico. She is middle age, referring to herself as a vieja in the professoriate, entertaining and engaging. Dona Ines is very direct. She shares stories about her background and family, noting that it is hard for her to address the topic in English. Her father was apparently a diplomat; her mother, an attorney. Ines admits she "was raised in comfort and privilege." She expands on the response of her family to her "condition" as a lesbiana. Her mother doesn't understand why she is not married, why she wears pants all the time, and why she doesn't have children. Her colleagues tell her "she wouldn't look so Lesbian, if she dressed differently," but her mother also doesn't approve of her dress and doesn't understand why Ines "doesn't dress or act como una mujer" ("like a woman"). There is a lot of warmth and affection in her family, but the overriding message is that homophobia and heterosexism within our cultura are oppressive and suffocating, as "woman are expected to demur to men" and to be the "keepers of purity." Lesbians, of course, are the ultimate "other."

The various presenters expand on how Latino cultures oppress women and homosexuals, especially lesbians. I sit and listen attentively to the speakers, trying to connect with them, despite our differences. I begin to think about Latino identity; about the dualities, and wonder what I have in common with the speakers. Dona Ines is a woman, I am a man. She is Cuban, I am Mexican. She is gay, I am not. One similarity, I think, is that we speak the same language, or do we? I think about her family, and I think about my family and wonder what binds us together as Latinos. Is it our sense of familia, I wonder? But is our sense of familia real or illusory? Are we one familia or many? Some scholars have argued that Latinos are ostensibly part of the same familia de la raza. Jose Vasconcelos called it La Raza Cosmica. n13

I am very aware that the focus of the Conference is on class and I wonder why the panelists are not really addressing the issue of class among Latinos. Dona Ines, for example, appears to come from an elite background. What are the various intersections among class, culture, gender, and sexual orientation?

June 15, 2000

Field Report #3

Querida Fermina: [*525]

I hope that you got the postcard I sent from Breckenridge. I really enjoyed the setting for the conference and the various sessions were extremely stimulating. One thing that I have noticed is that these LatCrits really know how to choose a conference site. The conference last year was also held in another beautiful setting, the Stanford Conference Center near Lake Tahoe.
Don't misunderstand. I'm not complaining! I really loved the setting for the conference, and the food, parties, and sauna. It was absolutely beautiful, and incredibly relaxing, but I do wonder why we meet in locales that are so isolated from our communities. It was strange because LatCrit V was held during the Cinco de Mayo weekend and, yet, there were no events to commemorate, or even acknowledge, the holiday. There was no reference to it in the program. Why do they pick sites that are so isolated from our communities? Perhaps the planning committee believed that by being isolated, the LatCrits could more readily address the issues that need to be addressed without any distractions.

After the presentations in the "Queering LatCrit Theory" session, the moderator asked for questions from the audience. There was generally a positive response to the presentations, although at least one woman said something like, "I agree with much of what was said, but you are not going to take our religion away from us." I asked the panel members whether there might be a danger of essentializing the "Latino Community" when we generalize across different national origin, language, racial, and class groups. Latinos, after all, are incredibly diverse. We represent some 32 distinct countries, different cultures, and all racial groups. n14 I sometimes wonder whether we even speak the same language. I know many of the words and expressions that I use are Mexican. Sometimes I will find that people from Central America do not know certain words that I use because they are Mexican idioms. The other day, Rufina, a Nicaraguan colleague in the Spanish Department greeted me and asked me how I was. We always speak in Spanish when we meet and have a really nice rapport. I told her that I was cambiando ("working") and she said, in an offended tone "que es eso? Eso no es una palabra en espanol!" ("What is that? That is not a word in Spanish!"). Although none of the presenters responded directly to my question, during the discussion the Cuban American professor, Dona Ines, addressed it indirectly and said--"I have never encountered a segment of the Latino community that was not homophobic!"

June 18, 2000

Field Report #4

Querida Fermina: [*526]

I have been thinking about homophobia in the Latino community. As you know, there has been precious little written about attitudes towards homosexuality in Latino cultures and, most of what has been written, has focused on traditional attitudes in Latino America, not on Latinos in the United States. Ironically, given the subordinate status of women in the cultura, much more has been written by and about lesbianas than about Gay Latino men. In fact, many of the leading Chicana writers like Gloria Anzaldua, Cherrie Moraga, and Ana Castillo are gay or bisexual. n15 Latino men, it seems, have been slow to come out of the closet, or to openly articulate a gay voice. n16 Given the apparent dominance of men in the culture, why is it that there are so many gay Latina writers, Fermina?

REFLECTIONS ON MACHISMO AND FATHERHOOD

It is Fathers' Day. Fathers' Day is a depressing day. It is a day where I reflect on all my failings as a father. You know, all of the things that I could have done to have been a better father. In retrospect, I guess I have been quite selfish in doing things like giving priority to my career, working so much, going to law school after having had a very full and successful career as a sociologist, establishing a law practice, and moving out to Tejas to teach in a law school. It bothers me a lot to think that I would put my dreams and myself ahead of my children, but I guess I have. I know that my son, Mano, told me that he feels homeless or displaced because he has nowhere to go in the summer or when the dorms are closed during Holidays at San Francisco State.

But you never know about such things. Life is strange. Sometimes you can do good things in spite of yourself. The other day I was feeling down about myself as a father when, out of the blue, I got this beautiful card with a note from my daughter, Lucia. It was very touching and I almost cried. Lucia basically told me that I had been a wonderful dad and that the fact that I had always pursued my dreams had helped her to mature into a confident, independent and strong woman who would never be afraid to follow her dreams. She said that, through my example, I had made her feel like there wasn't anything she couldn't accomplish, if she put her mind to it. So who said I wasn't a good father!

I thought a lot about my father on Fathers' Day. You know he was a very imperfect man. But he was also a beautiful man; vain, confident, self-centered, egotistical. My dad looked like a man, smelled like a man, [*527] and always acted like a man. But he was also a very violent person. He taught us that it was very unmanly to hit a woman, or anyone for that matter who was smaller, weaker, or vulnerable. "You should never start a fight, but you should know how, and when, to defend yourself." He was into maintaining family pride and, of course, honor. He was a strict disciplinarian and would beat us so severely that we would have these huge welts on our backs from his belt. It was embarrassing when we had to undress
My dad had this warped sense of fairness, which, in the end, was very unfair. He would beat us one at a time in chronological order. Since I was the youngest I had a lot of time to think about the impending beating. His three sons responded differently to the beatings. Alex, the oldest, was defiant and would try to block the blows or to defend himself. Hector was a little macho. He was impassive, never giving dad the satisfaction of seeing him crying or begging for mercy. I was the pragmatist, and always begged. Although he was definitely not a reasonable man, I always wanted to reason with my father. I figured I would be spared, if I only had the opportunity to "explain." I would tell my dad, "Pa, dejame explicar! Se que te vas a sentir muy mal cuando sepas lo que paso." ["Dad, let me explain! I know that you are going to feel bad when you find out what happened."] Amazingly, I was sometimes spared because, as my father would later confess, he admired my ingenuity and my ability to think on my feet under pressure. Disarmed by my complicated explanations, my dad would exclaim, "Este muchacho debe ser abogado!" ("This boy should be a lawyer!").

In spite of the bad temper, the beatings, and the fact that he was a compulsive gambler who couldn't keep a job, I think my father was a wonderful father, and an incredible man. You know what? I wouldn't trade him for any other father, especially not one of those successful nerdy guys who are always at the office or on their cell phone.

At a very primordial level, the best thing about my dad is that he was a man. Let me explain. He was very athletic and, other than the gambling, somehow very healthy. He loved sports, did not drink or smoke, and seemed to live every minute of his life like it was his last. I think one of the things that I appreciated most about pa was his zest for life. Especially when he wrote to us, he would use words that no one else seemed to use, like animo ("spirit"), ganas ("desire"), and fibra ("inner strength"). In the end, he was a very passionate, emotional, loving man. Somehow, I believe that the excitement is one of the things that attracted him to the gambling. I am sure the rush of playing the ponies or poker was an incredible "high." He had a lot of old pictures of himself and his friends, as a young man. He was always swimming, playing baseball, horseback riding, and yes, always surrounded by beautiful young women.

This may sound strange, but my dad was very clean. He loved to shower and he taught us the importance of personal hygiene and cleanliness. One of the fondest memories that I have of my dad is of his taking us to the Turkish baths on Saturday mornings. Los Banos Eden ("The Baths of Eden") were virtually across the street from my Grandmother's house in Tacubaya, next to the barber shop, and on Saturdays, we would walk across the street to the bath house.

I guess it was male bonding, although I didn't realize it at the time. It was neat to go through the whole bath ritual with my father. We would swim and then go into the steam room covered with these big white sheets. My dad also generally got a massage at the end and we would get our shoes shined while we were bathing. But the most invigorating part of the ritual was at the end. After the steam bath, we would conclude by taking an ice cold shower. The shower was very high up on the ceiling, came onto your body with a great deal of force, and was ice cold. Anyway, at the end of the ritual, I felt very relaxed, invigorated and, somehow, more bonded with my father.

It makes you think about the subtle ways in which parents teach children and socialize them into appropriate gender roles. The ritual was something that I couldn't have done with my mom, and which I have never enjoyed with my son. Ultimately, I think it was somehow a right of passage into manhood, but this was the nice, clean, wonderful part of being a man.

June 24, 2000

Field Report #5

Querida Fermina:

Thanks for responding to my last field report. I am glad that you found my discussion of Fathers' Day interesting. Thinking about my father made me cry. n17 It is only recently that I have really come to understand and appreciate him. People used to be very critical of his hedonistic lifestyle and the fact that he could not hold a job because of the gambling and bad temper.

He was the type that was always quitting his job, telling the boss off. You know my dad was a rebel; kind of like Jack Nicholson's character in "One Flew Over the Cockoo's Nest." He may have lost a lot of jobs, but n529 he never lost his sense of dignity or self-respect and, I think, that is something money can't buy. Regardless of how much money or power someone had, my dad never felt like he was less than anyone else was.
So why am I telling you all of this? I guess I am telling you this because I think making your children feel like they are important and conveying a sense of dignity and self-respect (amor propio) is really important as a parent. It is far more important than job success or wealth. I think it is something that you do unknowingly. And, in the end, I don't think you can respect others without first respecting yourself.

**JOTOS, PUTOS, Y MARICONES ("GAYS, FAGS, AND QUEERS")**

You know, other than my father and older brothers, I didn't have a lot of male role models while I was growing up. One of the most important influences in my life was my second cousin, Pepe. He was my dad's cousin but we used to call him Tio Quintos, or just Quintos. Quintos was much younger than my dad and not that much older than my eldest brother Alex. He was probably in his early twenties when I made my first communion. n18 We gave him the nickname Quintos, or "Nickels" because he worked for an airline and was always giving us money.

Tio Qunitos was different from other people in the family. He used to dress in the latest American fashions and he had taught himself English and French. He wasn't as good looking as my dad, because hardly anyone was, but he was always neat and well dressed. Because Alex had spent a year in the United States, and Hector and I didn't speak English, Alex and Quintos sometimes spoke English. I think it was just a little game they played so that they could talk privately and we would not understand.

Quintos was simply more worldly and cultured than anyone in my family. He would take us to movies, plays, and museums. He took us to all of the new Walt Disney films and bought us wonderful books like the "Arabian Nights." One of our favorite haunts was the Benjamin Franklin Library in Mexico City; another was Chapultepec Park. He was incredibly warm and affectionate and, I think, loved us a great deal. We would spend many hours at El Castillo, the Museum of History in Chapultepec Park, or just playing in the Park.

El Castillo is the famous castle that was occupied by the Austrian Emperors Maximiliano and Carlota during the French Intervention. It was also the last line of defense when the Americans invaded Mexico City during the Mexican War. Los Ninos Heroes ("Boy Heroes") were a group of young Mexican boys who defended the Castle. One of the boys, [^530] Juan Escutia, wrapped himself in the Mexican Flag and jumped to his death.

Anyway, we were very close to Quintos and it bothered me when I began to notice that other people in the family treated him differently. I don't know exactly how to say this, but some family members and friends would smirk or talk about Quintos behind his back. It was clear that they did not respect him.

It was only after we had been in the United States for some time, and I must have been around seventeen or so, when I got the nerve to ask my dad why people snickered when Quintos was mentioned or why they talked about him behind his back. My dad seemed surprised by the question, and asked calmly, no sabes? ("You don't know?"). I responded, "No, I don't." My dad looked at me and said matter of factly, "Es uno de los otros, no le gustan las mujeres." ("He is different. He doesn't like women"). My dad, shrugged and added, "Pobrecito," ("Poor guy"), as he uttered the words.

Anyway, that is how I learned that Quintos was gay. It was interesting because I can't recall anyone in my family ever talking about homosexuality. My dad's demeanor was also surprising. He wasn't upset or angry. He was very matter of fact about the whole thing. The sense that I got from my dad was that was just the way it was. It was part of nature somehow. Some men liked women; others, didn't. That's all there was to it. It wasn't a big complicated thing.

I don't know whether my dad was homophobic, but it seemed like he saw it in a matter of fact, dualistic way. Some men were attracted to women and others were not. Don't misunderstand, I am not suggesting that he was free of bias. He certainly would have freaked out if one of his sons had been gay. Yet, he didn't seem angry or condescending toward gays. I never heard my dad call anyone a joto, puto, or maricon ("Gay, Faggot, or Queer"). In fact, I never heard him swear or use offensive language, and he would have reprimanded us if we did. Even as an adult, I could not swear, smoke, or drink in front of my dad.

In fact, it was not until I learned English in the United States that I was really exposed to homophobic and racist attitudes. When I was around fourteen I played on a men's baseball team. The men were predominantly White, 25 to 40 year-old, working-class guys who smoked and chewed tobacco, swore incessantly, and were always demeaning women, homosexuals, and Blacks.

I am not suggesting that my family is typical or representative. No family is typical. I know that cada cabeza es un mundo ("Every head is a World onto itself"). What I am suggesting is that there are differences in the way Latinos respond to gender and homosexuality and that I never heard my dad disrespect women or homosexuals. As I reflected on the [*531] roundtable on Queering LatCrit Theory, I
also wondered whether we might be essentializing the experiences of Latinos when we make unqualified conclusionary statements that encompass all of the diverse segments of the Latino community.

June 22, 2000

Field Report #6

Querida Fermina:

I know that you, and everyone else, is tired of talking about little Elian Gonzalez, but I think it is an important topic for Latinos to talk about. It is important because it brings to the surface the fragility of this so-called "Hispanic identity." Mexicans just don't understand all of the fuss over the little Cuban kid. Don't get me wrong. I know he is a cute little guy, and it is a tragic story, but people cross the border illegally every day and it isn't that big a deal. They come, seeking to escape poverty and political oppression, and they risk their lives doing so. Can you imagine a Mexican or Central American family refusing to return their distant relative, or defying an Order of the Attorney General of the United States?

Anyway, before talking about little Elian, I wanted to share this dream I had the other night. I think dreams are important because they are supposed to reveal our innermost fears and apprehensions. The dream reminded me of this simple, preliterate society that revolves around dreams. I don't remember the name of the people, but it is one of those groups that was studied by anthropologists. People in this society treat dreams as real; as extensions of the every day non-dream world. Each morning family members share their dreams, and attempt to analyze them. It is sort of a society of Freudians in the sense that they believe they can gain a deeper understanding of everyday life by trying to incorporate dreams into waking reality. Anyway, let me know what you think about the dream, if you have time.

LITTLE "ALIAN" (ELIAN) AND ALIEN NATION

I had this dream about Little Elian, but in my dream he had a different name. Pepito Lopez is the son of Demetrio and Valentina Lopez. His parents are Indians from the State of Chiapas, a region that has been in civil war for a number of years. They are tenant farmers, work very hard, and live in abject poverty. They live in a simple hut on a hillside near the village of Totulco. Pepito is five years old and the youngest of three children. Valentina has secretly supported the Zapatistas and had been persecuted by Government forces because of her perceived links to this revolutionary organization. Demetrio supports the Government and does not sympathize with the Zapatistas.

These political differences have created tremendous stress and tension in the marriage. Valentina fears for her safety, and the safety of her [532] children, especially little Pepito. She is also disappointed that her husband will not support the rebels. After endless quarrels, Valentina decided to take matters into her own hands. She recently hitchhiked with little Pepito across Mexico to the U.S. Border. Valentina could not take her children with her, except for Pepito. She tried to enter the United States by swimming across the Rio Bravo with Pepito on her back. There was a tremendous current, as the spring rains swelled the River. Although an excellent swimmer, Valentina succumbed and drowned. Little Pepito somehow miraculously survived, clinging to an inner tube. He was picked up by some Jehovah's Witnesses who were canvassing the barrio on the U.S. side of the border, and eventually taken to the home of his great uncle, Chuy Lopez, in El Paso. El Tio Chuy was Valentina's second cousin but he was close enough and old enough to be called Tio. As you know, in Mexico being a "tio" or a "primo" ("cousin") are actually honorific titles, based as much on friendship as on lineage so that a good friend of the family like a compadre (e.g.,"child's godparent") is often referred to as "tio." Chuy is a 52 year-old recovering alcoholic who has had three DUI convictions in the past five years. He came to the United States as a bracero, worked as a laborer at a brick yard for many years, and is now retired. Pepito has been living at Chuy's house for the past several months and has bonded with Chuy's oldest daughter, Lola. Tio Chuy lives in a modest two-bedroom house in the barrio with his wife and four daughters, who range in age from 15 to 23.

Lola is a 23 year-old ex-chola. She is unmarried, which is unusual, since most of the girls in the neighborhood marry, or get pregnant, before the age of eighteen. Over the past several months, Lola has dedicated herself to taking care of Pepito and she has emerged as a mother figure for him, helping him to adjust to the terrible tragedy and the void that was left by the death of his mother. Lola is not currently active in a gang, but several years ago she had assumed a leadership role in Las Locas de Aztlan, one of the most violent gangs in the City.

El Chuy Lopez has become somewhat of a folk hero and is the talk of the barrio. At Dick's Barber Shop, Ahumada's Market, the panaderia, ("bakery"), la gente is talking about how he has defied the Migra, and the Attorney General's order to turn Pepito over to the INS. Chuy has even challenged the Attorney General, to see "if she has enough 'huevos' ("balls") to come and
get the boy out herself." Barrio residents have rallied around the little Mexican boy, and El Chuy. In short, he has become a symbol of freedom in the barrio, sort of like Che, Zapata, and the social bandit, Gregorio Cortez. In fact, a fast and protest vigil are currently in progress in the barrio with people chanting, "Hell No We Won't Go," "The people united will never be divided," and "Chuy Lopez for President." [*533]

The incident has been a Godsend for local merchants. The crowds around the Lopez house grow larger each day. Vendors are selling everything from Mexican Flags, bumper stickers, cheap Mexican curios, to "Save Pepito" tee shirts. But the most popular item is a replica of the inner tube that Pepito used to cross the Rio that says, "help keep your mojadito ("little wetback") above water." The local radio station is sponsoring a contest and offered a $ 1,000 prize for the person who submits the best corrido ("folk song") about the adventures of Pepito. n19 Finally, the kids in the neighborhood are going crazy over these little hard rubber figures n20 of El Mojadito ("Li'l Wetback"), El Tio Borracho (The Drunk Uncle), and, of course, Lola La Chola n21 ("Lola the Chola"). They are selling like tamales at the local gas station and the mercados ("markets").

The furor over Little Pepito has really gotten out of hand. Can you believe it? In fact, the media attention is scary. It makes you feel like drowning the kid yourself? Last week was a milestone, an incredible honor for Hispanics because it was declared "National Alien Week" by the President. We are supposed to fly the American Flag and remember all of those wonderful aliens who made this a great nation; the "Founders," I guess. Wednesday was "Take a Little Alien to Work Day" so that people were invited to take their gardeners, housekeepers, and car wash employees to work so that they could get a taste of the Good Life in America. It was great. I took my mechanic, Tony, to work with me. Even sales of the video "Alien" (with Spanish subtitles) are soaring because it is somehow cool now to be an "alien," to be foreign and exotic.

There is even an alien board game. It is modeled after monopoly, but with an alien theme. Instead of buying the railroads, you get to do work on the Trake. The object is to cross the border, to integrate into the economy, and to avoid being robbed by border bandits, or apprehended by the Migra and sent back across the border. Instead of "jail," you are sent to an INS detention center for a week.

But by far the most popular attraction is a new theme park that opened up in Disneyland in California and Disney World in Florida. The theme park is one of those "hands on" attractions called "Alien Nation." Passengers ride on these canoes, like in "Pirates of the Caribbean." Illegal aliens who are seeking safe entry onto the boat surround the boat. The object of the game is to repel the aliens by shooting them like ducks [*534] in an arcade, or hitting them with the oars and keeping them submerged under water. It is very realistic in that they are using real aliens so the public gets to dress up in different anti-alien roles. You have the option of assuming different parts such as an Orange County Skinhead who is into perpetrating hate crimes against foreigners, an irate Arizona Rancher who shoots aliens who come onto his property, or a White Supremacist who lynches illegals. Anyway, Alien Nation has proved to be the most popular attraction in the entire history of Disneyland. Oh yes, and they have entered into an arrangement with Microsoft so that you can play the game through the Internet or on your palm pilot.

It is hard to believe that a little alien boy could have done so much to unite the Nation and to promote traditional American family values. Pepito, Uncle Chuy, and Lola are scheduled to make a special appearance at the Republican National Convention. It is a desperate attempt by the Republicans to promote family values and to court the Hispanic vote.

June 28, 2000

FIELD REPORT #7

Querida Fermina:

I wanted to talk a little bit about my daughter Lucia. Lucia recently informed me that she was interested in law school, of all things. Can you believe it? Law school! I have to admit that I was both surprised and delighted by her revelation. I don't really know when or how she came to this decision, but I am glad that she did. As you know, she is graduating from San Francisco State in December. She is worried because she did. As you know, she is graduating from San Francisco State in December. She is worried because her grades could be better, and she feels like she needs a good score on the LSAT.

Lucia signed up for an LSAT class in the city this summer. I talked with her last night. She was distressed, and practically in tears because she took the diagnostic test and was blown away by it. You remember those tests, don't you? They make them harder than the actual exam so that you will be scared half to death and will be motivated to study like crazy. And then you always have some students who have already been studying and preparing for months. You know the type; the ones whose parents, grandparents, and great-grandparents were all lawyers. The ones that act like the test was a piece of cake and finish early so that they can go home and study some more. The truth is that you really can't study that much for the LSAT. But what do you tell your daughter when she is devastated and feeling like she doesn't belong in law
school? What do you say? How do you give her animo ("spirit" or "encouragement")?

The first thing I told her was that this was only the beginning, and that it wasn't going to get any easier. But I also told her that the test had nothing to do with whether you would be a good lawyer, and everything to do with how skilled you are at taking standardized tests. If you did well on the SAT, the chances are you would also do well on the LSAT. Finally, I told Lucia there is no doubt in my mind that she would make a wonderful attorney. I may be somewhat biased, but she is smart, intuitive, charismatic, articulate, personable, and, on top of all of that, beautiful. I have no doubt that she could run circles around a lot of the nerds who will do well on the LSAT and will get into top law schools.

THE BOXER n22

You know it is strange, but I have been dreaming more and more. The dreams come nightly and have become incredibly vivid. Some nights I will even have two or three dreams. I also seem to remember the dreams more than I ever have. If there is a pattern in the dreams, it is that they revolve around unresolved issues or problems in my life. Anyway, I would like to share my most recent dream, which focused on my daughter, Lucia.

... We are in a make-shift boxing ring. Lucia is in the ring and dressed in a very pretty outfit. She is wearing the tricolor; the colors of the Mexican flag. The outfit consists of green, white, and red satin trunks and a matching top. Her hair is in trenzas ("braided") with red, white, and green ribbons. She has on bright red boxing gloves with matching head gear, and a green, white, and red mouthpiece. I guess she saw Oscar de La Hoya wearing one and she decided to do the same. My dad and my brother, Hector, are in her corner. I should mention that Hector was a Golden Gloves boxer in Chicago. He had really fast hands and great footwork, but he couldn't hit as hard as my oldest brother Alex. n23 Alex wasn't that fast or fancy, but when he hit you, you usually went down.

My dad and Hector have taken a lot of time in preparing Lucia. Hector is in charge of the physical conditioning and training. They jog every morning at five, wearing these matching gray sweat suits and black sailor caps, just like in the movie "Rocky." He is showing her how to move, feint, and to dance in the ring.

My dad is in the corner, yelling out instructions in Spanish. I am in the ring. Apparently, I am the designated sparring partner, or punching bag. I am wearing black boxing trunks, and am trying very hard to hold in my stomach, and to not get hit. I spar playfully with Lucia, but she is very intense. It reminds me of the sparring sessions that we used to have with my dad when we were kids. Like my dad, I stick out my chin, daring Lucia to hit me, and deftly evading her punches as she lunges forward. It is exciting to box with Lucia because she has become a skilled boxer. In fact, she hurt me a couple of times with quick right hands that I wasn't expecting. My reflexes aren't what they used to be. I soon learn that Lucia has very quick hands and appears to be a natural. My dad says she has manos pesadas ("heavy hands"), or manos de piedra ("hands of stone"), like Alex. I try to use my gloves to evade her punches. My father yells approvingly every time that Lucia lands a punch--Dale, dale, no lo dejes! ("Nail him, nail him. Don't let him go!"). The tias (aunts) and primos (cousins) are in the audience. They cheer approvingly for Lucia. I am feeling like the bad guy in a wrestling match.

We are in training camp, but the focus is not really on boxing. No, we are actually training for the LSAT, law school, and beyond. My dad always believed in facing life's challenges head on. And, like the Greeks, he believed you couldn't have a healthy mind without having a healthy body. The mornings are devoted to road work and sparring, the afternoons to preparation for the LSAT. It is a grueling work schedule which ends with a relaxing steam bath and a cold shower. In the evenings, we eat dinner and talk.

My niece, Ayala, and nephew, Raul (Hector's children) are at the camp. Raul is a doctor. He is amazing. He has always done well in the sciences and on standardized tests. He has come up with some simple formulas for the word games on the LSAT. By using algebraic formulas, he says, you can actually figure out the various possible combinations and permutations among the response choices. Ayala is a nurse and brilliant. She is working with Lucia on reading comprehension and analytical reasoning. Lucia's mother, Eva, is not at the camp but she has also been helping. She has studied the questions linguistically and is trying to coach Lucia so that she will recognize the various linguistic patterns. By looking at the syntax of a question carefully, you can eliminate certain choices because they are dissimilar from the root question. My dad works on her overall concentration and mental focus. He is like a Mexican zen master.

Despite our collective efforts, we are all aware of our limitations. We know very well that we can only encourage and support. In the end, we know that she is the one who must face the challenge the one who will step into the ring. We won't be there during the test, except in spirit. She will be alone. But we do take comfort in knowing that this is a "win-win" situation.
FIELD REPORT #8

Querida Fermina:

I spent the Fourth of July Weekend in Erie, Colorado, a suburban community about ten miles outside of Boulder. It really was somewhat eerie because I have been writing about my earlier trip to Breckenridge and talking about flying into Denver. Anyway it was deja vu all over again, as Yogi Berra used to say.

I don't know if it is because it is the Fourth of July, but I have been thinking a lot about the current political climate and have decided to write my reflections on politics. It seems like so much has happened in the political arena over the past few months, not only in the United States but also in other parts of the Globe.

First, there was the big news that the Supreme Court would not hear the appeal and so little Elian finally was permitted to return home to Cuba. Now, from the perspective of most aliens, this is really weird because I don't know of any case where an alien child was ordered to stay in the United States against the wishes of his custodial parent.

Then, the Mexican presidential elections turned out to be historic, coinciding with the July 4th weekend and celebration. Perhaps it signals a coming of age for Mexico. I think the assassination of Coloso was a low point for Mexico, and this election is, hopefully, a turning point. If one compares the Mexico election with the upcoming presidential election in the United States, it seems like there was more of a choice for the Mexican electorate. Anyway, I have been feeling very patriotic and would like to share some of my thoughts on Independence Day. I hope that they will make some sense to you.

PATRIOTISM

It's really hard to describe my feelings on Independence Day. I am staying in a subdivision called "Yuppie Ridge." It is a fancy bedroom community for professionals who commute into Boulder, Denver, and surrounding communities. The houses are new and spacious, some even have four-car garages. In a way, the community seems to be a modern upscale, yuppie version of the 1950s. It is like the 1950s in the sense that, although many of the residents are young and college educated, a substantial number of women appear to be stay-at-home moms. I would guess that most of the residents are in their early-to mid-thirties, college educated, and have small children under twelve. Almost all of the residents are White. Most of the houses are less than two years old and quite spacious, generally two stories and more than 3,000 square feet.

There is a community center with a park, a playground, a large swimming pool, a soccer field, tennis courts, and a clubhouse. A three mile path for running and horse-back riding borders the subdivision, and every quarter of a mile or so there are various types of exercise equipment where one can stop and do sit ups, pull-ups, or some other type of exercise.

It is around 10:30 in the morning and I am participating in a Fourth of July celebration at the community center. Subdivision residents received an announcement that the parade would start at the clubhouse. Residents were encouraged to dress up in costumes and to decorate their bicycles. I am standing on the side in the shade, hoping not to be spotted by anyone that I might know. It would be embarrassing to appear on the six o'clock news as a "typical resident" celebrating the Fourth. A police car is to lead the parade and a fire truck will follow at the end of the procession.

I don't know what comes over me, but as the parade starts and the participants begin to stroll around the park, I suddenly join them. I guess I feel safe in joining the procession because no one knows me and because the activity seems innocuous enough. Many of the children have painted their faces and decorated their bicycles red, white, and blue, and a few are dressed in military fatigues and carry guns or rifles. One boy has built a makeshift tank that he has constructed, like a crude soap box derby type of car. It is a beautiful day as we stroll surrounded by the majestic, snow-capped mountains. The day is clear, sunny and near one hundred degrees. The adults are dressed casually in shorts or swimming trunks, and tank or halter-tops. Many are carrying American flags, and some wear the American colors. We walk aimlessly and haphazardly around the block, returning to the place where we started in the parking lot in front of the community center. There are a few feeble shouts and halfhearted cheers, but mostly we just stroll casually around the block. The participants seem unsure of themselves. The parade takes about five minutes, at most. It is sad, almost tragic because it is a parade without an audience, and without a clear purpose. A handful of spectators sit on the porches of their houses and stare curiously at the participants.

After the parade, there is a potluck lunch, with hot dogs, soda pop, and desserts. Residents were asked to bring a side dish or a dessert. I have brought two-dozen cupcakes. They were purchased at the local grocery store.
I am sitting at my desk at the back of the room. The teacher is talking and the children are laughing. There is a festive mood in the classroom, but I don't have a clue as to what is going on. One of the American girls walks up to me, placing a bag on my desk, as the entire class watches, and says with a smile, "This is yours." I return the package, and tell her emphatically, "no es mio!" She persists, placing the package on my desk a second and, then, a third time. I rise from my chair emphatically, walk to the front of the room, placing the package on the teacher's desk, and I tell her indignantly, in Spanish, that this package is not mine. The teacher smiles, and continues with the celebration. I am embarrassed . . . humiliated. All of the children are looking at me, laughing, but I do not understand.

I would soon learn about American culture. I would soon learn that all of the children exchanged little Valentine cards, and that some would get larger and nicer Valentines for "special" people. No, I would actually learn that all class members would not get a Valentine from everyone else in the class. I would learn that it was actually a popularity contest to see who would get the most, and best, Valentines, and who would get the least. Some children would buy a Valentine for every single member of the class, and for the teacher.

I feel humiliated by the incident. I am motivated to learn English in order to avoid further embarrassment and humiliation. It seems incredible, but I am fluent in English in about three months. I was very entrepreneurial then, and surprisingly popular. I had a large collection of puppets that I had brought with me from Mexico. I decide to stage puppet shows, and to invite some classmates. I charge a nominal admission fee, like ten or fifteen cents. I get a surprisingly good turn-out, but some of the children want their money back when they discover all of my productions are in Spanish. They feel cheated, or as they say, "gypped." I don't know any plays in English. I soon find a solution. I learn to translate the plays, and my schoolmates appear to be satisfied, and entertained. They like the English versions of plays like Don Juan Tenorio and other productions that I perform.

What is interesting, as I look back on it, is that although I may have learned to speak English better than most, if not all, of my classmates, and have become immersed in American culture, I would never come to feel like an American. Oh yes, I was always "American" in a Mexican sense. We see being American as being part of a continent. I was Latino Americano, and part of the American Continent, but I never felt "American," like hot dogs, apple pie, and all of the other stuff that goes with being American. Don't misunderstand, I participated extensively in American culture. I played little league, pony league, adult league baseball, and became an avid White Sox fan. I was a Boy Scout until I earned my "Tenderfoot Badge." I lettered in football and wrestling in high school, cruised the A&W Root Beer stand, and attended "sock hops" and the Prom. Yet, I always knew deep down that I was different from the other children. I always knew that I was Mexican. I knew that no matter how hard I might try, I would never be an American boy. I always knew that I was Brown . . . that I was Mexican.

July 15, 2000

Field Report #9
Querida Fermina:

"CLEANING UP OUR OWN HOUSES AND LATINODIDAD" n27 [*541]

I have been thinking a lot about Latino ethnic consciousness, or the notion of a pan-Latino ethnic identity ever since LatCrit V. I know it is fashionable for the media and for social scientists to refer to Latinos as "Hispanics," and a lot of us appear to have internalized the label. In fact, on the U.S. Census, we are the only group that is identified by ethnicity, rather than simply by race. n28 Anyway, it is weird to see all of these Indian-looking people referring to themselves as "Hispanics."

The issue reminded me of Jerry Lopez's piece on "Cleaning Up Our Own Houses." n29 It was a work in progress and I don't know whether Lopez ever published it, but it was really thought provoking and insightful. Do you remember the piece? We read it in the Law and Subordination Seminar, I believe. In the piece, Lopez sort of issues a challenge to People of Color to begin to focus more on race and less on ethnicity. Lopez admits to feeling a little bit leery whenever I'm told people are going to talk about "ethnicity." I picture all kinds of crazy scenes. I imagine people sitting around celebrating what over time has become safely ethnic in the United States. I see them wearing colorful dashikis and guayaberas, eating tasty Caribbean cuisine, talking about . . . Frida Kahlo. n30

Lopez maintains that the problem is that by focusing on ethnicity, we tend to minimize the importance of race. Although Mexicans are racially diverse, or racially distinct, they were definitely treated as non-White by the dominant group. Lopez recalls how growing up in East Los Angeles, unlike the various European groups in the City, Mexicans were considered "greasy" and definitely not White. Thinking about the article made me reflect once again on the Breckenridge session on Queering LatCrit Theory. As I sat and listened to a panelist talking about her elite background and family, I couldn't help but wonder about race, class, and colonization in the Americas. n31 The theme of the Conference, after all, is race and class and relating to working-class Latino communities. Perhaps, I am missing something here, but it strikes me that the panelists are not really addressing issues of class or race.

Fermina, I agree with Jerry Lopez that we need to start talking about race. But we also need to talk about class and gender. But don't you think it is painful for Latinos to talk about race? Since the Conquest, race and class have internally divided us. I guess one thing we share, as Latino Americanos, is heritage to hybrid cultures that resulted from the Spanish Conquest of indigenous groups. We don't like to talk about race, but in Mexico and other Latino countries there has always been a strong fit between race and class status, with White Europeans at the top of the hierarchy, and indigenous groups and Blacks at the bottom.

A complex racial caste system evolved in Colonial Mexico. At the top of the hierarchy were the gente de razon ("people of reason"), or peninsulares. The top caste was made up of individuals who were born in Spain and whose ancestors were Spanish and White. The criollos ("creoles") were the children of Spanish parents born in the Americas. Mulatos were the products of interbreeding between Whites and Blacks; Sambos a mixture of Indian and Black. Indians were at the bottom of the hierarchy. Even today, Mexico remains racially stratified with the upper classes made up largely of the descendants of White Europeans and the masses being Indian or mestizo ("mixed"). n32

I guess the racial dynamics in Cuba are different. One of the devastating consequences of the Conquest was massive depopulation of the native population, as they were exposed, and succumbed, to the many diseases introduced by the Europeans. As a result, in some areas in the Caribbean in general, and Cuba in particular, the indigenous population was virtually exterminated. The racial caste system that evolved in Cuba was different, except that, as in Mexico, White Europeans who traced their line directly to Spain were at the top of the hierarchy, and Blacks at the bottom. The similarity is that in both Mexico and Cuba, the people in power have historically been White, and they remain White. n33

Lopez also believes that we ("People of Color") need to stop focusing on our relationship with Whites and to begin to dialogue with other groups so that we may begin to take steps to forge effective coalitions among groups of Color. n34 Lopez argues, in other words, that rather than simply blaming Whites for all of the problems we face, we need to first "clean up our own houses." We need, in other words, to acknowledge both inter-ethnic and intra-ethnic tensions and conflicts. n35 I agree. In fact, I propose that the "Hispanic" label itself is a facile way to homogenize significant differences among diverse groups. n36 It's like my mother use to say about Latinos, "Juntos, pero no revueltos" ("We are united, but not the same").

One of the problems with the term "Hispanic," or "Latinos," frankly, is that it encompasses such a diverse collection of individuals and groups. As noted earlier, it includes various national origin groups which are themselves internally stratified along racial, class, and gender lines. One of the dangers, I fear, is that the
labels serve to obscure these differences and to essentialize Latinodidad or Hispánidad. n37

An additional difficulty is that the term Hispanic not only ignores our Indian heritage but that it focuses on language, rather than class or race, and obscures the importance of race in establishing class hierarchies within the various Latino groups. Although we have a different conception of "race" ("raza") than Americans that focuses more on culture, language, and a common heritage, throughout history in Latino America race has definitely mattered.

What do you think Fermina? Do you think there is a danger that the term Hispanic may serve to essentialize the diverse experiences of Latinos? It is important to use our own experiences and biography to enhance our understanding of broader issues and problems, but is there also a danger that we might essentialize our experience? Can we really say that we ever know and understand all Latino communities? Aren't we always looking at the world from a particular vantage point, or perspective, as "insiders" or "outsiders" relative to other groups? What is it that Latinos share in common besides language? What are some distinguishing characteristics of our cultura, besides salsa music, beer drinking, gangs, negative machismo, and homophobia?

LIVING LA VIDA LOCA: IMPLICATIONS FOR LAW AND LATCRIT THEORY

I wanted to close by discussing some of the implications of this chronicle for law and LatCrit Theory. Perhaps the most important implication is that it calls into question the commonly held assumption that "Hispanics" are a unitary ethnic group. I propose that we abandon the term Hispanic not only because it tends to homogenize the experiences of diverse cultural, national origin, racial, gender, and class groups but because it focuses on our European heritage and ignores our indigenous roots. n38 Terming Hispanics an ethnic group makes as much sense as [*544] calling people from Australia, Canada, Ireland, New Zealand, Britain, Colonial Africa, and the United States "English" simply because they speak the same language. Language, nationality, race and culture are not the same. Speaking English does not make one English, and speaking Spanish does not make one Hispanic. I speak English and Spanish but I am certainly not English, or Spanish.

A second, related, implication is that we need to begin focusing less on ethnicity and more on race. n39 The term "Hispanic" has been more palatable to mainstream society, and readily incorporated into popular culture, because it serves to homogenize, sanitize, assimilate, and commodify what is essentially a non-White population. The term is insidious because with a broad stroke it magically transforms indigenous people into a White European ethnic group. The current Hispanic frenzy, or obsession with La Vida Loca, n40 is reminiscent of Rudy Acuna's discussion of the "Return of the Spanish Boys." Acuna notes that during the 1950's it was not uncommon for some light skinned Mexican-Americans who were seeking to "pass" as White, thereby gaining greater status and acceptance, to say, euphemistically, that they were actually "Spanish," rather than mexicano. n41 Being Hispanic was preferable to being Mexican because Hispanics were classified as White and European, whereas "Mescans" were Indian and non-White.

According to Guillermo Rojas, the more revolutionary term "Chicano" appears to be giving way to Hispanic, "a bland and conformist term." n42 Whereas Chicano was abrasive, rejected Western ideology, and was not intended to be inclusive or tolerant, Hispanic ostensibly "erases all traces of language, of culture and our historical discrimination within the context of the Southwest" and signals "the death knell of all Chicano aspirations, desire for change, for confrontation, for equality under the law and eventually political power . . ." n43 The term Chicano was feared [*545] by the mainstream and conservative raza who had already gained acceptance and status. n44 But once Chicano was replaced by the Hispanic label,

. . . it made all Spanish-speakers in the U.S. equal-campesinos, Cuban refugees, Panamenians, Guatemalans, Filipinos . . .

As the term "Hispanic" became reified in the items of consumption, Pepto Bismol, Bud Light, tires, taco shells, and as these consumer items grew in identity with "Hispanics" so grew our national false consciousness that in fact the Chicano had arrived and was now equal to the American consumer. n45 Chicanos presumably became more "tolerant" and "inclusive" as they adopted the Hispanic label and were consumed by the American melting pot. Some Hispanics, like Richard Rodriguez, even argued that equality and freedom would be attained by eliminating bilingual education and affirmative action. n46

Another problem with "Hispanic" is that it was a label that was imposed by the national government and the media. According to Raymond Buriel,

as the size of the Mestizo population began to receive national attention in the mid 1970s, it became necessary for demographers and government bureaucrats to find a convenient catchall label to describe this ethnically diverse group. After months of meetings in Washington D.C., the federal government officially designated this group as "Hispanic." n47
Leo Estrada, a demographer who participated in some of these meetings, believes that it was one of the few times that a name was selected by the Government and imposed on a group, and adds that if you had gone out into any Mexican community in the United States and asked at a gathering for all of the Hispanics to stand up, there would have been a lot of confusion as to the referent for the term. n48

Over the past decade or so the mass media and American capitalists have become very much aware of the power of the Hispanic market, transforming "Hispanics" into a saleable and palatable commodity. Numerous articles in the media have pointed to the coming of age of Hispanics in music, advertising, and the media. A number of artists like Selena Quintanilla, Rickie Martin, Gloria Estefan, Julio Iglesias, Enrique Iglesias, and Marc Anthony have successfully "crossed-over," recording either bilingually or in English and appealing to both Spanish and English markets. In a word, Hispanics today are CALIENTE, or HOT, if not sizzling. n49 The "Buena Vista Social Club" compact discs, for example, introduced millions of American audiences to Afro-Cuban rhythms and traditional musica tropical; musica del recuerdo ("nostalgic music") long familiar to Latino audiences. Salsa music is incredibly hot across racial, ethnic, and class groups. Latinos are also now prominent in beer commercials, which readily display beautiful brown women and attractive young men, salseando, enjoying La Vida Loca with incredible gusto. n50

The growing popularity of soccer has exposed millions of Americans to soccer players from Brazil, Argentina, Mexico and other Latino countries. In fact, some Latino soccer players have become bona fide super-stars. But it is undoubtedly in beisbol that Latinos have made the greatest inroads. A growing number of major league baseball players are Latino and it would not be an exaggeration to say that most of the very best young talent, the future super-stars, are raza. Sammy Sosa, the Dominican Chicago Cub slugger, has entertained millions of fans with his charismatic personality and awesome power not only in "The Windy City" but also throughout the United States, as he and Mark McGuire competed to break the single season home run record.

The proliferation of Latino ballplayers in the major leagues has done much to undermine the binary model of race that has long prevailed in the United States. The binary model of race has been especially prevalent in law. Under this model, race is literally defined in Black and White terms, leaving Asians, Indians, and Latinos on the periphery of the discourse on race. One is, therefore, either White or Black. Since many Latino players are clearly Black, they serve to illustrate that being Latino and being Black are not mutually exclusive so that one can be both Latino and Black, or Black and Latino.

Neil Gotanda n51 has observed that race relations in the United States have been characterized by the "Rule of Hypodescent." n52 The American system of racial classifications conform to two formal rules. According to the Rule of Recognition, persons of Black-African ancestry are visibly black and can be readily recognized by others as black. Hence, any person who can be visually recognized as Black, even if that person's skin color is not dark, is Black. n53 "Blackness," then, is not based so much on skin color as it is on being visibly recognizable as black. The second rule, the Rule of Descent, "holds that any person with a known trace of African ancestry is black." n54 According to the Rule of Descent, regardless of the proportion of black and White blood, any person with a trace of Black blood is Black. n55 This view emanates from the belief that the mixing of the races somehow "taints" the purity of the White race and has been termed the "one drop of blood" rule. n56

"Whiteness" has also been linked to access to economic rewards and privileges. In an article entitled, "Whiteness as Property," Cheryl I. Harris discusses how during the 1930's her light skinned, straight haired African American grandmother with "aquiline" features worked at a major retail store in Chicago, passing as White. While the decision to "pass" as a White woman was "an act of both great daring and self-denial," for Harris' grandmother, "becoming White meant gaining access to a whole set of public and private privileges that materially and permanently guaranteed basic subsistence needs and, therefore, survival." n57 Whiteness is property because in the United States, "the law has accorded 'holders' of Whiteness the same privileges and benefits accorded holders of other types of property, n58 including the right to possess, use, and dispose. n59 The attributes of property are the right to transfer (alienability), to use, enjoy, and to exclude others. n60

Perhaps what is most striking about the American legal system of racial classification is that it does not recognize intermediate or "mixed-race" classifications. Even if one were to assume, hypothetically, two original "pure" races, one Black and the other White, racial mixing in reproduction would inevitably produce a multiracial society. n61

In contrast to the binary model, Gotanda identifies four distinct racial schemes: (1) Mulatto, where all mixed children are termed mulatto, regardless of the proportion that is White or Black; (2) Named Fractions, where individuals are distributed into
categories and identified according to fractional proportions so that a mulatto would be half Black, a quadroon one fourth Black and three-fourths White; a sambo one-fourth White and three-fourths Black, etc; n62 (3) Majoritarian, where one is [*548] assigned to the racial group that corresponds to the higher percentage of either White or Black ancestry, and (4) Social Continuum, a variation on the named fractions where labels are generally assigned according to the proportion of White or Black ancestry, but where social status also enters into which label is applied. n63

African American Latinos like Sammy Sosa and Alex Rodriguez seriously challenge the bipolar model of race in that they are both Black and Latino. They may be phenotypically similar to Black Americans, but they are culturally and linguistically Latino. While the bipolar model of race has been dominant in the United States, racial relations in Latino America have conformed to a more flexible model of race, the "Color Gradient" which recognizes a broad range of hues between the theoretically "pure" White and "pure" Black. Many Latinos from Puerto Rico and the Dominican Republic who are mixed, for example, have been shocked to discover that in the United States, they are suddenly Black. n64

One of the problems with the term Hispanic, as noted earlier, is that it serves to homogenize the Latino experience, thereby obscuring the internal diversity of the Latino population. Kevin Johnson has noted that Latinos have enjoyed limited success in bringing about social change through effective litigation strategies, in part, because of the internal diversity of the Latino community. Whereas African Americans were able to coalesce around a race-based litigation strategy, which culminated in Brown v. Board of Education, n65 barring de jure racial segregation in the schools, Latinos have enjoyed more limited success in forging a litigation strategy. According to Johnson, "the great heterogeneity among Latinos in terms of race, color, immigration status, country of origin, socioeconomic background, and other variables limits the utility of a strictly race-based strategy . . . ." n66

Plyler v. Doe n67 held that undocumented children could not be denied a public education by the states. While Plyler has been important for Latinos, it lacked the transformative power of Brown. n68 An immigration based litigation strategy is also limited because all Latinos are not [*549] immigrants, and many who are immigrants are legal residents. Although many Latinos are sympathetic toward immigrants, others hold ambivalent attitudes about immigration. In fact, there are Latinos whose views on immigration could be characterized as anti-immigrant. n69 Also, for some Latino groups like Puerto Ricans, immigration is not a salient issue, but statehood and sovereignty are.

Another important implication of the Chronicle is that we need to start talking not only about race and immigration status but also about class. The problem with the term Hispanic is that it obscures class and economic differences within the Latino community. Although Latinos are found disproportionately in the working class, and among the poor, all Latinos are certainly not working class or poor.

Fermina, do you remember when we were law students how there was a Mexican Graduate Student Association at Stanford? Because the group was attempting to work with other Latinos on campus, they would invite members of the Stanford Latino Law Student Association (SALSA) to their dances and other events. The interaction was eye-opening, and conflictual. A number of the Mexican students were definitely "White" and came from very wealthy, elite backgrounds. There was considerable tension between the two groups and some of the Mexican students, frankly, looked down on the Chicanos not only because they spoke an "inferior" Spanish and danced to musica de negros ("Rap Music"), but because they were inculcos ("low brow" or "low class").

From the beginning, Latino America has been stratified by class, and since the colonization of the Americas, race and class have been intertwined. While race relations in Latino America are characterized by a "Color Gradient," as in the United States, race has definitely mattered. However, rather than giving primacy to race, as is the case in the binary model, Latino American hierarchies revolved around class or wealth. Unlike the United States, the racial hierarchies in Latino America were not based on the one-drop rule or the Rule of Hypodescent, but, rather, on wealth. Although there was a high correlation between race and class the racial hierarchy was more fluid and those who acquired wealth could also attain a higher racial status. n70 In Brazil, for instance, one could buy, or purchase, status in a higher racial category. Hence, people with money and power tend to be viewed as White, regardless of ancestry or skin color. [*550]

July 25, 2000
Field Report #10

Querida Fermina:

Gracias for your response to the last chronicle. As usual, your comments were insightful and useful. I would like to close by returning to the theme of "Cleaning Up Our Own Houses." I agree with Jerry Lopez that we need to talk not only about race but also about inter-and intra-group differences and conflicts.
among groups of Color. Because of space limitations, I have opted to focus on Latinos. In addition to race, we need to start talking, and writing, about class, gender, and homosexuality in Latino communities.

Without denying the existence of machismo and homophobia in the Latino community, we need to examine whether all segments of the Latino community are equally machista and homophobic. A recent study on machismo and being a man in Mexico City by Mathew Gutmann calls into question many commonly held assumptions and beliefs about Mexican men and masculinity. Gutmann concluded that gender roles are changing in the colonia Santo Domingo, a working-class community on the outskirts of Mexico City. n71 Men are sharing more equally in child rearing and household tasks, and the most common explanation given by respondents for why men are assuming greater responsibility in the home is por necesidad ["by necessity"]. n72 Although men continue to have extramarital relations, there is less acceptance of the casa chica, or second household. n73 "One of the creative responses of some women to men's adultery has been to take on lovers of their own," n74 since women today have greater opportunities to meet and interact with other men and to have extramarital relations. [*551]

Surprisingly, people in Mexico City were not particularly homophobic. Homosexuals are concentrated in la zona rosa ("the pink zone"), a major tourist attraction and site of the busiest Metro stop in the city. Consequently, thousands of people cross la zona rosa every day on their way to work. n75 There is an interesting intersection between race, class, and homosexuality. The Alameda is a very popular park, and tourist attraction, next to Bellas Artes, in the Centro Historico of Mexico City. Many young prostitutas ("male prostitutes") cruise the park in search of clients and sexual liaisons. Patricia Villalba has studied more than three hundred prostitutas in the city and concluded that "the great majority of them are adolescent and darker-skinned indigena migrants from the countryside who are hired to have sex with other, often lighter-skinned men. n76

A popular opinion, voiced especially by older men in Santo Domingo, is that "there are more maricas (faggots) and machos among the rich, as if to imply that (what they see as) sexual deviance--and sexual access--is greater within the elites." n77 Homophobia is typically manifested through homosexual joking and sexual barbs among friends than it is by anger or "gay bashing." These cultural contradictions are noted by Gutmann, who says "homophobia is a code of boyish insults, whereas sexual experimentation by young men with young men and by young women with young women is increasingly seen as legitimate." n78

From this discussion it is clear that if law and LatCrit Theory are to address the problems of the Latino community, and work to incorporate Latinos into law and law discourse, we must continue to work to gain a greater and more complete understanding of the internal diversity and heterogeneity of the Latino population. Latinos are a growing and increasingly important segment of the United States population. A united Latino community has the potential to be a powerful political force, but the unity cannot be based on recognizing both our similarities and differences. We need to be unidos: " Juntos pero no revueltos."

Please write as soon as you can, and let me know what you thought of Alfredo's Mountain Adventure.

Con carino,
Alfredo

FOOTNOTE-1:

n1 It should be noted here that I am not using the terms law and lawyering in a narrow, technical sense. The issues discussed in the Chronicles have important implications for law, lawyering, and LatCrit Theory, although I may not always draw out these implications. It should also be noted that I have a broad vision of the word "love" that is inclusive and all encompassing.


n3 For a more detailed discussion of the field placement and the groups, see id. at 1348-50.

n4 Id.

n5 Fermina was born in the barrio of South Colton. Her father was a Bracero who started as an orange picker and eventually landed a job at the Portland Cement Company in Colton. After attending Valley Community College, she transferred to Santa Cruz. Upon graduating from Stanford, Fermina worked for the MILAGRO Immigration Clinic in Watsonville. She now teaches part time in the History of Consciousness Program at Santa Cruz. Fermina recently published a novel about Chicanas gangs, and she is working on a collection of poems and short
On the weekends, she is part of a folklorico group and occasionally sings at El Sombrero Restaurant in Watsonville. She is a charter member of the Lienso Charro del Norte and was on the Olympic Equestrian Team.

n6 I am reminded of Sojourner Truth who was born into slavery, but was an incredibly gifted woman and orator. See her famous "And Ain't I A Woman" speech. Narrative of Sojourner Truth (Nell Irvin Painter ed., 1998).

n7 Our history is filled with strong images of women, dating back to Pre-Columbian Goddess, Coatlicue, "Lady of the Serpent Skirt," an ominous, androgynous deity who is said to have been the "creator and destroyer of all matter." See Alfredo Mirande & Evangelina Enriquez, La Chicana 17 (1981). Not only were half of the Aztec deities women, but the origin of the Aztec universe itself was feminine so that "from her Zeus-like promiscuity sprang innumerable gods and goddesses of Aztec mythology." Id. Unfortunately, the contributions of women have not always been recognized. Diego Rivera's famous History of Mexico in El Palacio Nacional has been criticized because of the conspicuous absence of women. David Leonardo has responded with a mural in San Miguel de Allende where all of the historical figures represented are women. See also Elizabeth Salas, Soldaderas in the Mexican Military: Myth and History (2000) (describing the roles played by Mexican women in armed conflicts).

n8 Fermina, I know what you're thinking. This seems incredibly Freudian, but it is true nonetheless.

n9 I speak in the past tense because my mother passed away on Christmas Eve, 1998.

n10 See Mirande, supra note 2, at 1350.

n11 Tere was my grandmother's oldest sister who migrated to Chicago when she was around seventeen and eventually married, Rudolf Neebe ("Tio Rudy"), the son of a German immigrant. El Tio's father, Oscar Neebe, was actually a historic figure. He was President of the Beer Delivery Men's Union, or Teamsters, and one of the Haymarket Square Martyrs. While vacationing in Mexico City, Tere decided that it was too difficult for her sister (my grandmother) to take care of us. She, therefore, decided to enroll us in Queretaro, since it was conveniently located on the route back to Chicago.

n12 Substantive Program Outline, Class in LatCrit Theory and Praxis in a World of Economic Inequality, Fifth Annual LatCrit Conference, 1 (May 4-7, 2000).

n13 Jose Vasconcelos, La Raza Cosmica (1948).


n15 See e.g., Cherrie Moraga, Loving in the War Years (1983); Gloria Anzaldua, Borderlands-The New Mestiza (1987); This Bridge Called My Back: Writings by Radical Women of Color (Cherrie Moraga & Gloria Anzaldua eds., 1987); The Sexuality of Latinas (Norma Alarcon et al. eds., 1989).

n16 There is a dearth of research on Latino homosexuality in the United States. See Tomas Almaguer, Chicano Men: A Cartography of Homosexual Identity and Behavior, in Men's Lives (Michael S. Kimmel & Michael A. Messner eds., 1995).

n17 My dad was very sensitive and always cried when he got emotional.

n18 Quintos was my padrino, or godfather, for my first communion.

n19 The winning entry was set to the music of the old "Davey Crocket" song which was popular in the 1950s. The lyrics started something like this: "Born in Totulco in 95, raised on tamales til he was five . . . ."

n20 The figures can be used as key chains and are modeled after the "homie" figures which depict various barrio pseudo-gang characters.

n21 Chola/o initially referred to a half-breed, mestizo, Indian, or one of the common people. In the urban Southwest, it refers to working-class youth who have adopted a distinct way of dressing and talking that is said to have originated with

n22 By the way, "The Boxer," an old Simon and Garfunkel song was one of my brother Hector's favorite songs.

n23 Both of my brothers and parents are deceased. Alex was killed, along with two of his children, more than twenty years ago in a tragic automobile accident in Mexico. Hector died unexpectedly around ten years ago. He had an aneurysm and a massive brain hemorrhage. My dad died of natural causes several years ago. My mother passed away on Christmas Eve, 1998.

n24 This is not the real name. I have changed the name for the sake of anonymity.

n25 I don't get the escalofrio ("chills"), or thrill, that I get when I hear the Mexican National Anthem, or listen to certain Mexican songs like "La Negra" or "Las Mananitas," the traditional Mexican birthday song.


n27 This term refers to the sense of being "Latino" and identifying positively with other Latinos or what is sometimes referred to as Raza or La Raza.

n28 See Gimenez, infra note 36, at 55-56; Luis Angel Toro, Race, Identity, and "Box Checking:" Clarification in OMB Directive No. 15, in The Latino Condition, supra note 14, at 5354.

n29 Gerald P. Lopez, Cleaning Up Our Own Houses (November 6, 1991) (unpublished manuscript, on file with the author, New York University School of Law).

n30 Id. at 1.

n31 It is frankly hard to relate to her elite background and I am thinking that, if it wasn't for the strong Spanish accent, the speaker looks very European and, definitely, white.


n33 Id. at 196-97; Louis A. Perez, Jr., Cuba: Between Reform and Revolution 210-11, 306-07 (1995).

n34 See generally Lopez, supra note 29.

n35 Id.


n38 Latino is clearly the preferred term among Latinos themselves, but even "Latino" is problematic and has generated confusion because it tends to be equated with "Latin" which includes Italians and other Southern Europeans. I prefer Raza or La Raza which literally means "The Race" but connotes a sense of peoplehood and recognizes the unique racial dynamics that characterize Latino America.

n39 Lopez, supra note 29 at 1.

n40 La Vida Loca is a term used by Chicano gang members to describe their "crazy" life-style, which is characterized by violence, drugs, danger, arrests, police harassment, and unpredictability. The recent popular song by the same name has nothing to do with La Vida Loca and is a perversion of the term.

n41 A young Latino woman, Pilar, who works at the Law School told me that she recently met a Mexican American in Illinois who said that he was American, and not Mexican, because he has lived in
the United States for a long time and had nothing in common with Mexicans. Pilar is one of these smart, in your face Latinas, and she told him to "look in the mirror." She also made reference to an old Spanish saying, ("El Mono, aunque se vista de seda, mono se queda") ("The Ape, though he be dressed in silk, an ape he remains").

n42 Rojas, supra note 36, at 54.
n43 Id. at 55.
n44 Id. at 57.
n45 Id. at 56-57.
n47 Rojas, supra note 36, at 56 (quoting Raymond Buriel).
n48 Id.
n49 The theme on a recent afternoon talk show was featured as "I left my man for an Hispanic, living La Vida Loca!"

n50 Davila, supra note 37.
n52 The term "hypodescent" was suggested by American Anthropologist Marvin Harris. See Marvin Harris, Patterns of Race in the Americas 37, 56 (1964).
n53 Gotanda, supra note 51, at 258.
n54 Id.
n55 Plessy, for example, was not permitted to ride in the "White only" railroad car despite the fact that, according to the Court, he was "seven-eighths Caucasian and one-eighth African blood." Plessy v. Ferguson, 163 U.S. 537, 538 (1896).
n56 Id.

n57 Cheryl I. Harris, Whiteness as Property in Critical Race Theory, supra note 51, at 277.
n58 Id. at 281.
n59 Id.

n60 Id.
n61 Gotanda, supra note 51, at 258.
n62 Id.
n63 Id.at 258-59.
n64 See generally Piri Thomas, Down These Mean Streets (1967). See also Ian Haney Lopez, The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice," 29 Harvard C. R.- C. L. L. Rev. 1, 39-46 (1994) for Lopez's discussion of Piri Thomas' "quest for identity." The Thomas family was mixed Indian, African, and European descent, and when they moved from Puerto Rico to Spanish Harlem, they considered themselves White. However, after moving from Puerto Rico to Spanish Harlem where they were defined as Black, Piri came to believe that he was Black.

n68 Johnson, supra note 66, at 44.
n69 Id.
n70 One of the leaders in Mexican War of Independence from Spain, Jose Morelos, for example, was mulatto. The Mexican Abraham Lincoln, Benito Juarez, was an Indian from the state of Oaxaca and an orphan, but he became a leader and president of Mexico.

n72 Gutmann, supra note 71, at 156.
n73 Jennifer S. Hirsch et al., Because He Misses his Normal Life Back Home: Masculinity, Sexuality, and AIDS-risk Behavior in a Mexican Migrant Community 2 (unpublished manuscript, available from author, on file with Rollins School of Public Health, Emory University). Hirsch notes that the social construction of gender, masculinity, and
sexuality are being transformed both by structural factors and individual strategies for social mobility. While some men subscribe to the traditional discourse where sexuality is seen as an arena for the expression of masculine power and privilidge, "other men assert a different kind of manhood." Men who subscribed to a self-consciously modern masculinity describe their sexual relationships "as arenas of mutuality and affectivity . . . ." Id.

n74 Id. at 133.
n75 Id. at 127.
n76 Id.
n77 Id. at 129.
n78 Id. at 145.
In La Causa Chicana, The Movement for Justice, Juan Ramos asserts the text's purpose is to "present information about Chicanos to social workers and members of other helping professions so they may become involved in the movement by Mexican Americans to be first-class citizens of the United States." In a similar vein, the purpose of this essay is to promote knowledge of Chicanas/Chicanos. Yet it is not limited to the sole task of advancing information, but also declares imperative two key points. First, LatCrit theory is transformative knowledge regarding communities of color specifically. This is accomplished through its focus on inter alia communities of color, specificity of regions, and engaging each other's texts to advance the human condition. Without engaging text, transformative knowledge and praxis become stymied and communicative praxis as yet a second effort defaults to traditional text. Accordingly, self-critique, a necessary prong of advancing praxis allows us to find newer meanings and employ strategic counter-theory. It not only aids in constructing knowledge, but it also advances further particularities and praxis regarding the Latina/Latino condition in law and, in sum, proves the vitality of law.

Within LatCrit scholarship, several participants are advocating turning to Chicana and Chicano Studies to not only engage in communicative praxis but in turn, to advance transformative theory. Professor Margaret Montoya, for example, emphasizes that a gendered perspective--inconsistent in Chicana and Chicano theory until recent times--is critical to ensuring a successful LatCrit project. Professors Kevin Johnson and George Martinez in their excellent essay on Chicana/Chicano Studies advocate an activist-bent model in which to direct future LatCrit directions. This essay incorporates by reference their stated assertions with full force, but it also considers yet another factor that might prove useful to the directions of LatCrit theory. The focus of this essay also engages the scholarship of Chicana and Chicano Studies both within and outside legal investigations. It calls for joining Chicana and Chicano Studies to advance the jurisprudence of LatCrit theory and, in whatever measure, to possibly contribute to the actions of Chicana and Chicano advocates addressing the needs of communities in distress.

Chicana and Chicano Studies as a distinct theory resulted in large part from the Chicana/Chicano movimiento, which began as a social/political movement with the involvement of community activists, academics, students, and union members. A number of factors contributed to their advocacy but, in general, land theft, poll taxes, segregation, inequality in education, social, economic and political participation--injurious to Chicana and Chicano communities--spawned their activities. Activists also responded to the absence of Chicana and Chicano faculty members or institutions, which failed to reflect anything but the dominant population. Its participants refuted Western thought that claimed neutrality in its production of knowledge. Teresa Cordova asserts, "the University as an institution is a key arena where 'legitimate' knowledge is established . . . Our presence . . . and the issues we raise threaten the class legitimation function of the University." The LatCrit community is comprised of the greater realm of Latinas and Latinos throughout the Americas. Similarly, Chicanas and Chicanos are scattered throughout the United States. Regional and demographic differences exist even within the same geographical border. The class differences marked by
the Chicanas/Chicanos residing in rural, as opposed to urban, communities underscore this point. This essay is not only based on the scholarship and activism of Chicana/Chicano Studies, which promotes the study of Chicanas/Chicanos and the Indigenous population and other marginalized groups, but also aims to draw forth further understanding of the legal and political standing of Chicanas/Chicanos in Colorado and the surrounding region.

Because Chicana/Chicano Studies remains in its infancy, no one key theory dominates the field. Since the late 1950s, and in some instances even earlier, the study of Chicana/Chicano legal and political standing has failed to fully define and develop a broad theoretical base. As a work in progress, this "infancy" demonstrates that much can be shared or learned from Chicana/o Studies. Accordingly, this essay analyzes the legal struggles of Colorado Chicanas/Chicanos resulting from various legal, social and political disturbances, and demonstrates how the full force of the law has been employed to curtail their advocacy.

This essay asserts two specific points relating to its goal. First, the small-scale context of Chicana and Chicano Studies provided within this essay could further LatCrit jurisprudential efforts that emphasize praxis and its connection to our communities. Second, this essay calls for a return [*556] to exploring Chicanas' and Chicanos' standing as a conquered gente. n15 Chicanas/Chicanos have yet to reach "first-class citizenship" as witnessed by the dominant population. n16 The facilitating agent promoting their subordinate status is located in law with the means disallowing less than full citizenship status for Chicanas and Chicanos. n17

Part I provides a contextual background of Chicanas/Chicanos using a brief historical construct of the Chicano movement and its theoretical underpinnings in the region. Although Chicana and Chicano Studies is in its formation stages, much of its experience in seeking justice, politically and economically, has made great strides towards a more complete understanding of the nation's Chicanas/Chicanos. n18 Much of these efforts can prove invaluable to the emerging jurisprudential objectives of LatCrit theory. Part II presents an overview of the National Association of Chicana Chicano Studies ["NACCS"]. This organization joins those within our community looking to connect with Chicana/Chicano scholars and activists pursuing liberation and justice for impoverished and subordinated communities. Liberation movements such as the NACCS are a logical connection to a struggle long lacking in legal representation. Considering the number of dire conditions remaining in several Chicana/Chicano communities, NACCS underscores the long missing attention and the less than equal protection of the law allowed indigenous and Chicana/Chicano communities. Part III discusses possible future direction of LatCrit projects.

I. Chicanas and Chicanos

The Chicano is an extremely diversified "individual." We are as heterogeneous as our history. Without that background of history, it is difficult to understand us. No somos Mexicanos. We are citizens of the United States with cultural ties to Mexico and in some instances to [*557] Spain, but, within our ties of language and culture, we have developed a culture that is neither Spanish nor Mexican. n19

Property ownership facilitates participation in the political process. It also provides a means to resist the arbitrary and capricious actions of governing bodies. n20 For Chicanas/Chicanos, federal or state actions have challenged their citizenship status and property ownership standing. n21 Deriving from the conquest of the former Mexican Northernmost Provinces, Chicanas/Chicanos offer testimony as to the role of law in ensuring their outsider status. n22 In losing their property holdings to arbitrary and inconsistent legal rulings, land ownership disappeared. n23 Irreconcilable legislative actions disallowed property to vest in Chicana and Chicano hands, and denied them the full attributes of citizenship. While several Chicanas and Chicanos resisted extra-legal activities they also could not thwart unequal and unjust legal rulings.

A. Chicana/Chicano Movimiento Historical Account

"a page of history is worth a volume of logic" n24

Professor Mario Barrera asserts that "historical investigation can . . . clarify chains of causation which are not obvious through studies confined to one time period." n25 Professor Teresa Cordova and other scholars write on the exclusion of Chicanas/Chicanos from traditional scholarly investigations, and their absence from higher level institutions. n26 Without [*558] their presence, Chicana/Chicano history as an example becomes excluded, lapses into the sphere of the ignored within mainstream law, and allows misrepresentations to stand as the non-refuted record.

This use of history is evident in Professor Gordon's illustration:

Most of the ways in which lawyers use history are, however, not 'critical' in any plausible sense of the term. For lawyers the past is primarily a source of authority --if we interpret it correctly, it will tell us how to conduct ourselves now. History is not only a source of authority but of legitimacy: It reassures us
that what we do now flows continuously out of our past, out of precedents, traditions, fidelity to statutory and Constitutional texts and meanings. n27

Without studying history we are not only left unsure "that what we do now flows continuously out of our past, out of precedents, traditions, fidelity to statutory and Constitutional texts and meanings" n28 but also left without any response but to query the status quo.

Adopting a critical legal-historical approach to the dominant record is a tool that can only advance the LatCrit project. Uncoding dominant theory shows the manipulation of historical records as a means to gain legitimacy over the claims of marginalized communities. To round out this framework, several key incidents that propelled the movement towards achieving full standing as citizens are examined next.

B. Colorado

The key objective, viewed through a LatCrit normativity, is to ensure that our intergroup comparisons are performed in ways that promote the commitments and alliances that strengthen a community of solidarity. n29

Throughout the Americas, the rich diversity of Latinas/os marks key differences in our communities of color. n30 In promoting "commitments and alliances that strengthen a community of solidarity," n31 the annual LatCrit Conference takes place throughout the country. Its purpose in [*559] large measure underscores the diversity and particularities specific to each region. A key theme permeating LatCrit scholarship is that without specificity, the various and rich diversity of our Latina/o communities becomes essentialized and lost. In Colorado, Chicana/Chicano communities have long confronted essentialism, racism and other forms of social control different from Chicanas/Chicanos in other geographic regions throughout the country.

During the 1960s, the decade recognized as the "birth" of the Chicano movement, several key events transpired both inside and outside Colorado. n32 Several of these determinants serve as guideposts allowing analysis of the Colorado Chicana/Chicano Movimiento.

Colorado's Chicana/Chicano legal history is deeply rooted in land grant, n33 civil rights, education, labor and political struggles. n34 Yet, in instance after instance, Chicanas/Chicanos were blamed for their impoverished conditions or characterized as "mere pawns of external forces." n35 Foreclosed from remedial relief in law, Chicanas/Chicanos "took to the streets." n36 These various key events not only triggered but also propelled Chicana/Chicano activists to assert their full citizenship standing.

While other civil rights issues also define the region, Chicana/Chicano scholarship reveals a more realistic and accurate legal history. n37 Ernesto B. Vigil, for example, provides a more precise account of the impetus and governmental reaction regarding Chicana/Chicano advocacy [*560] in Colorado. n38 Yet, his text on Chicana/Chicano history goes beyond a mere accounting of the Colorado Chicana/Chicano experience with an analysis of the extent to which federal and state governmental actors curtailed Chicana/Chicano activism. n39 Vigil reports on the specificity of Chicana/Chicano confrontations with police brutality, excessive arrests, malicious prosecution, segregation, labor struggles, educational disparities and political inequality. n40 Without property Chicanas/Chicanos were successfully cordoned off from full participation in the legal process. The fact that all this was accomplished through the use of law is a major consideration for LatCrit theorists.

In confronting extra-legal activities and their disenfranchisement, Colorado community activists organized the Crusade for Justice, led in large part by Rodolfo Gonzales, and Chicana/Chicano youth. n41 While several factors played a role in promoting the Crusade for Justice, "police brutality, corruption, and scandal" n42 served as the major impetus behind their advocacy. Even today, reporter Angela Cortez writes, "people usually call police for help in certain situations, but recent shootings in Denver have some residents thinking twice." n43 The fact that police shootings in Colorado resulted in the deaths of Chicanos represents the basis of her assertion. n44

Vigil also provides an account of "checkout" practices, a Denver Police Department tactic designed to abuse and terrorize the community. "Checkout" practices, as Vigil writes, occurred when "police routinely arrested and held people without charge in violation of their constitutional rights." n45 Closely related to checkout practices are charges of abuse, brutality, and malfeasance. In addition, officers disallowed "suspects" to call for assistance "until the police decided to release them or file charges." n46 In sum, Vigil asserts, "the checkout system allowed police to gather evidence and file charges, or not file charges, while the person remained in custody. The system was ripe for abuse. Officers could continually arrest suspects without justification." n47 The disproportionate [*561] number of arrests makes evident the abusive nature of the practice.

A number of major occurrences in Denver detrimental to the well-being of Chicanas/Chicanos serve as
reminders of their second-class citizenship status, and which propelled them into the public sphere advocating for justice. In addition to police activities or shootings, the fact that a disproportionate number of Chicanos were drafted during the Vietnam War also accelerated activism as seen in the anti-war movement. Additionally, school segregation and other inequalities caused the rejection of mainstream politics by Denver Chicanas/Chicanos that "opened the way for a strategy of militant grassroots organizing." n49 Through various partnerships and affiliations with community activists from the Black and Native American communities, the Crusade for Justice further promoted various cultural and ethnic events. For example, the Crusade's work with California farm workers brought to Denver the Teatro Campesino, its theater group, to promote unionization efforts. n50 As means of both promoting the attributes of full citizenship status and protesting against unequal and discriminatory treatment, the Crusade formed a new school and facilitated a youth crusade. n51 Charges from a high school teacher that "people from the Crusade were ignorant and uneducated" n52 further instigated Chicana/Chicano activism.

This essentialism failed to consider the results of educational practices affecting Chicana/Chicano youth. n53 A government report on educational practices in the Southwest, for example, reveals the results of excluding everything but the Anglo culture. It provides:

The dominance of Anglo culture is most strongly apparent in the schools. Controlled by Anglos, the curricula reflects Anglo culture and the language of instruction is English. In many instances those Chicano pupils who use Spanish, the language of their homes, are punished. [n562] The Mexican American child often leaves school confused as to whether he should speak Spanish or whether he should accept his teacher's admonishment to forget his heritage and identity. n54

A graduate in San Antonio, for example, expressed the "deep resentment" arising from this exclusion with the following: "Schools try to brainwash Chicanos. They try to make us forget our history, to be ashamed of being Mexicans, of speaking Spanish. They succeed in making us feel empty and angry, inside." n55 In Colorado, 7.8% of elementary schools, and 15.6% of elementary school classes; 10.7% of secondary schools, and 46.4% of secondary school classes discouraged use of Spanish. n56 School officials enforced a "No Spanish rule" by a number of means, ranging from "suggesting that staff correct those who speak Spanish" and "requiring staff to correct those who speak Spanish," to "miscellaneous means of correction." n57 Nor was Colorado the only educational public school system practicing exclusionary methods. In Texas, "two San Antonio high school students told of being suspended, hit, and slapped in the face for speaking Spanish." n58 This cultural exclusion produced, in large part, exceedingly high dropout rates and further disparate treatment of Chicana/Chicano youth.

Responding to the unequal treatment directed towards Chicana/Chicano youth in Denver, a "freedom school" in the form of a summer youth program was formed to "instill ethnic pride" by teaching "Chicano history, culture and politics." n59 The school's efforts to instill ethnic pride became apparent when student Jeanine Perez corrected a public school teacher's mispronunciation of her name. n60 It also served as a symbol of hope for the high school walkouts. The walkouts also witnessed the beginning of the first National Chicano Youth Liberation Conference n61 where Chicana/Chicano youth produced El Plan Espiritual de Aztlan with assertions that they are "free and sovereign . . . a Nation." n62 Pursuit of their objectives of self-determination also resulted in the growth of the Black and Brown Berets, with both male and female [n563] members. Their stated mission encompassed securing safety in Chicana/Chicano neighborhoods. In Pueblo, Colorado, the Brown Berets along with the Pueblo La Raza Unida Party "paralleled the Crusade for Justice" n63 in terms of membership, ultimately becoming one of "its closest political allies." n64 In addition to political activism, the Brown Berets also provided security at dances, city parks and high schools. While controversy colored their actions, such as suspension from school for refusing to remove their berets and the physical assault of member Pat Apodaca by a teacher, it also initiated further student activism and high school walkouts. n65 Student protests caused several Brown Berets to quit gangs, and "challenged schools that failed them," n66 and which then "blamed them" n67 for failing.

While other key events surfaced in Colorado such as a school bus bombing, the region reached out to the Chicano antirwar moratorium in Los Angeles. Groups from across the nation, as well as in-state participants, attended to protest the disproportionate numbers of Chicanos drafted and killed in Vietnam. n68 The Los Angeles protests resulted in the death of Los Angeles Times reporter and the news director of a local television station, Ruben Salazar. n69 Salazar lost his life by the actions of a deputy sheriff while in the Silver Dollar Cafe. Although the Cafe, as noted by several authors, was located a distance from the protests, the deputy's firing of a high-powered tear gas
canister with a ten-inch projectile striking Salazar in the temple is riddled with questions regarding the deputy's intentions. n70 [*564]

Colorado political and community activism further produced actions such as taking over swimming pools, parks, and community organizing. Advocacy initiated the Escuela Tlatelolco, resulting from the expulsions of students, and The Second National Chicano Youth Conference. n71 The Youth Conference, furthermore, was marked in part by the call for a third political party and an eventual reaching out to La Raza Unida Party. n72 La Raza Unida Party, created in South Texas, "came out of a mass movement which developed as a result of the school walkout in Cristal" n73 by students demanding improvements in their schools. La Raza Unida also responded to the extreme poverty in Texas, civil rights violations, and economic disparities n74 resulting from the absence of land ownership and economic opportunities. La Raza Unida sought to nationalize the various Chicana/Chicano constituencies and encourage them to assert their power and self-determination. Denver played an instrumental role in nationalizing the La Raza Unida Campaign led in part by activists Liz Montoya and Priscilla Salazar. n75 Women played an active role with the first La Raza Unida "slate" in Colorado listing four women candidates. n76

Yet it is the actions of governmental officials at the federal and state levels that underscore this essay. The Chicana/Chicano community in Colorado as characterized by Vigil as a "war on dissent," n77 witnessed the early demise of the activism of the past. Culling through FBI files, Vigil provides an excellent review not only of Chicana and Chicano activism in the region, but also of the aggressive and intrusive governmental response. Former governor Clarence Morley's membership in the Ku Klux Klan and its role in promoting "various prejudices" as early as the mid-1920s and lasting into the 1930s, emphasizes the long-lasting vulnerability of Chicana/Chicano communities. n78 Various Klan members employed as Denver policemen, for example, controlled the "peace" several years beyond their tenure on the force. n79 Vigil's testimony and account is important in revealing the extent to which governmental actors sought to repress the Crusade for Justice. [*565]

Outside of city and state practices in the movement, the Crusade for Justice and its links to the Black Power Movement and the American Indian Movement also spawned FBI surveillance. n80 The FBI noted the Crusade's connection with Reis and Patsy Tijerina in their efforts to recapture millions of acres of land lost to legal posturing following the war between the Mexican and American Republics. n81 Reis and Patsy Tijerina, and others organized the Alianza Federal de Mercedes in New Mexico to reclaim the dispossession of their families from their native community land grants. Not unlike Crusade for Justice participants, the Alianza also witnessed various civil rights violations resulting from their protests. n82

The sum efforts towards seeking justice for Chicana/Chicano communities resulted in Herbert Hoover and federal officials spawning para-military operations across the country. n83 FBI vigilantism and deaths of Chicano activists ultimately evidenced in large part the demise of the activism in Colorado and throughout the nation. n84

Yet while La Raza Unida Party failed in its efforts to nationalize, and the Crusade for Justice was structurally forced to downsize its efforts; all is not lost. In the present Chicana and Chicano youth are calling for a return to activism. The Brown Berets are returning and Chicana/Chicano youth across the nation are recapturing the Chicana/Chicano activism of the past and producing some results. In California, for example, the actions of university and college students succeeded in the creation of a Cesar Chavez Center at the University of California.

II. National Association of Chicana/Chicano Studies

Chicana/Chicano Studies is characterized as a "multifaceted struggle for social justice; inspired by belief that cultural pride and ethnic unity were together the raw stuff of political mobilization and empowerment." n85 Not until the 1960s with the entry of scholars of color [*566] was the plight of Chicanas/Chicanos emphasized with any significant force. n86

A. Chicana/Chicano Studies

As in the case with many Indigenous peoples in the United States, Chicanas/Chicanos negotiated and contracted an international treaty with the United States. In the Treaty of Guadalupe Hidalgo (the "Treaty") the United States and Mexico terminated the war between the two Republics. n87 The Treaty, comprised of a series of covenants, promised to not only end the war but also to protect the property, n88 civil rights, n89 and citizenship status n90 of those residing in the newly acquired territories. n91

The demand for recognition of the rights negotiated and promised to them in the Treaty provided one of the earliest rallying calls for participants in the struggle. Movement participants sought the equal standing granted the dominant population as promised under various covenants in the Treaty. While several studies on the Treaty are surfacing in the contemporary period, much of what transpired remains unexamined and the
role of the American Republic in constructing the legal standing of Chicanas/Chicanos precludes opportunities to transform.

From the war between the two Republics hard times followed, as made evident in part by the Colorado experiences. Elsewhere, other instances of inequality and disparate treatment in Chicana/Chicano communities also surfaced but space only allows for discussion of a few. Racism directed towards Chicanas/Chicanos for example resulted in hangings, death, and imprisonment without due process, segregation from public educational institutions, and disenfranchisement. A number of extra-legal attacks on Chicana/Chicano communities, as witnessed in Colorado, were accomplished by governmental actors committing violence. An instance includes the Texas Rangers use of State sanctioned force in driving Chicanas/Chicanos from their Texas properties. Other legal maneuvers disallowed intermarriage between African Americans and Chicanas/Chicanos.

Responding to this vast historical and legal record scholars and others have placed at the center of inquiry inter alia labor issues, Chicano colonialism, Chicana feminist theory, historical events, education, politics, health issues, and the impact of poverty in our communities. Through the scholarship of Chicana and Chicano Studies, scholars and activists, a more precise account of Chicana/Chicano activism and participation is emerging.

B. Chicana/Chicano Theory

Several scholars advocate a Chicana/Chicano paradigm. Yet, a distinct Chicana/Chicano paradigm, thus far, is addressed only "peripherally." As a relatively young enterprise, Chicana/Chicano Theory is not limited to one defining paradigm, nor has placing Chicanas/Chicanos at the center of academic inquiries resulted in a dominant paradigm specific to Chicana/Chicano Theory. Thus far, several theories have emerged ranging from colonial models, historical period studies and/or a combination of the two, social science interpretations, and political theory. More recently, feminism, socialistfeminist positions, and postmodernism have also entered with full force. In postmodernism literature, "Chicana and Chicano historical writings have been presented as 'readings,' 'positionings,' 'perspectives,' and 'constructions.'"

While the above scholars range in their approach to Chicana and Chicano Studies, all remain consistent in seeking to affirm "self-determination" for Chicanas/Chicanos as "an ideologically based challenge to traditional social science." Initially, some in the movement espoused a nation building effort characterized as "Aztlan." In the present, however, Chicanas/Chicanos are also expanding the study of racism and other forms of oppression as extending to all Latina/o communities. In sum, Chicana/Chicano Studies scholars remain grounded in their thesis that "objectivity as presented in Western thought does not exist." In contrast to misrepresentations of Chicanas/Chicanos as mere pawns in their destinies, Chicana/Chicano scholarship offers a more precise account of gente Latina.

With much deference to the excellent scholarship produced in Chicana/Chicano Studies, this essay nonetheless promotes the assertions of scholars advocating a return to colonial models and academic investigations of Chicanas and Chicanos. From the earliest conquest of Mexico Antigua, Hispanics seeking gold for the Spanish Crown displaced Indigenous communities throughout Latina America. Similarly, Chicanas/Chicanos as a product of the war between the United States and the Mexican Republic witnessed the conquest of their property. The colonial model, although studied and analyzed, has remained relatively absent, criticized or deemed inapplicable.

This author, Professor Raul Contreras, and others assert that examining the legal histories and experiences disallowing citizenship without regard to race, class, gender, and other identities, contemplates an internal colony framework. In considering the Chicana/Chicano condition in law windows of opportunity facilitating change and promoting justice in our communities could draw innumerable lessons from studying colonial models. Only from the Treaty of Guadalupe Hidalgo did Chicanas'/Chicanos' legal standing become recognized. It is from that period of time, for the purposes of this analysis, that law was employed to evade their legal rights and disallow protection. Without studying the various intersections flowing from the conquest, transformation of distressed communities becomes stymied and attendant power relations privileged by their institutional standing stay protected.

C. National Association for Chicana and Chicano Studies

Not unlike the LatCrit community of participants involving academics, non-academics, community activists and students, Chicano Studies participants are organized regionally and nationally in the NACCS, which is considered next.

Out of the above framework NACCS declared its goal and objective is to provide a direct response to the racism, oppression, discrimination, and resistance
disallowing the full assimilation of Chicanas/Chicanos. The first gathering began as the National Caucus of Chicano Social Scientists from 1972-73. Several name changes thereafter ultimately generated its present title as the National Association for Chicana and Chicano Studies. (NACCS). NACCS's stated purpose, as declared in Article II from its Mission, declares six principle objectives:

1. Facilitate dialogue about Chicana and Chicano experiences among scholars, students and community members;
2. Encourage, promote, and assist the development of Chicana and Chicano studies centers, programs, and departments.
3. Facilitate the recruitment of Chicanas and Chicanos at all levels of education.
4. Promote and develop curriculum and the integration of Chicana and Chicano Studies from kindergarten to college. [*570]
5. Provide mentorship for undergraduate and graduate students to facilitate their entrance and success in the academy and the community.
6. Provide mentorship to faculty to facilitate their entrance and success in the academy. n111

NACCS's stated mission is:
To advance the interest and needs of the Chicana and Chicano community. To advance research in Chicana and Chicano Studies. To advance the professional interest and needs of Chicanas and Chicanos in the academy. n112

The National Association for Chicana and Chicano Studies founded in 1972 seeks to promote, research and further the "political actualization of the Chicana and Chicano community." n113 The Association's preamble provides that:

NACCS calls for committed, critical, and rigorous research. NACCS was envisioned not as an academic embellishment, but as a structure rooted in political life. n114

The preamble further provides that NACCS:

...presupposed a divergence from mainstream academic research. We recognize that mainstream research, based on an integrationist perspective emphasizing consensus, assimilation, and the legitimacy of society's institutions, has obscured and distorted the significant historical roles class, race, gender, sexuality and group interests have played in shaping our existence as a people. Our research confronts these perspectives and challenges the structures and ideologies of inequality based on classist, racist, sexist, and heterosexist privileges in society. n115

The preamble also speaks to transforming Chicana/Chicano communities. It states:

In shaping the form of this challenge, the Association contends that our research generate new knowledge about the Chicana and Chicano community. It should also help solve problems in the community. Problem solving cannot be detached from an understanding of our position in this society. n116

LatCrit's emphasis on transforming subordinated communities is on target with the above stated goals. [*571]

Another similar LatCrit effort regarding the construction of gender, racial and other inequalities is reflected in the last section of the Preamble. It provides:

NACCS recognizes the broader scope and significance of Chicana and Chicano research. We cannot overlook the crucial role of ideas in the construction and legitimization of social reality. Dominant theories, ideologies, and perspectives play a significant part in maintaining oppressive structures on theoretical, experiential, and policy levels. NACCS fosters the construction of theories and perspectives which attempt to explain the oppression and resistance of the Chicana and Chicano past, present, and future. Ideas must be translated into political action in order to foster change. n117

In "fostering the construction of theories and perspectives which attempt to explain the oppression and resistance," n118 LatCrit can connect the above considerations with an attendant legal framework. Facilitating such can only advance transformative theory and praxis.

III. A LatCrit Moment

LatCrit theory is not directed towards reducing group experiences to a series of published fora without regard to the conditions of subordinated communities. Nor does its course constitute a mere, imperceptible and non-discernible thought within the realm of legal jurisprudence. n119 In speaking to the mechanism of legal and political oppression, LatCrit scholarship establishes and proves the vibrancy of law and its obligation to seek social, economic and political justice for impoverished communities. Not unlike other periods of ebb and flow within dominant theory, LatCrit theory provides an example in which law is permitted to soar and, in turn, prove beneficial to the jurisprudence of dominant theory.
In advancing ethnic and political solidarity, movement participants, through their association with NACCS, nevertheless confronted a series of difficulties—some of which are surfacing within the LatCrit community. Regional and ideological differences, for example, were made evident at national and regional events. "Divide and conquer" tactics against NACCS and its organizational structures further depleted funds.

Internal dissent also arose from the initial lack of attention paid to gender issues and queer theory. While the jurisprudence of LatCrit theory argues for inclusiveness, it must strive to diminish any sort of dissent that could undermine our efforts. Even with the recent focus on the nature of class as constructed in Boulder, Colorado during this year's conference, much work remains to be addressed. The study of Chicana/Chicano Studies and the governmental role in dissent against First Amendment principles, inter alia, shows the immeasurable harm of outside forces through unwarranted surveillance, the shooting of Chicana/Chicano activists, and the targeting of Chicano attorneys, all which curtailed Chicana/Chicano activism nationally, depleted fragile resources and disenfranchised them and their organizing efforts.

A number of issues, moreover, require further inquiry. Teen pregnancies, high-school drop-outs, unemployment, underemployment, racial-profiling, farmworker children working in the fields, the elimination of legal services to assist farmworker families, affirmative action challenges, politics, gender and sexual orientation issues, gang warfare, poverty and drugs are but a few examples. To date, moreover, a Department of Chicana/Chicano Studies does not exist in Colorado and existing departments in institutions outside the state remain vulnerable to institutional and political challenges. In the alternative pluralism models, with various ethnic studies departments incorporated under one umbrella are moreover de-emphasizing the role of departmental status for Chicana and Chicano Studies.

Yet another lesson surfaces. Some in Chicana/Chicano studies are asserting that there is slippage between academics and the community. Students, for example, are frustrated by the lack of activism on the part of faculty. Chicana/Chicano youth have historically engaged in direct action against racism and other forms of mistreatment ranging from rallies, conferences, marches, the Chicano Youth Conferences' manifestation of the Plan de Santa Barbara, and calls for nationalizing La Raza Unida Party. LatCrit theory similarly, is drawing the attention of Chicana/Chicano youth and presents much hope for future LatCrit projects. Ultimately looking to the Chicana/Chicano experience with law allows newer forms of communicative praxis. It not only permits a shared vision but also advances future directed strategies in our interaction with one another.

Conclusion

The LatCrit record shows a jurisprudence driven in part to connect the struggles of subordinated groups. Yet in contrast to dominant theory it is also a jurisprudence centered on cultivating community coalition and praxis:

LatCrit theory recognizes the need to attend to more than immediate self-needs. LatCrit theory therefore is committed to the notion that our theorizing, as a form of practical and transformative social struggle, must be referenced to other anti-subordination theories and struggles.

Communicative praxis enlarges our collective efforts, and links our struggles with the plight of other subordinated communities in expanding legal precepts harmful to our communities. As a transformative event, LatCrit scholarship shows it's aiming for the stars in bringing disenfranchised communities of color within the realm of law's privileges. Much, therefore, can be garnered from exploring and connecting the role of law that thwarted the transformation of Chicana/Chicano and Native American communities for too long into the present period.

FOOTNOTE-1:

n1 Juan Ramos, Foreword, in La Causa Chicana, The Movement for Justice (Margaret M. Mangold ed.,1971) [hereinafter La Causa Chicana].


n3 Recent symposia issues with a focus on LatCrit theory include, for example, 19 Chicano-Latino L. Rev. 1 (1998); 53 U. Miami L. Rev. 1119 (1999).

n4 Communicative praxis references the "construction of meaning, projects, visions, values, styles, strategies, and identities through interaction with and against one another." Markus S. Schulz, Collective Action Across Borders: Opportunity


n7 While the issue of essentialism produced misrepresentations in law, much of the legal-historical background of Chicanas and Chicanos remains standard text in law. See, e.g., Sena v. United States, 189 U.S. 233, 239 (1903) (describing the "loose manner" in which Mexico and Spain awarded land grants in direct opposition to the formality employed during the Mexican period); William W. Morrow, Spanish and Mexican Private Land Grants, in Spanish and Mexican Land Grants 1, 15 (Carlos E. Cortes et al. eds., 1974).

n8 See Montoya, supra note 6, at 1127-41. For examples of placing women at the center, see, e.g., Laura M. Padilla, Single-Parent Latinas on the Margin: Seeking A Room With A View, Meals and Built-In Community, 13 Wis. Women's L.J. 179 (1998); Emma Perez, The Decolonial Imaginary, Writing Chicanas into History (1999).


n11 See id. at 1147-50.

n12 See id.

n13 An example of the combined efforts of faculty and community activists can be found at the University of Minnesota, Department of Chicano Studies, Minneapolis, Minnesota, see University of Minnesota, Chicano Studies: Origin of Department, available at http://cla.umn.edu/chicano/.


n15 Translated to "conquered people." Referring to the conquest of the former Mexican territories that now falls within the boundaries of the states of California, Nevada, Texas, New Mexico, Arizona, Colorado and parts of Utah. See Dr. David A. Sandoval, Colorado Hispanics, in 138 Cong. Rec. S8452-01 (daily ed., June 18, 1992).
n16 Racial profiling and heightened scrutiny of individuals appearing Mexican by law enforcement officials represent a small example of the status and place of Chicanas and Chicanos within the dominant population.


n20 U.S. Const. amend. V.

n21 See, e.g., United States v. Chavez, 159 U.S. 452 (1895).


n26 For an excellent reference on Chicana history see Del Castillo, supra note 2. For an account of the "central features" of the Movimiento, John Garcia provides:

(1) self-determination and self-definition of the Chicano experience in American society;

(2) the need for indigenous leadership and organizations to carry out the interests of the community;

(3) resurgence and positive redefinition of culture and traditions;

(4) adoption of direct confrontation politics with unresponsive institutions and political actors; and

(5) a strong sense of urgency for immediate social change.


n28 Id.


n31 See Iglesias, supra note 29, at 595.

n32 See, e.g., Dennis Nodin Valdes, Al Norte, Agricultural Workers in the Great Lakes Region, 19171970 (1991) (examining the role of mutualistas in the Midwest and throughout Chicana/Chicano communities).


n34 See cases cited supra note 22.


n36 For a contemporary example, see Guillermo Contreras, Judge Rejects Suit To Reopen Fatal 1972 Police Shooting, Albuquerque J., Apr. 12, 2000, at A1 (discussing the 1972 police shooting of Chicano activists Rito Carnales and Antonio Cordova).


n39 Id. at 18-53.

n40 Id. at 81-109.

n41 For a photographic essay of the Crusade for Justice, see 500 Anos del Pueblo Chicano, 500 Years of Chicano History in Pictures 129-30 (Elizabeth Martinez ed., 1991) [hereinafter 500 Anos].

n42 Vigil, supra note 38, at 11.

n43 Angela Cortez, Police Need to Regain Our Trust, Denver Post, May 16, 2000, at B11.

n44 Id.

n45 Vigil, supra note 38, at 11.

n46 Id.

n47 Id. For other examples of police misconduct during different periods of time, see David L. Carter, Hispanic Perception of Police Performance: An Empirical Assessment, 13 J. Crim. Just. 487 (1985); Police Misconduct, 6 Chicano L. Rev. 63 (1983); Ellen Miller, 50 Protest Fatal Shooting by Narcotics-Team Officer, Denver Post, Mar. 1, 1992, at 8C.

n48 Vigil, supra note 38, at 19.

n49 Id. at 26.

n50 Id. at 46.

n51 Id. at 64-80.

n52 Id. at 81.

n53 See generally U.S. Comm'n on Civil Rights, The Excluded Student: Educational Practices Affecting Mexican Americans in the Southwest Report III (1972) (discussing the role and effect of assimilation) [hereinafter U.S. Comm'n on Civil Rights]; Philip D. Ortego, Schools For Mexican-Americans: Between Two Cultures, in Pain & Promise: The Chicano Today 224 (Edward Simmen ed., 1972). Ortego provides that the Chicana/Chicano "dropout rate is more than two times the national average" with Chicanas/Chicanos reaching 7.1 years; and Anglo children achieving 12.1 years. Id. at 225.

n54 U.S. Comm'n on Civil Rights, supra note 53, at 11.

n55 Id. at 11 (quoting Stan Steiner, La Raza, The Mexican Americans 212-13 (1970)).

n56 Id. at 16.

n57 Id. at 18.
n58 Id. at 19.
n59 Vigil, supra note 38, at 81.
n60 Id. at 81-82.
n61 Id. at 95-97.
n62 Vigil, supra note 38, at 99; see also Stan Steiner, Chican Power: Militance Among the Mexican Americans, in Pain & Promise: The Chicano Today 130 (Edward Simmen ed., 1972) (providing an account on the meaning, intent and identification of Aztlan). Steiner provides, for example: “Aztlan! It was the ancient Kingdom of Montezuma, Emperor of the Aztecs, that had vanished from history in 1513, when the Spanish Conquistadors conquered Mexico.” Id. at 130.
n63 Vigil, supra note 38., at 111.
n64 For a review of the activities of La Raza Unida Party and its origins in Texas, see La Raza Unida v. New Mexico, 577 F.2d 677, 677 (10th Cir. 1978) (“seeking to enjoin the enforcement of certain New Mexico statutes relating to the appointment of local election officials to serve on precinct election boards”); see also Jose Angel Gutierrez, The Making of A Chicano Militant, Lessons From Cristal (William L. Andrews ed., 1998); John Staples Shockley, Chicano Revolt in a Texas Town (1974).
n65 Vigil, supra note 38, at 111-12.
n66 Id. at 113.
n67 Id.
n68 For accounts of the Vietnam experience, see Aztlan & Vietnam, Chicano and Chicana Experiences of the War (George Mariscal ed., 1999).
n70 See generally Lopez, supra note 69, at 1.
n72 For one account of this effort see Rodolfo "Corky" Gonzales, Chicano Nationalism: The Key to Unity for La Raza, in A Documentary History of the Mexican Americans 488 (Wayne Moquin & Charles Van Doren, ed., 1971).
n74 Id. at 241. In Zavala County, Texas, the median family income in its county was $1,754 per year with a median educational level at 2.3 grades. Id.
n75 Vigil, supra note 38, at 165.
n76 Id. at 165-66.
n77 Vigil, supra note 38.
n78 Id. at 4.
n79 Id.
n80 Id. at 29.
n81 Id. at 30-33.
n82 For an account of the Alianza reference, see, e.g., Richard Gardner, Grito!, Reis Tijerina and the New Mexico Land Grant War in 1967 (Richard Gardner ed., 1970). For a photographic image of Chicana/Chicano families being arrested during the land grant insurgency see 500 Anos, supra note 41, at 122.
n83 For one account of FBI activity in Chicano communities see Munoz, supra note 71, at 14.
n84 Id.
n85 See Lorena Oropeza, Making History: The Chicano Movement, in Voices, supra note 18, at 198 (the author’s characterization of Chicano Movement participants).
n86 See generally Johnson & Martinez, supra note 9 (stating that the development
of LatCrit scholarship can be attributed to this new generation of Latina/Latino legal scholars).


n88 See Treaty of Guadalupe Hidalgo, [Art. VIII].

n89 Id.

n90 Id. at [Art. IX].


n92 See generally Martinez, supra note 37 (account of several litigation experiences confronting Chicanas/Chicanos).


n94 Perez v. Lippold, 198 P.2d 17, 26-27 (Cal. 1948).

n95 See, e.g., Tomas Almaguer, Toward the Study of Chicano Colonialism, 2 Aztlan (1971).


n98 See, e.g., Dennis N. Valdes, Region, Nation, and World-System: Perspectives On Midwestern Chicana/Chicano History, in Voices, supra note 18, at 115.

n99 For an excellent study of Chicano politics, see Juan Gomez-Quinones in Roots of Chicano Politics, 16001940 (1994); see also From Peones to Politicos, Class and Ethnicity in a South Texas Town 1900-1987 (Douglas E. Foley ed., 1977).

n100 See generally Chicana Feminist Thought: The Basic Historical Writings (Alma Garcia ed., 1997). For an example of the exclusion and institutional power structures criticized by Chicanas see Christine Marie Sierra, The University Setting Reinforces Inequality, in Chicana Voices, Intersections of Class, Race, and Gender (Teresa Cordova et al. eds., 1990) [hereinafter Chicana Voices].

n101 See Emma Perez, Speaking From the Margin: Uninvited Discourse on Sexuality and Power in Chicana Voices, supra note 100, at 57.

n102 See Building with Our Hands, New Directions in Chicana Studies (Adela de la Torre & Betriz M. Pesquera eds., 1993). For an account of Chicano history and "paradigm shifts" see Ramon A. Gutierrez, Chicano History: Paradigm Shifts and Shifting Boundaries, in Voices, supra note 18, at 91.

n103 Gutierrez, supra note 102, at 105.

n104 See Living Chicana Theory, supra note 14, at 17; Christine Marie Sierra, The University Setting Reinforces Inequality, in Chicana Voices, supra note 100, at 5.

n105 Dennis N. Valdes, Introduction, in Voices, supra note 18; see also Albert Camarillo, Chicanos in a Changing Society: From Mexican Pueblos to American Barrios in Santa Barbara and Southern California, 18481930 (2001). Other citations regarding Chicana/Chicano history can be found in Johnson & Martinez, supra note 9, at n1.

n106 See Living Chicana Theory, supra note 14, for a discussion on this thesis.
n107 See, e.g., Christine Marie Sierra, The University Setting Reinforces Inequality, in Chicana Voices, supra note 100, at 5; see also Douglas Holt, Teachers' View of Latino Past Sparks Dispute, Dallas Morning News, April 13, 1997, at 48A (discussing the discharge of Patsy and Nadine Cordova for teaching Chicano history).

n108 For one discussion of this model, see generally Munoz, supra note 71.

n109 This is in direct contrast to feminist paradigms recognizing the conquest of Mexico in 1513 as the beginning as opposed to the 1848 date deriving from the Treaty of Guadalupe Hidalgo. From a legal perspective, however, 1848 is the date in which Chicanas/Chicanos were annexed into the American Republic and their legal rights formally executed. See Gutierrez, supra note 64, at 101.

n110 See, e.g., Raoul Contreras, Chicano Studies: A Political Strategy of the Chicano Movement, in Mapping Strategies: NACCS and the Challenge of Multiple (Re)Oppressions 92 (Maria Beltran et al. eds., 1999); Rene Nunez, Taking Back Chicana and Chicano Studies: Reflections on Chicana/Chicano Student Faculty Relations, in Mapping Strategies, supra at 19.


n112 Id.

n113 Id.

n114 Id.

n115 Id.

n116 Id.

n117 Id.

n118 Id.

n119 As to the objective of LatCrit theory, see, e.g., Laura E. Gomez, providing:

First, LatCrit is a critical scholarship in refusing to see the law as internally consistent and fundamentally just. We realize the law can be used to further just ends, but we are far from accepting this as inevitable . . .. A related critical element is that LatCrit scholars see their agenda as both beyond law and beyond Latino interests. We support legal change as part of a broader agenda of social and political transformation. We seek the betterment of society for many who are disenfranchised and self-consciously seek coalitions with other racial minorities, white progressives, poor and working people of all races, and subordinated peoples world-wide."


n120 Reference, for example, the case involving attorney Francisco "Kiko" Martinez, Martinez v. Winner, et al., 548 F. Supp. 278 (1982)reh'g granted, vacated in part, aff'd in part, 800 F.2d 230 (10th Cir. 1986); for a criticism of the attorney's actions, see also Tomas Romero, Looking Back Gives Us A Chance To Redefine Heroism, Denver Post, April 10, 1996, at B07.

n121 Francisco Valdes, Under Construction: LatCrit Consciousness, Community and Theory, 85 Cal. L. Rev. 1087, 1094 (1997), 10 La Raza L.J. 1, 8 (1998); see also John Florez, Chicanos and Coalitions as a Force for Social Change, in La Causa Chicana, supra note 1, at 78.
I. Introduction

Tax and business law have generally remained outside the LatCrit enterprise, and that is too bad. The problem may be that tax and business law seem to be ultimately about money, and worrying about money appears so crass—so alien to the issues of anti-subordination and social justice that have occupied center stage in LatCrit discourse. Those of us who labor in areas of the law concerned with the distribution, protection and multiplication of money might therefore seem unlikely contributors to the LatCrit enterprise. LatCrit V changed that.

LatCrit V was unique because it began the process of integrating the money areas of the law (“money-law”) into the LatCrit enterprise. Despite the usual absence of these areas from critical discourse, at LatCrit V, we learned that activists and scholars have been putting money-law knowledge to work in creative ways which advance the LatCrit agenda. We learned, for example, of a new and different approach to legal aid, one that focused on providing the legal aid needed to start businesses within immigrant communities in Miami. We also learned of the connection between tax and Indian law.

This essay grows out of my participation in LatCrit V and explores a number of connections between three seemingly disparate subjects: the Cuban Revolution, LatCrit scholarship and contemporary tax policy. As a tax lawyer, teacher, and scholar, I have devoted much of my professional life to the study of a system that might seem to be only about money. As I will try to demonstrate, however, the system is actually about much more. It reflects our views about who should win and who should lose, and why.

Although money-law is often seen as involving what Fidel Castro dubbed preocupaciones burgesas, of import only to those who have money and thus have reason to care about its protection and multiplication, such a view is shortsighted. A study of the ways in which the law entrenches the distribution of money and enhances its multiplication should be within the purview of all scholars who care about anti-subordination, because the law can entrench and abet the absence of money and thus contribute to continued subordination. As I will demonstrate, tax systems can do precisely that.

This essay, which draws on the narrative piece I wrote following LatCrit III as well as on my experience as a speaker and participant in LatCrit V, explores the ways in which those of us who work in money-law can enhance the LatCrit project. Although I have centered my discussion on tax because that is the area I know best, I hope that my comments prompt other business law scholars to share insights grounded in their areas of expertise. My aim is to prompt those who believe in the anti-subordination objective of LatCrit to work to bring more Latina/os into these areas of the law so that these areas do not remain a fiefdom of the Anglo majority. LatCrit V began that process— I want to foster its growth.

II. Money, The Second Generation

My claim is that the concern about money and economic well-being is not just a preocupacion burgesa but is, at bottom, a concern about human rights. Social, economic and cultural rights may be
referred to as [*577] second-generation human rights, n7 but the important thing is that they are acknowledged to be human rights. n8 After five years, LatCrit is poised to give birth to the second generation of critical analysis.

A study of how the design of a tax system affects economic well-being is central to this analysis, particularly in the United States, where so much of our social and economic policy is effectuated through the tax system rather than through direct expenditure programs. Although tax systems often act invisibly, they may be even more dangerous than systems that act overtly and thus invite more immediate scrutiny and resistance. In sum, tax should count in the critical enterprise.

Tax counts for at least three reasons. First, tax policy cuts to the heart of issues of distributional equity, issues which are of acute importance to our constituent communities. Second, our cultural heritage and our perspective as critical scholars can offer a different vantage point from which to analyze the structure and operation of the tax system. Third, our presence and our influence should be felt everywhere, so all fields should be our province and no field should be offlimits. I will discuss each of these reasons in turn.

III. Distributional Equity

Tax systems are the primary means by which democratic governments redistribute wealth. It is neither an accident nor a coincidence that some of the most respected legal philosophers of our time use the tax system as a vehicle for developing and articulating views about justice. For example, John Rawls devotes a considerable portion of his A Theory of Justice to an analysis of the optimal tax system, n9 and Robert [*578] Nozick uses tax systems as metaphors for society in Anarchy, State and Utopia. n10

That tax is at the heart of inquiries about the meaning of justice is not surprising. In developing a tax system, a society must work out the relationship between the private and the public. A society must ask itself how much each individual is going to be asked to contribute to the common good, and in working out the answer to that question it must grapple with fundamental values. It should come as no surprise, then, that tax systems reflect the values of the societies that create them. n11 When a colleague opens his Jurisprudence course by asking: "What is the difference between a mugger and the IRS?" he goes to the core of the connection between tax systems and justice. It is telling that in attempting to answer that question students are able to touch on most of the major themes in legal philosophy. n12

A. A Lesson from Cuba

A story, both true and recent, will help to illustrate not only why I think all of us should care about taxes but also why it is that I, a Cuban refugee, do. While visiting Cuban friends in Miami, I was asked where I had boarded my Philadelphia dog. I explained that the vet had recommended a new place, ingeniously designated a "pet resort," and I recounted the experience of registering my dog there. As I explained, I had been asked how many times I wanted the "play technician" to visit my dog--for an additional fee, which would vary with the number of play sessions I ordered, a play technician would amuse my dog. As I suspect I was intended to, I ordered more play sessions than was fiscally prudent because I felt guilty about leaving my dog at the kennel. As I told this story in Miami one of my listeners shook his head and said: "Sometimes I think that what this country needs is a good dose of Fidel Castro."

Although I knew that the observation was not an endorsement of Fidel's economic philosophy, I nevertheless found the observation startling. The speaker had used Fidel to express what I consider to be a laudatory sentiment--a condemnation of the conspicuous consumption so prevalent in contemporary American society--but in my circle of [*579] Cuban refugee friends and relatives, I had never before heard Fidel's name used to express anything other than contempt, derision and hatred. The statement got my attention.

As I considered the differences between Fidel's reaction to the problems of income inequality and wanton consumption among Cuba's upper class during the 1950's and the reaction of American tax scholars to rampant consumerism in American society, I was struck by both the differences and the parallels. The gulf that separated the haves and the havenots in the Cuba of the 1950's was probably no bigger than that which separates those in the top and bottom of the income distribution in twenty-first century America. The great sugar plantation owners and rum and tobacco scions of the old Cuba were easily as disparate from the campesinos who worked in the fields as the Wall Street barons, corporate executives and dot.com wunderkinds of today are from the inner-city project residents and single welfare mothers who seem to be an intractable part of urban life in the United States today. Absence of inequality does not distinguish one place from the other.
Nevertheless, the two places differ dramatically in the governmental response to inequality and its consumerist manifestations. Castro's answer was to nationalize industries and strip property owners of their holdings without compensation, while jailing or executing all who disagreed with his tactics or ideas.

n13 By contrast, in the United States consumerism and the paucity of individual savings have become fodder for a national debate. That debate has focused not on outlawing private property or market transactions, but on using the tax system to even the playing field and provide a disincentive for engaging in wanton consumption. Thus, the Cornell economist Robert Frank has written an entire book on the runaway train of conspicuous consumption and has advocated the use of the tax system to slow it down, n14 and the pages of law journals are filled with debate over the merits of a consumption tax. n15

As I reflected on my Cuban friend's backhanded compliment to Fidel Castro's policy objectives, I also realized that the observation provided a window into what attracts me to the study of tax policy. For me, tax policy is interesting and important because it reflects and implements our values. Tax policy determines the distribution of the tax burden, and that affects the distribution of income and, ultimately, the distribution of wealth. However, unlike Fidel Castro's policies, tax policy in this country functions through the democratic process flawed and imperfect though it is, and respects human rights.

The beauty of tax is that a tax system that develops through the exercise of the democratic process can serve the redistributive objectives of leaders like Fidel Castro, who captivated the American left because of his egalitarian rhetoric, but can do so without obliterating civil and political rights. Tax policy allows us to distinguish between the redistributive goals of Fidel Castro, many of which were commendable, and his means for achieving them, which were almost universally reprehensible. Of course, a tax system cannot carry the weight of all of a government's policies, and how the government spends the money it collects is crucially important to the well-being of its citizens. My point is not that tax systems are everything, but only that they are an important component of social policy, one that too often is relegated to outsider status in critical discourse.

The brief exchange that began with a query about my dog allowed me to come to a more nuanced understanding of both Fidel and his revolution on the one hand, and the nearcanonization of him so prevalent within the American left on the other. For me, commendable ends do not justify repressive means, and Fidel is guilty of having sacrificed the means to the end. n17 By contrast, tax systems offer the promise of achieving egalitarian ends through democratic means. n18

B. The Promise of Tax Systems

A tax system that results from the exercise of the democratic process offers the promise of justice in both the means and the ends. A study of tax systems ought therefore to be the province of any progressive enterprise. By studying tax systems, we can learn about the connection between the operation of the system and the distribution of income. We can also discover how the design of a given tax system reflects the allocation of power, and its converse, subordination, in the society to which it applies.

Two examples will illustrate what I mean. The first will show the importance of studying the structure of the tax system and how it allocates power. The second will show the importance of studying the distribution of the tax burden in tandem with the distribution of income.

IV. The Allocation Of Power In Tax System Design

As I have observed elsewhere, tax systems can give, even as they are taking away. n18 What tax systems can give is power. Although this is an unusual claim to make about tax systems, it is nevertheless one which is not only supportable, but which allows a more complete analysis of the way the design of a tax system affects the well-being of those on whom it is imposed. Although tax systems are usually seen as instruments of burden, not benefit, analyzing the ways in which a tax system empowers is crucial to understanding how tax systems can serve as instruments of both subordination and liberation.

A. The Importance of Looking at Empowerment

Taxes, like the coins in which they are ultimately paid, have two sides. On one side is the burden they impose. That side is easy to see and is shared by all tax systems, but the other side of tax systems is harder to see. On that other side is the empowerment that tax systems can provide. As I will explain more fully below, tax systems empower when they are designed in ways that allow individuals either to control the amount of tax they pay by behaving in particular ways or to shift the economic burden of the tax to someone else. Because not all tax systems empower and because the extent to which a tax system empowers reflects and implements important values, it is appropriate to analyze the ways in which particular tax systems empower and to examine whom they empower.

[*582]
1. The Ways in Which Tax Systems Empower

Tax systems can empower individuals in at least two ways. First, they can give individuals the power to alter the amount of their tax liability by altering their behavior. For example, a tax system that provides a deduction for home mortgage interest but not for rent gives taxpayers the ability to alter (reduce) their tax liability by buying a house which they finance with a loan secured by a mortgage. By encouraging taxpayers to behave in ways that affect the size of their tax bills, the tax system empowers them. A taxpayer who can say to herself, "I've bought a house and now my taxes will be lower," feels in control of her tax destiny because she has taken an affirmative action that affects her tax liability. Of course, the taxpayer who cannot afford the down payment on a house and must continue to rent will not enjoy that feeling of mastery, but more about that later. The point is not that the tax system empowers everyone, but that in providing for different tax consequences for different behavior, it empowers some people.

Empowerment is not a necessary attribute of a tax system. Tax systems do not have to be designed in a way that empowers anyone. Consider, for example, a head tax. Such a tax offers few avenues for the exercise of taxpayer choice in affecting the amount of the tax burden. Outside of committing fraud, the only things that a taxpayer can do to affect the size of her tax liability under such a system are to emigrate or to die, neither of which are likely to be attractive options for most people. Consider, less drastically, a system that provides only a "standard" deduction of the same size available to everyone. Taxpayer behavior would not affect tax liability under such a system and taxpayers would therefore lack the power that the current system gives some of them. Thus, when we adopt a tax system that empowers, we are faced with deciding whom to empower.

Second, tax systems can be designed to give individuals the power to shift the economic burden of the tax. For example, a system that taxes the sale of an item gives the seller, who has the obligation to remit the amount of the tax, the ability to shift the economic burden of the tax to the buyer. The seller can effect such a shift by charging a given amount for the item and having the tax apply to that. In effect, the seller is simply collecting the tax, and it is the consumer who is bearing the economic burden of it. The design of the tax--a tax on sales--gives the seller the power to shift the economic burden of the tax to the consumer. The state sales tax systems provide ready examples of such taxes, as do the federal excise taxes, such as the federal excise tax on gasoline. Choosing a different method of taxation would change this allocation of power.

2. Why We Should Care About Empowerment

Analyzing the effects of power can turn popular wisdom on its head and ensure that activists do not fall prey to the seemingly populist claims of politicians. For example, if tuition tax credits make it easier for educational institutions to raise tuition, they help educational institutions, not students and their parents. Under a similar analysis, the much-vaunted home mortgage interest deduction can change from the great helper of first time home buyers into a provision that inflates home prices because sellers can ask more, knowing that buyers will be able to deduct part of the cost. Seen this way, the deduction ultimately helps sellers and lenders, not buyers. Similarly, reducing the federal gasoline excise tax will help only gasoline sellers, not consumers, if the sellers enjoy sufficient market power to allow them to refrain from reducing the price of gasoline despite the reduction in the tax.

These effects can occur because the design of the tax system gives some people the power to affect the amount of their tax liability by changing their behavior and the power to shift the economic burden of the tax or, conversely, the power to retain the economic benefit of a tax reduction. While it is probably impossible to quantify precisely the extent to which taxes affect behavior and burdens are shifted to others, and while it is virtually certain that taxes are not the only determinant of either prices or behavior, activists and policy analysts should nevertheless be aware of the consequences of empowerment.

Indeed, analyzing the ways in which tax systems empower may be even more important than analyzing the burdens they impose. There are three additional reasons for this. First, empowerment can affect progressivity, generally by reducing it. Traditionally, the negative aspects of a tax system--its distribution of burdens--have determined its progressivity. Yet, empowerment, which is generally positive, can offset the negative aspect of the burden. Empowerment can therefore reduce the net burden imposed by a tax system, and, by doing so, reduce its overall progressivity. To analyze the distributive impact of a tax system in its entirety, activists and policy analysts should ask not only how much the system takes away and from whom (the burden) but also ask how much it gives and to whom (the empowerment). Only then can a complete picture emerge.

Second, empowerment can affect the visibility, and consequently the accountability, of a tax system. When a system places its burden on someone who has the power to shift that burden, it effectively taxes people...
who will often not know that they are being taxed. Taxation that is invisible is even worse than taxation without representation. One cannot rebel against, much less attempt to change or reform, that which one does not know is there. [*584]

Third but perhaps of greatest importance, a tax system that empowers people to shift the economic burden of the tax vests in private individuals the authority to decide how the burden of a tax shall be allocated. In a tax system where the nominal burden of paying the tax coincides with the economic burden, where no shift is possible or likely, the government decides who pays and how much they pay. By contrast, in a tax system that permits the shifting of the economic burden, the nominal bearer of the tax decides who will bear the economic burden. Under such a system, taxation proceeds, at least proximately, from the nominal bearer's exercise of her power to shift the economic burden of the tax. Such a system has great potential for treating similarly situated individuals differently.

B. Application to the Current Federal Tax System

A review of the current federal income tax system reveals that the system grants many choices, but it generally grants those choices to people who possess material wealth. It therefore distributes choices progressively, just as it distributes burdens. A comparison of the way the two most significant federal tax systems, the federal income tax and the federal employment (social security) tax system, allocate choices will illustrate the ways in which the allocation of power in tax system design implicates values.

Under the income tax system, the wealthier an individual is, the greater the number of choices she has. Not only do those with less wealth have fewer choices under that system, they also have a greater proportion of their wealth subject to tax under the other system, one that provides virtually no opportunity for the exercise of taxpayer choice--the social security tax system. Indeed, studies have shown that "lower-and middle-income Americans now pay more social security taxes than they pay in federal income taxes."

n20

By contrast to the federal income tax system, the social security tax system provides little opportunity for the exercise of choice. The mere receipt of compensation for personal services generates the liability for the tax. No deductions and very few exclusions exist regardless of what the taxpayer does. For most taxpayers, the only choice the system provides is not to work. n21 Why is it that the tax that imposes the greatest burden on low-and middle-income Americans is also the tax with the smallest [*585] opportunity for the exercise of choice? It is because of the value we, as a society, place on material capital.

Taken as a whole, the federal tax system provides for the exercise of choice in proportion to wealth. This exercise of choice turns a seemingly progressive system, like the income tax system, into one in which the outward appearance of progressivity can be overturned "by the voluntary actions of individual persons over time" and in which the connectedness wrought by the objective of progressivity is undercut by the disconnected manner in which each choice is exercised. n22 Moreover, because bestowing the power to choose in proportion to wealth is itself anti-egalitarian, possession of the power can overturn the egalitarian objective even if that power is not used. n23

The rich can buy houses, invest in tax-advantaged financial instruments, and get paid in stock options that generate no current income or employment tax liability, but the working poor have none of those choices. n24 By distributing the power to choose in proportion to wealth, the federal tax system contributes to the subordination of poor people, particularly poor working people.

As the data discussed in the next part will illustrate, under the current tax system the rich win the choice sweepstakes, as well as the tax distribution sweepstakes. Although wealthy individuals pay a higher proportion of their income in taxes than poor individuals, the data reveal that over a 10-year period, the increase in the income of the wealthiest 1% of the population has far outpaced the increase in their tax burden.

V. The Distribution of Income and the Distribution of the Tax Burden

It is no longer news to point out that the distribution of income in this country is very unequal and that income inequality is increasing at an alarming rate. Indeed, Enrique Carrasco, a prominent LatCrit scholar, extensively and persuasively documented this phenomenon. n25 What is much less well known is the role of the tax system in perpetuating and exacerbating the unequal distribution of income. Although many of us may not be surprised to find out that most of the gains in income have gone to those at the very top of the income distribution, we might be [*586] surprised to compare the changes in the distribution of income with the changes in the distribution of the tax burden. n26 We are fast becoming a winner-take-all society, and the winners are winning the income sweepstakes, the choice sweepstakes, and the tax sweepstakes as well. n27

First, let us look at what has happened to the distribution of income. "In 1990, families in the top
20% of the income scale received 51.4% of all income; families in the top [one percent] received nearly 13% of all income but families in the bottom [forty percent] also received 13% of all income." n28 Something is wrong when families in the top [one percent] of the income distribution receive as large a share of total income as families in the bottom [forty percent]. Figures 1 and 2, below, paint the picture. [*587]

[SEE TABLE IN ORIGINAL]

[*588]

Not only was the distribution of income skewed dramatically towards the top of the income scale a decade ago, but more importantly, the increases in income went disproportionately to those at the top of the distribution. While most American families were seeing their share of total income decline, and families at the bottom of the income distribution were seeing their share decline by nearly 25%, families in the top one percent increased their share of income increase by an extraordinary forty-five percent. n29 This would not be troubling if the distribution of the federal tax burden had kept pace with the distribution of income, but that is one race the winners have been losing. As Professor McMahon and I noted in Winner, "while changes in shares of income and taxes have remained in rough proportion to one another for 99% of the population, the increase in share of income has outstripped the increase in share of taxes by a factor of almost 5 for those at the top 1% of the income scale--the real winners. The spike in the graph confirms both the expansion of winner-take-all markets and the growing disjuncture between the distribution of income and the distribution of the tax burden." n30 While the share of income received by families in the top 1% rose by 45% during that period, their share of the tax burden only rose by 9.5%. n31 Figure 3, below, paints this picture. [*589]

[SEE TABLE IN ORIGINAL]

[*590]

Neither activists nor tax policy scholars have considered the ways in which the distribution of income within the top quintile should affect the distribution of the tax burden. While the data on which Figure 3 is based confirms the widely touted claim that individuals at the top of the income scale pay more than half of the taxes (according to the forgoing data, families in the top quintile paid more than 51.5% of the taxes in 1990), that assertion overlooks the relationship between their share of income and their share of taxes. Not only did the share of income held by individuals in the top 1% go up almost five times faster than their share of the tax burden, but they were the only income category which enjoyed such disparity between the increase in their income and the increase in their tax liability. Individuals in almost all other income categories witnessed a reduction in their share of taxes that was commensurate with the reduction in their share of income or that was actually smaller than the reduction in their share of income. Only the individuals in the lowest quintile saw a reduction in their share of the tax burden that was greater than the reduction in their share of income, but the size of the reduction in their share of income was so great that the slightly greater reduction in income, but the size of the reduction in their share of was so great that the slightly greater reduction in their share of the tax burden must have been small comfort.

Given the structure of the federal income tax system and the way in which it distributes power, as described supra, the forgoing result is not surprising. What is surprising is that tax issues have only recently begun to come within the purview of critical scholars. By participating in LatCrit, I hope that I can contribute to changing that.

VI. Tax For Everyone

Critical scholars have begun to apply the tools of critical analysis to the current tax system and in so doing have provided us with much food for thought. Thus, Dorothy Brown has studied whether the marriage penalty affects black couples disproportionately, concluding that it does, n32 Beverly Moran and William Whitford have looked at the Internal Revenue Code from a critical race theory perspective, n33 and David Brennen has considered what would happen if the Treasury were to take the position that race-based affirmative action policies violate social policy and hence revoke the tax exemption enjoyed by educational and other charitable institutions. n34 Other examples abound: feminist scholars have also provided insightful critiques of the current tax structure; n35 scholars working in queer theory have begun to analyze the heterosexual bias in the Code; n36 and an entire book was devoted to essays written by critical tax scholars on a variety of topics. n37 But those efforts have met with substantial resistance from within the tax academic community, and much work remains to be done. n38 Word of that work needs to spread beyond the ranks of tax scholars.

Latina/o scholars have much to contribute to this critical enterprise. Not only do we have a perspective traditionally underrepresented in tax policy debates, but the diversity in our community cannot help but enrich those debates. For example, Alfonso Morales has advanced our understanding of tax compliance behavior based on his field study of recent immigrants from Mexico, which demonstrated the complexity of tax compliance decisions and the influence of what Morales terms "supply-side" considerations in tax avoidance behavior. n39 Following are other examples of the ways in which a Latina/o perspective can affect
tax policy debates. I confess that my thinking in this area is embryonic, but I offer it because it has the potential to prompt others to add their voices and thus enrich the discourse, and to underscore the importance of tax to the LatCrit enterprise.

A. Citizenship

For some portions of our community, citizenship matters, and citizenship matters a lot in some areas of taxation. My own interest in the taxation of individuals who renounce U.S. citizenship to save taxes--tax-motivated expatriation, as it has come to be known--grew out of the very personal way in which I value my U.S. citizenship. That personal connection caused me to think about it often and led to interesting discussions whenever I taught the subject in my course on International Tax. It is not surprising that when Congress proposed significant changes in this area, writing about it was easy. n40 I do not think that it is mere coincidence that I was the first scholar to publish a law review article on the subject, and I wonder whether it is mere coincidence that the second such article by an academic was also written by a Cuban. n41 That we take differing positions is further evidence of the diverse ways in which Latina/os can enrich the debate, even in what seems like a technical area of the law. [*592]

B. Residence

My connection to my citizenship has also made me interested in the ways in which the tax system discriminates against individuals who have resident status for tax purposes (and are therefore subject to the full force of U.S. taxing jurisdiction even though they cannot vote and often do not enjoy resident status for immigration purposes), and who are sometimes treated more harshly than citizens. Although my work in this area has barely begun and its fruits will have implications far beyond the Latina/o community, my interest in undertaking it is undoubtedly colored by my family's experience, for a time, as tax-paying but non-voting U.S. residents.

C. Culture

My perspective as a Latina and my understanding of Latina/o culture has also been useful in helping to understand the administration of the tax laws. During a discussion of the Internal Revenue Service's treatment of immigrants who claim the Earned Income Tax Credit at an ABA Tax Section meeting several years ago, I was struck by the way in which cultural assumptions informed, or, more accurately, misinformed, the Service's interpretation of actions by members of some immigrant groups. The discussion centered on the problem of grandparents, aunts, and uncles who claimed that certain children were their dependents even though the adults' relationship to the children did not fit the definition of dependent established for that purpose in the Code. The underlying assumption seemed to be that the individuals in question were either stupid or dishonest. To me, however, an alternative explanation for the difficulty was at least plausible: a difference in the cultural assumptions about who was "family."

In Latino culture, extended families are common and the bonds between generations are often strong. It is not uncommon for multiple generations to share a dwelling, which makes it harder to sort the familial relationships into the more atomistic and money-based categories of Anglo culture, which the Code reflects. Such a difference in cultural perspective could explain the behavior the Service was seeing and could allow for more thoughtful responses to the communication problem it posed. My participation in that discussion did not lead to a new legislative initiative and was less than a drop in the bucket of solutions to administrative problems in the tax system. I was speaking to but a handful of individuals who are part of a system that consists of thousands. Nevertheless, what I was able to do in the context of that handful of individuals illustrates the changes that can occur as more of us who can bring a different cultural perspective develop the technical expertise and the clout to move in those circles. [*593]

I could not have made a difference in that context had I not first mastered the technical aspects of the tax law. But I was able to offer something beyond technical mastery: a different cultural perspective that technical mastery alone cannot supply. Others can make similar contributions, and every little bit will help.

VII. Conclusion

The paucity of current work on the impact of the tax system on the Latina/o community leads me to conclude by again urging that more of us need to become engaged in this work. We need more Latina/o tax teachers who can not only serve as role models, but who can also eloquently state, by their presence, that this is a field open to all. As a community, we also have to be willing to embrace tax and other business subjects so that our students do not feel they have to suppress any interest or passion they may have for them. We have to nurture our students' interest in these subjects by making the subjects ours.

Nurturing more minority tax lawyers is crucial to the critical enterprise for another reason. Even if the study of tax systems could not offer insights important to the LatCrit antisubordination project and even if the experience of Latina/os could not enhance tax policy discourse, it would be important for Latina/os to
become tax lawyers. By being at the table, I believe that I help to earn respect for Latinas and Latinos. By being a walking billboard for the intellectual diversity of Latinas and Latinos, I think I advance the cause of inclusion and empowerment generally.

If we are to make a difference, if we are to achieve for ourselves the kind of self-actualization to which I think we all aspire, our presence must be felt in every facet of life. For those of us who are lawyers, that means in every facet of law, including the money-law areas traditionally closed to us and often alien to our lives. In other words, tax counts, and all of money-law should become a vibrant part of the critical enterprise. Tax should not be just for tax people anymore.

FOOTNOTE-1:

n1 By "money-law," I mean the areas traditionally viewed as comprising the business curriculum: tax, corporations, securities, commercial law (UCC), securities, banking, antitrust and the like.

n2 Russell Jacobs spoke of his work with Steps Toward Success, a legal aid program that goes beyond solving particular problems or disputes to help low-income individuals develop the skills and resources necessary for long-term business success. The program relies on entrepreneurship to provide an exit from poverty, apparently taking its cue from the Chinese proverb: "Give a person a fish, and you feed her for a day. Teach a person to fish, and you feed her for a lifetime." Rhoda Thomas Tripp, The International Thesaurus of Quotations 981 (1970).

n3 Scott Taylor, of the University of New Mexico, spoke about the ways that tax law intersects with Indian law and affects the status and well-being of Native Americans, a subject to which he has devoted recent scholarship. See Scott A. Taylor, State Property Taxation of Tribal Fee Lands Located Within Reservation Boundaries: Reconsidering County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation and Leech Lake Band of Chippewa Indians v. Cass County, 23 Am. Indian L. Rev. 55, 56 (1998); and Scott A. Taylor, An Introduction and Overview of Taxation and Indian Gaming, 29 Ariz. St. L.J. 251, 251 (1997).


n5 The phrase translates almost literally as bourgeois concerns. Fidel Castro often used this phrase during the early days of the Cuban Revolution as a way of expressing contempt for what he considered the petty worries of the affluent.


n8 The International Covenant on Economic, Social, and Cultural Rights ("ICESCR") was adopted by the United Nations in 1966 and entered into force in 1976. Id. at 22. Article 9 of the ICESCR provides for the right to social security and Article 11 provides for the right to an adequate standard of living. Id. at 23. See also 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 (1997). For an excellent discussion of both the definition and importance of individual well-being and its connection to the prosperity of nations, see The quality of life (Martha Nussbaum & Amartya Sen eds., 1993).

n9 John Rawls, A Theory of Justice (1971). Although Rawls discusses taxation specifically as part of his discussion of the "distribution branch," id. at 277-282, all of Chapter V, which addresses the question of distributive shares, implicates issues that are fundamental to the design of a tax system.

n10 Robert Nozick, Anarchy, State, and Utopia (1974). Nozick speaks of taxation directly when he compares taxation of income from labor to forced labor, id. at 169-172, and when he speaks of the differences between compulsory versus voluntary contributions to the common good, id. at 265-68, but all of the nearly 100 pages of Chapter 7, Distributive Justice, implicate the very issues that are at
the heart of debates on tax policy. It is no wonder that, like many debates on tax policy, Nozick’s pages contain quantitative formulations of the concepts he examines. See, e.g., id. at 21011.


n12 I am indebted to my colleague, Professor Richard Greenstein, who generously allowed me to take his Jurisprudence course several years ago, which he indeed began as I have described.


n14 See Robert H. Frank, Luxury Fever: Why Money Fails to Satisfy in an Era of Excess (1999). Frank’s extensive bibliography is a further testament to the degree of attention the subject has received.


n16 For a sampling of recent scholarship debating the merits of progressive taxation, see, e.g., Donna M. Byrne, Locke, Property, and Progressive Taxes, 78 Neb. L. Rev. 700 (1999); Donna M. Byrne, Progressive Taxation Revisited, 37 Ariz. L. Rev. 739 (1995); McMahon & Abreu, supra note 4; Jeffrey A. Schoenblum, Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals, 12 Am. J. Tax Pol’y 221 (1995); Lawrence Zelenak & Kemper Moreland, Can the Graduated Income Tax Survive Optimal Tax Analysis? 53 Tax L. Rev. 51 (1999). One of the classic treatments of the subject is Walter J. Blum & Harry Kalven, Jr., The Uneasy Case for Progressive Taxation (1953).

n17 For a succinct history of Cuba, including Castro’s revolution, and an analysis of the impact of the subsequent exodus of Cubans on U.S. immigration law and policy, see Joyce A. Hughes, Flight From Cuba, 36 Cal. W. L. Rev. 39 (1999).

n18 Abreu, supra note 11. I take much of what follows directly from that piece, although I have omitted most of the footnotes and almost all of the detailed analysis, and generally adapted the discussion for an audience of non-tax specialists.

n19 See I.R.C. § 163(h) (2000). This section provides for such a deduction, subject to certain limitations.


n21 There are some types of work that will not generate liability for the social security tax, such as work by a minister of a church, I.R.C. § 3121(b)(8)(A) (2000), and work by newspaper delivery people under 18 years of age, I.R.C. § 3121(b)(14)(A) (2000), but they are generally of fairly narrow application. I.R.C. § 3121(b) (2000).

n22 Nozick, supra note 10, at 164 (“Any distributional pattern with any egalitarian component is overturnable by the voluntary actions of individual persons over time.”)
n23 See id.
n24 The earned income tax credit, which was intended to provide some relief for the working poor, is, at best, a blunt instrument, and at worst, largely ineffective. See Anne L. Alstott, The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform, 108 Harv. L. Rev. 533 (1995); and George K. Yin et. al., Improving the Delivery of Benefits to the Working Poor: Proposals to Reform the Earned Income Tax Credit Program, 11 Am. J. Tax Pol'y 225 (1994).
n26 This discussion is taken from McMahon & Abreu, supra note 4, at 7-8, although I have omitted many of the footnotes given the difference in the audience for which the discussion is intended. Those interested in the more complete treatment of the subject are invited to read the full article.
In The Winner-Take-All Society, Frank and Cook describe how an increasing number of labor markets now operate in ways that depart significantly from the classical economically efficient model. In these markets, a large number of individuals compete for a relatively small number of positions that offer the possibility for financial rewards far exceeding those that await less successful competitors. As in the entertainment industry, where the difference between the compensation received by the star and that received by her understudy is almost always far more than proportional to the differences in their talent, these steadily growing markets display what is essentially a winner-take-all paradigm.
McMahon & Abreu, supra note 4, at 3-5.
n28 McMahon & Abreu, supra note 4, at 5.
n29 Id. at 6.
n30 Id. at 7.
n31 Id.
n32 Id. at 8.
n33 Id. at 9.
n34 Id.
n38 Happily, there are many articles on tax written from a feminist perspective, and I am not even going to attempt to provide a bibliography. Nevertheless, for a recent, and very far from comprehensive, sampling, see Anne L. Alstott, Tax Policy and Feminism: Competing Goals and Institutional Choices, 66 Colum. L. Rev. 2001 (1996); Wendy C. Gerzog, Solutions to the Sexist QTIP Provisions. 35 Real Prop. Prob. & Tr. J. 97 (2000); Marjorie E. Kornhauser, What do Women Want: Feminism and the Progressive Income Tax, 47 Am. U. L. Rev. 151 (1997); Nancy C. Staudt, Taxing Housework, 84 Geo. L.J. 1571 (1996).
n41 See, e.g., Lawrence Zelenak, Taking Critical Tax Theory Seriously, 76 N.C. L.
Much of that issue of the North Carolina Law Review was devoted to the issue of critical tax and contained both scathing critiques of the enterprise and powerful defenses. The work of critical tax scholars was, however, featured in the most recent AALS-sponsored Workshop on Taxation held in Washington D.C. in October, 1998.
Introduction

Scholars have commented that by the time of his death in 1997, Paulo Freire had moved well beyond his early work in Pedagogy of the Oppressed. We understand that position, but we also argue that Freire's early work continues to provide a critical framework for educators struggling for social justice. Freire's early work provides a powerful tool because of its parsimony and simplicity, and because it is "not less complex . . . but simply more accessible." In this article, we merge the critical pedagogical work of Paulo Freire with the critical race and LatCrit frameworks.

I. Critical Race Theory and Critical Race Pedagogy

How can we better understand the role of critical pedagogy in higher education? One theoretical framework that can be used to help answer this question is critical race theory. Critical race theory draws from and extends a broad literature base that is often termed critical theory. In paraphrasing Brian Fay, William Tierney has defined critical theory as "an attempt to understand the oppressive aspects of society in order to generate societal and individual transformation." Indeed, for our purpose here, critical race theory is "a framework that can be used to help answer this question is critical race theory. Critical race theory draws from and extends a broad literature base that is often termed critical theory. In paraphrasing Brian Fay, William Tierney has defined critical theory as "an attempt to understand the oppressive aspects of society in order to generate societal and individual transformation." n6

Mari Matsuda views critical race theory as the work of progressive legal scholars of color who are attempting to develop a jurisprudence that accounts for the role of racism in American law and that work toward the elimination of racism as part of a larger goal of eliminating all forms of subordination. n9

Therefore, the overall goal of a critical race pedagogy in higher education is to develop a pedagogical strategy that accounts for the central role of racism in higher education, and works toward the elimination of race and racism as part of a larger goal of opposing or eliminating other forms of subordination such as gender, class, and sexual orientation in and out of the classroom.

Critical race pedagogy in education has "at least five elements that form its basic perspectives, research methods, and pedagogy." They are: (1) the centrality and intersectionality of race and racism; (2) the challenge to dominant ideology; (3) the commitment to social justice; (4) the importance of experiential knowledge; and (5) the use of interdisciplinary perspectives.

A. The Centrality of Race and Racism and their Intersectionality with Other Forms of Subordination

A critical race pedagogy starts from the premise that race and racism are endemic, permanent, and in the words of Margaret Russell, "a central rather than marginal factor in defining and explaining individual experiences of the law." Although race and racism are at the center of a critical race analysis, we also view them at their intersection with other forms of subordination such as gender and class discrimination. As Robin Barnes has stated, "Critical Race scholars have refused to ignore the differences between race and class as basis of oppression . . . Critical Race scholars know that class analysis alone cannot account for racial oppression . . ." We argue further that class and racial oppression cannot account for gender oppression. This intersection of race, gender, and class is where one can find some answers to the theoretical, conceptual, methodological, and pedagogical questions related to the experiences of People of Color. We also concur with John Calmore in that what is noticeably missing from the discussion of race is a substantive discussion of racism. Indeed, in moving beyond a discussion of race, we must name, define, and focus on racism. For our purpose here, we use Manning Marable and define racism as "the system of ignorance, exploitation, and power used to oppress African Americans, Latinos, Asians, Pacific Americans, American Indians and other people on the basis of ethnicity, culture, mannerisms, and color."
E. The Transdisciplinary Perspective

Marable's definition of racism is important because it shifts the discussion of race and racism from a Black/White discourse to one that includes multiple faces, voices, and experiences.

B. The Challenge to Dominant Ideology

A critical race pedagogy challenges the traditional claims that the educational system and its institutions make toward objectivity, meritocracy, color-blindness, race neutrality, and equal opportunity. Critical race educators argue that these traditional claims act as a camouflage for the self-interest, power, and privilege of dominant groups in U.S. society. n18 [*598] In addition to challenging the way we examine race and racism, Kimberle Crenshaw and her colleagues have argued that critical race theory also tries "to piece together an intellectual identity and a political practice that would take the form both of a left intervention into race discourse and a race intervention into left discourse." n19 Anthony Cook also stated that "it is this profound critique of norms, background assumptions and paradigms, within which Black progress and regress take place, that gives Critical Race Theory its critical bite." n20

C. The Commitment to Social Justice

A critical race pedagogy is committed to social justice and offers a liberatory or transformative response to racial, gender, and class oppression. n21 We envision social justice education as the curricular and pedagogical work that leads toward (1) the elimination of racism, sexism, and poverty, and (2) the empowering of underrepresented minority groups. Critical race educators acknowledge that educational institutions operate in contradictory ways, with their potential to oppress and marginalize co-existing with their potential to emancipate and empower.

D. The Centrality of Experiential Knowledge

Critical race pedagogy recognizes that the experiential knowledge of Faculty of Color is legitimate, appropriate, and critical to understanding, analyzing, and teaching about racial subordination. In fact, critical race pedagogy views this knowledge as a strength and draws explicitly on the lived experience of People of Color by including such methods as storytelling, family histories, biographies, scenarios, parables, cuentos, chronicles, and narratives. n22 In our analysis, we incorporate the experiential knowledge of Faculty and Students of Color by drawing from [*599] interview data, the research literature, biographical and autobiographical data, and other literary sources to create a counterstory. n23

E. The Transdisciplinary Perspective

A critical race pedagogy challenges ahistoricism and the unidisciplinary focus of most analyses and insists on analyzing race and racism by placing them in both an historical and contemporary context. n24 Critical race pedagogy utilizes the transdisciplinary knowledge base of ethnic studies, women's studies, sociology, history, law, and other fields to better understand racism, sexism, and classism in and out of the classroom.

In this article, we take each of these five themes and apply them to Freirean pedagogy. These themes are not new in and of themselves, but collectively, they represent a challenge to the existing modes of scholarship. Indeed, a critical race pedagogy is critical and different from other frameworks because: (1) it challenges the traditional paradigms, methods, texts, and discourse on race, gender, and class; (2) it helps us to bring to the forefront and focus on the racialized and gendered experiences of People of Color; (3) it offers a liberatory or transformative method to racial, gender, and class oppression; and (4) it utilizes the interdisciplinary knowledge base of ethnic studies, women's studies, sociology, history, and the law to better understand the various forms of oppression.

Indeed, critical race pedagogy names racist injuries and identifies their origins. In examining the origins, critical race pedagogy finds that racism is often well disguised in the rhetoric of shared values and neutral social scientific and educational principles and practices. n25 However, when the ideology of racism is examined and racist injuries named, victims of racism can find their voice. Further, the injured discover that they are not alone in their subordination. They become empowered participants, hearing their own stories and the stories of others, listening to how the arguments are framed, and learning to make the arguments themselves. It is at this point where the pedagogy of Paulo Freire is most useful for critical race scholars. Indeed, evidenced in the following counterstory, Freirean pedagogy begins with "naming the problem" or, as critical race theorists say, "naming the injury." [*600]

II. Critical Race Pedagogy and Counterstorytelling

In order to integrate critical race theory with critical pedagogy, we use a technique that has a long tradition in the social sciences, humanities, and the lawstorytelling. Richard Delgado uses a technique called counterstorytelling. n26 Delgado argues that counterstorytelling is both a method of telling the story of those experiences that have not been told (i.e. those on the margins of society) and a tool for analyzing and challenging the stories of those in power and whose story is a natural part of the dominant discourse-the majoritarian story. n27 These counterstories serve five
pedagogical functions: (1) they build community among those at the margins of society; (2) they challenge the perceived wisdom of those at society’s center; (3) they open new windows into the reality of those at the margins of society by showing the possibilities beyond the ones they live and that they are not alone in their position; (4) they teach others that, by combining elements from both the story and the current reality, one can construct another world that is richer than either the story or the reality alone; and (5) they provide a context to understand and transform established belief systems. n28 Storytelling has a rich and continuing tradition in the African American, n29 Chicana/o, n30 and Native American n31 communities, and as Delgado has stated, "oppressed groups have known instinctively that stories are an essential tool to their own survival and liberation." n32

We add to this tradition by illuminating the lives of critical educators, who may at times be at the margins of higher education. n33 As a way [*601] of raising various issues in critical pedagogy, we offer the following counterstory about two professors engaged in a dialogue. One is Professor Sanchez, a tenured male professor at a southwestern university and the other is Professor Leticia Garcia, an untenured female professor at another western college campus. We ask the reader to suspend judgment, listen for the story's points, test them against her/his own version of reality (however conceived), and use the counterstory as a pedagogical case study. n34 The two Professors meet at the annual meeting of the American Sociological Association. n35 Their story begins here.

III. In an Elevator of the Hotel Sheraton

It was about 5:30 in the afternoon and I was attending a national sociology conference. The day's sessions were winding down and I was heading to my room for a quick nap. As I was standing in the elevator, the door opened at the mezzanine level and Leticia stepped in.

"Professor! You're just the person I wanted to see." We exchanged greetings and Leticia continued, "Can we talk? I have so much to tell you. I just finished my first year as a faculty member and I have so many questions." I was pleased to see her. Leticia was my graduate student, and I chaired her dissertation committee. We co-authored two articles, and I had not heard from her in a couple of months. I replied, "I figured you were really busy with your first-year adjustments, and I was actually hoping to catch up with you here. Would you like a cup of coffee? It's been a long day and I need something to get me started again."

"Sounds great," she replied, "It will remind me of graduate school, discussing theory, research, and practice over coffee. You know, compared [*602] to now, those days seem relaxing. It sure is different with my own classes and research, let alone my family life."

As we made our way to a coffee shop, we were able to catch up on the months we hadn't talked to each other. Leticia began to describe her first year in a tenure track position at her university. She was struggling to establish her research program, as well as teach five classes a year. "You know my daughter Victoria is in the first grade, and she's reading a book a week," beamed Leticia.

I responded, "She has her mother's gifts." Leticia smiled as I continued, "How's your husband Frank doing?" She replied, "He's still working for MALDEF (Mexican American Legal Defense and Education Fund) and is looking to set up his own law practice with a group of old community activists." I wanted to ask her to define "old," but I figured I would wait until another time.

IV. Institutional Confines versus Critical Pedagogy

We stopped at a small cafe. Leticia found us a table and I ordered a Colombian blend and a maple scone. "Did you get me a baguette?" Leticia wanted to know. I nodded my head with a smile, "You haven't changed a bit." Leticia just smiled and I grabbed a stirrer so she could mix more cream and sugar into her French Roast. "This bread reminds me of the bolillos I used to buy at the panaderia near my mom's house," said Leticia. I sighed as I sat down at the table. It really did feel like it had been a long day.

Leticia started right away, "Professor, did you hear the question raised at the opening plenary session yesterday? "Which one?" I asked. Leticia continued, "Sorry, I guess for me it was the only question. You know, when the panel was discussing critical pedagogy and the article by Stephen Sweet, Radical Curriculum and Radical Pedagogy: Balancing Political Sympathies with Institutional Constraints? n36 Well, remember when someone asked the panel, 'How do we as critical educators maintain a sense of integrity as we attempt to work for social change within the confines of the academy?'

I responded, "I think I was just getting there when that happened, because I remember the moderator of the panel saying, 'We'll answer that question throughout the conference.' And I was confused by her statement."

"Yes, that was the question she was referring to, and that was her response in the interest of time. But the panel never really got back to it. [*603] I appreciated the question because it raises some very important issues for new professors, and it really hit home for me in my first year of teaching."
I replied, "In the part of the panel I heard, they were responding to Sweet's article looking at the dismal state of critical pedagogy in sociology, which raised some important issues that I think educators need to be discussing. What did you think of his article? Does it address any part of the question?"

"Not really," Leticia admitted, "Sweet lays out three tactics for dealing with the tensions that arise for critical educators between the institutional demands on hiring, promotion, and tenure, and one's belief in the tenets of critical pedagogy. The first response to these tensions was to subordinate institutional demands to your own radical philosophy. The second response was to subordinate your radical philosophy to institutional demands, and the third response was to continue to struggle to achieve a balance between your radical philosophy and your institutional demands." She paused for a moment and then continued, "I was feeling something missing from those alternatives. Maybe because I don't see myself fitting into those three response options? Or maybe because the options sound so antiseptic?"

V. Merging Critical Race and Freirean Pedagogy

As I started my first cup of coffee, I began, "I've read the article, and I agree the alternatives seem to be missing something. Maybe it's uncomfortable for us that Sweet seems to talk about critical pedagogy in the absence of the context of real students, struggling with racism, classism, sexism, and other forms of oppression everyday. There are some important frameworks that link everyday struggle with critical pedagogy in the classroom and we should draw on those frameworks. Still, I believe Sweet raises two important issues that critical educators struggle with on a continuing basis: (1) the intersection of the personal history that each of us brings to the teaching enterprise, and (2) the contextual obstacles and opportunities that lay in our paths."

Puzzled, Leticia asked, "Professor, I'm not sure I follow you. What do you mean by personal history in a critical pedagogical context?" I thought for a moment and then continued, "Each of us brings to our research and teaching an accumulation of experiences that have had a profound impact on our work. For instance, I was an undergraduate during the 1960s and was influenced by and participated in the civil rights, antiwar, and farmworker movements. My beliefs and values for social justice were being applied right outside the classroom door, in the communities just off campus, and in the community that I grew up and lived in. We could see the contradictions and connections between what our professors were telling us and having us read, and what was happening in these very active struggles. On the other hand, you were an undergraduate in the late 1980s and a graduate student in the early 1990s and probably didn't have that experience with an active, broad-based civil rights movement."

Leticia cut in, "You're probably right. Just as the overt racism of the 1960s has given way to more covert, insidious forms, activism to challenge racism has also changed forms. Most of my activism was on campus and related to student issues. When I left campus, it wasn't to engage in an organized 'civil rights' struggle per se, but to tutor high school students in East Los Angeles."

I waited until she paused and then responded, "Those are very important activities and are crucial to the continuing civil rights struggle. There has to be a place for people to participate in any way they can. Today, the struggles to maintain the skeletons of affirmative action, bilingual education, and immigrant rights are very important and ongoing."

Leticia thought for quite a while and then continued, "Professor, you bring up another issue: the struggle for social justice is a continuing one and it has a long history. I try to explain the struggles of the past with my students, and maybe I don't link those struggles enough with today's struggles." "Perhaps," I said, "your students would benefit from seeing themselves as part of this tradition of resistance. We have to see this as a long-term struggle. If we don't come to grips with that reality along with the further reality that civil rights gains are never completely won, then we can't deal with the continuous pattern of setbacks, short gains, setbacks, and short gains."

Leticia said, "That's a hard reality to come to grips with. I've been doing readings of legal scholars whose work outlines how civil rights gains are only allowed to the extent that they benefit Whites. They call it the 'interest-convergence theory.' n37 We should talk more about this. Actually, I've been working on an article that examines the linkages between a theoretical framework in the law--critical race theory--and its relation to education and the problem-posing pedagogy of Paulo Freire. I think I've been struggling in my writing because I have had a hard time coming to terms with some of these issues myself."

I replied, "That is going to be an important piece of work, Leticia. As you continue doing the research for it, look up Charles Lawrence. n38 He tells us that 'searching history to retrieve collective strengths is part of the work that must be done by law teachers engaged in liberating pedagogy.' n39 We must continue to search for that history and bring it to our classrooms. Mari Matsuda argues that 'critical commentators should look to the bottom and acknowledge the
richness there.' n40 Leticia responded, "Sounds like she's referring to individual, family, and community histories, stories, and struggles in Communities of Color." "Yes and so much more," I added.

Leticia continued, "So far in my article, I've outlined how I utilize Freire's work, exposing the banking method of education, and how I try to use the problem-posing process in my own curriculum and pedagogy. n41 I walk with my students through this problem-posing method of naming the problem, finding the cause of the problem, developing an action-plan to remedy the problem, and finally reflecting on the whole process and renaming the problem to start the process over again." "Sounds like you're off to a solid start," I said. "The problem-posing method has two interrelated goals: (1) to teach the student certain educational skills, and (2) to develop a critical consciousness in the student. Have you outlined with them the different levels of Freirean consciousness?" "Yes," said Leticia, "and I have them try to relate it to their own experiences and use examples that come from their experiences to describe each level. I'll explain that part in a minute." "Good," I replied, "those are necessary discussions to have with your students. As educators, we need to find out how people develop critical consciousness and our role in that development. For instance, can a person have an uneven consciousness development? Can there be growth in some areas and not in others? Indeed, one could be at the critical consciousness level as it relates to class, but be at the magical or naive level in his/her gender and/or race consciousness. In our pedagogy, we need to look at the development of a critical race, gender, and class-consciousness. In fact, as we develop what Freire called 'generative codes,' to facilitate a critical reading of the word and the world, we must make sure to identify those examples that depict the intersection of race, gender, and class oppression and engage our students in a dialogue at that location."

"Well Professor, I'd like to bring us back to the question during the panel session. How do we, as critical educators, maintain a sense of integrity as we attempt to work for social change within the confines of the academy? I have this diagram that I've adapted from some work of my colleagues, and I want to include it in my article. What do you think? Can it help us address the question?" [606]

VI. An Algebraic Approach to Resistance?

"Now, I hope you know that math, especially algebra, was never my strong suit, but . . .," Leticia pulled a piece of paper from her bag, unfolded it, and placed it on the table. "Oh," I said, "I recognize some of this." "Yes," said Leticia, "my colleagues have really taken the idea of resistance and pushed the envelope to look at resistance as not just a self-defeating, destructive cycle. n42 What I'm trying to do is understand these types of resistance within a Freirean approach to education." "Can you talk me through the diagram?" I asked. Leticia flashed a smile and said, "Of course."

"This figure replicates my colleagues' chart, n43 with the only change being the labels along the y-axis. My colleagues label the y-axis at the bottom 'no critique of the system' and the top of the y-axis, 'critique of the system.' I utilize Freire to label the y-axis from bottom to top, magical, naive, and critical consciousness, each indicating the extent of an individual's critique of the system." n44 [607]

[SEE TABLE IN ORIGINAL]

[608]

"OK," I said, "now allow me to try and describe what I see. Like you said, the y-axis identifies Freire's three levels of consciousness. n45 The bottom of the y-axis is the magical stage, where students may blame inequality on luck, fate, or God. Whatever causes the inequality seems to be out of the student's control, so he/she may resign to not do anything about it. For example, a person at a magical stage of consciousness may explain, 'In the U.S., if Chicanas do not get a good education it is because, God only helps those who help themselves.'"

"Exactly," said Leticia. She continued, "in the middle of the y-axis is the naive stage, where students may blame themselves, their culture, or their community for inequality. Because they're informed by a naive consciousness, students may try to change themselves, assimilate to the White, middle class, mainstream culture, or distance themselves from their community in response to experiencing inequality. For instance, a person at a naive stage of consciousness may say, 'In the U.S., if Chicanos do not do well in life, it is because culturally, they focus only on today rather than planning for tomorrow.'"

"I like this tag team thing," I replied. "So the top of the y-axis is the critical stage, where students look beyond fatalistic or cultural reasons for inequality to focus on structural, systemic explanations. A student with a critical level of consciousness looks toward changing the system and its structures as a response to inequality. For example, a person at a critical stage of consciousness may explain, 'In the U.S., if Chicanas and Chicanos don't go to college, it is because from kindergarten through high school they are being socialized for working class occupations that don't require a college degree.' n46"

"OK, now we're cooking," said Leticia. "The x-axis is where I've been struggling the most, so I'll describe it and then we can get back to it later?" "OK," I said. She
continued, "The x-axis addresses various levels of motivation toward social justice. I'm defining social justice as 'working toward the abolishment of racism, sexism, and poverty, and the empowerment of underrepresented minority groups.' n47 A person who is not motivated by social justice would be on the left side of the x-axis. Someone who is not motivated by social justice perpetuates the status quo and upholds systems of inequality because he/she believes the system works (‘if it ain’t broke, don’t fix it’). Someone who is moderately motivated by social justice looks to reform the current system by reforming him/herself and his/her community. This person would be in the middle of the x-axis. Someone who is motivated by social justice looks to transform the system by changing the structures of the system, which disempower underrepresented minority groups. A person motivated toward social justice would be on the right side of the x-axis." I took out my automatic pencil and began to take notes on my coffee coaster.

Leticia went on, "The four quadrants of the figure depict various forms of oppositional behavior. My colleagues adapt and extend the work of Henry Giroux to write about various forms of oppositional behavior, yet they differentiate reactionary or defiant behavior from the three methods of student resistance, which they identify and describe as (a) self-defeating, (b) conformist, and (c) transformative. Each of these three forms of resistance are based on two intersecting dimensions: (a) critique of domination (consciousness), and (b) motivation by an interest in individual or societal transformation (motivation toward social justice)." "Now I see the reason for the x and y axes!" I exclaimed. "Yes Professor, pretty exciting work, huh!" I grinned, as I continued to listen to Leticia.

She explained, "The upper left-hand quadrant is selfdefeating resistance, which infers that one holds a critique of the structured nature of inequality but is not motivated by social justice and thus responds to oppression in ways that perpetuate inequality for him/herself and others. For example, a Chicano who complains to his teacher about being misplaced in a remedial class may be conscious of the structures of inequality that benefits from him being miseducated. However, if this Chicano drops out of school in defiance of being treated poorly, not only does he reinforce the school's notion that he was not able to do well in a 'regular' class, but he also limits his own socioacademic opportunities. Even though this Chicano had a strong critique of the inequality perpetuated by society's institutions, he is now a high school drop out, which adds to negative statistics and ideas about Chicanas/os."

I interjected, "Even if he is a 'push out,' meaning the system pushes him out and he leaves, it's still the student who ends up with limited options and resources."

"Good point Professor," Leticia continued, "the lower right hand quadrant, conformist resistance, can be seen when one does not critique the systemic nature of inequality, and although moderately motivated to create change for society, looks to create changes within the system (conforming to the system) by changing individuals, communities, cultures, etc. For example, a Chicana who begins to speak only English at school and home, in order to succeed in education, changes herself and may not question the system that privileges English and downgrades Spanish. This Chicana may try to assimilate linguistically to the dominant culture, but her individual sacrifice leaves the structures of domination intact. As she tries to conform (fit in) to the system, she may even start to look down on other Chicanas/os who speak Spanish as inferior, thereby strengthening the oppressive power of the system."

Leticia continued, "The upper right-hand quadrant, transformative resistance, means one critiques the structures of domination and is motivated toward social justice. Transformative resistance to oppression necessitates liberatory changes to the system. For example, the Chicana/o students who organized against California's anti-youth Proposition 21, held a strong critique of the structural nature of social inequality and were highly motivated to abolish racism, classism, and sexism and empower minority groups. n48 These Chicana/o high school students protested alongside other Youth of Color to transform the social dialogue about juvenile crime and to transform the hypocritical California system that structures injustice through multiple means--such as being number one in the U.S. on prison spending and number forty-one on education spending." n49

"Whew!" I sighed. "That's a lot in one figure. But it makes sense. I think your examples are helpful; make sure you include them in your article." "Thanks Professor, but how do I facilitate my students' movement through the stages of consciousness, through levels of motivation toward social justice, and still get promoted to tenure? How do I maintain my ideal for social justice and still get tenure at my institution?" Leticia paused and looked at her watch, realizing it was 7:30 in the evening and then made the suggestion, "I think the panel moderator was right, this question looks like it's going to take awhile, would you like to have dinner and continue this conversation?"

"I'd like that," I replied, "but I have to make a phone call first."
VII. Toward a LatCrit Theory of Education

I returned to the table and Leticia was browsing through the dinner menu, and talking in Spanish to a man bussing tables. I picked up my menu and began to peruse the salad selections, finally settling on one with chicken, wontons, and sesame sauce. I nodded "hello" to the man as he left and Leticia said, "He was an engineer and his wife was a professor in Mexico. He was joking with me about how his kids are like ones in the Tigres del Norte song, Jaula De Oro. Have you heard it?" "No," I replied, "I don't think so." Leticia continued, "It talks about an undocumented worker whose children were born in the U.S. and the pain he feels because he wants to go back to Mexico but his children have become so Americanized they want to deny that they're Mexican. And the song is all in Spanish, except one part where the father asks his son in [*611] Spanish if he'd like to go back to Mexico, and the son answers in English, 'Whatcha talkin' about Dad? I don't want to go back to Mexico. No way, Dad.'" n50 Leticia chuckled, "It's sad but funny to hear the song, because the kid sounds like Opie from that one show . . . ." Leticia trailed off as she looked for something to eat. The waitress took my order and Leticia ordered a turkey club sandwich. "Gotta have a sense of humor," I noted. "Yes," replied Leticia, "you've always reminded me of that. For Chicanas/os, Latinas/os I believe that sense of humor has been key to our survival."

"For oppressed peoples, I think humor has been a form of survival and also a form of resistance," I added.

While we waited for our food, I brought us back to our discussion. "I think I'm starting to see how this figure can help you answer the question you referred to. Have you read the work of Andre Gorz?" "No," Leticia said, "do you think he'd be helpful?" "I think so, but I'm not sure how," I responded, "let me think out loud and we'll see. Gorz wrote Strategies for Labor n51 in 1967, wherein he outlines three types of reforms: reformist, non-reformist, and revolutionary. n52 Basically, he says reformist reforms are those which maintain the status quo, and do not challenge the system of inequality." n53 Leticia interjected, "So a reformist reform might work to reform a school bureaucracy, only to make the bureaucracy marginalize Chicanas/os more efficiently?"

"You could say that," I replied. "According to Gorz, nonreformist reforms move to change the system, but keep the system intact. n54 The difference here is that the non-reformist reform works to change the system into something more equitable, but it works within the system to make this happen." Again, Leticia commented, "So the system itself doesn't get challenged?" "Right," I said. "And finally, revolutionary reforms work toward a radical transformation of the present system and the creation of an entirely different, more equitable system." n55 [*612]

"Wow," remarked Leticia, "I think I see where this might fit in." "Maybe," I said, "The reformist reform would be somewhere in the area of being not-so-motivated toward social justice because it's more conformist resistance." "Yes," Leticia nodded her head and replied, "and maybe non-reformist reform would be somewhere in the area of motivated toward social justice, but it's in-between conformist and transformative resistance, whereas revolutionary reform sounds like it'd be in the highly motivated toward social justice and transformative resistance area." I agreed and said, "But do you see what I see?"

Leticia asked, "Do we as critical educators ever really engage in transformative resistance? Are our reform efforts ever nonreformist or revolutionary?" "That's exactly what I'm seeing," I said. "I think at best, we engage in non-reformist reforms with an eye toward revolutionary reforms. But more than likely, many of us may be making more reformist and conformist efforts from within our academic positions."

Leticia added, "I think that's where we hear the frustration in the question: How do we keep our integrity as critical educators working toward social justice from within the academy? In the end, as we try to teach a critical pedagogy, we ourselves are not feeling like we've been true to the struggle because the structures of inequality remain intact."

"Maybe we need to go back and listen to the spoken word of Gil Scott-Heron who eloquently reminded us that 'The Revolution Will Not Be Televised.' n56 As critical educators, we can't become like 'Chuy,' the armchair revolutionary, who sits and waits for a revolution in the satire of the stalled Chicano Movement by Chicano-Latino theater group Culture Clash. n57 Maybe we should go back and read some of the goals of the Chicano Movement like El Plan de Santa Barbara?" I said.

"Good points," said Leticia, "or maybe even the Black Panther Party's Ten Point Program. Those struggles surely speak to the same concerns we continue to deal with in our communities and within our educational system. And speaking of the strengths of those historical struggles, I've been trying to utilize Latina/o Critical Race Theory--LatCrit theory to extend the critical race discussions to Chicanas/os in education--and an important part is the interdisciplinary, historical aspect which we need to bring to our research."
responses. I also appreciate the ways in which critical race theory as a 'synthesis,' as you put it, demonstrates that the dynamic nature of oppressions requires dynamic responses. I also appreciate the ways in which critical race and LatCrit scholars are clear about analyzing race as a social construct."

"Definitely," I agreed, "they do not approach race without challenging its very problematic ideological basis. And they are unapologetic in their focus on racism. I think this is important because they recognize that even the language we utilize to identify ourselves is grounded in archaic notions of biological determinism and anthropological 'othering.' Yet, they are not naive in their critique of how notions of 'race' play themselves out in very real ways, through racism. We need to understand how we are racialized, how race has been socially constructed, and how that leads us to discussions of racism and racism's intersections with other forms of oppression."

"Exactly," Leticia nodded her head in agreement, "your comments remind me of bell hooks' Teaching to Transgress, n59 where she quotes from an Adrienne Rich poem, "this is the oppressor's language yet I need it to talk to you." n60 We need to talk about the concept of race so that we can critique and challenge racism. Like we talked about earlier, racism changes forms, and our ways of thinking about and responding to racism and its many subtle and overt tendencies, also is an ongoing process. I see LatCrit as a natural outgrowth of critical race theory, but I do not see them as mutually exclusive. I think LatCrit scholarship is evidence of the ongoing process of finding a framework that addresses racism and its accompanying oppressions. LatCrit draws on the strengths outlined in critical race theory, and emphasizes the intersectionality of experience with oppression, and the need to extend conversations about 'race' and racism beyond the Black/White binary. And I think that Freire pushes me to also look at the intersectionality of resistance."

"Yes," I replied, "I also think our goals as LatCrits are similar to Freire's goals. Freire's problem-posing approach is used to develop and move toward a critical consciousness as a means by which to create societal change. Likewise, critical race and LatCrit theorists are working toward the end of racial oppression as part of the broader goal of ending all forms of oppression such as those based on gender, class, and sexual orientation. Both Freirean pedagogy and critical race theory challenge the traditional claims of the educational and legal systems to neutrality, objectivity, and colorblindness. They see these concepts as a camouflage for the self-interest, power, and privilege of dominant groups in U.S. society."

Leticia followed, "As I mentioned in my working definition earlier, LatCrit and Freire would also acknowledge that educational institutions operate in contradictory ways with their potential to oppress and
marginalize co-existing with their potential to emancipate and empower."

Leticia continued, "Both frameworks recognize that the experiential knowledge of People of Color is critical to understanding and analyzing the fields of education and law. Actually, both traditions argue that the experiences of People of Color should be examined for their ability to contribute to the establishment of a society where people participate and contribute as equals in a culturally democratic social environment."

"Freirean pedagogy and critical race theory are about strengths, and strengths are what we should be looking for within Students and Communities of Color," I responded.

VIII. What does a Critical Race/LatCrit Freirean Pedagogy look like in my classroom?

"So, as LatCrit educators, how are we participating in nonreformist reforms?" Leticia asked. I thought a moment, and replied, "Looking at your working definition, we are challenging the dominant ideology and are working toward social justice, but what that looks like in real life depends on the type of institution we work in. Doing critical pedagogy will be very different at a community college where you teach 10 classes a year with no research and publishing responsibilities, compared to a four-year comprehensive teaching institution where you teach 6 or 7 classes a year, but have additional research and publication pressures. Still different will be a research institution where you teach 3 or 4 courses a year, but have the primary responsibility to conduct research, publish, and bring in grant monies. Each system is a unique balancing act of time and resources and doing critical pedagogy takes place within that context."

I continued, "Leticia, it's been 21 years since Daniel Solorzano wrote that article documenting his use of Freirean pedagogy with Chicana/o students in a community college classroom." n61 Leticia replied, "Did you know that Sweet mentions Solorzano's article as one of only 13 published articles in 23 years in the journal Teaching Sociology that practiced radical pedagogy?" n62 I replied, "Yes, I recall reading that. I also remember Solorzano's article because I was in a similar situation, trying to utilize Freire as a young community college instructor. Since those years in the California Community College system, I have taught in California's other two higher education systems; the California State University and the University of California. Throughout the years, I have continued to use different forms of critical pedagogy in the classroom with varying degrees of success."
After the waitress cleared away our dinner and refilled our coffees, I continued, "You have to decide for yourself how you define critical pedagogy. You then have to decide how you can incorporate the working definition into your scholarship and teaching. Once you make those decisions and, as you know, they are not easy decisions, and they are not set in stone, you can begin the process of developing a critical pedagogy that works for you. It has to work for you because you are the one who will struggle with various classroom challenges that arise for all educators. But you will have the added challenge of teaching from a critical perspective, being a woman, and being Chicana." I knew what was going to come next as Leticia said, "Professor, one of my biggest problems is students who somehow think that I have no right to be in front of that class, to be teaching them. I get challenged in areas where my White colleagues don't. It has been a painful process."

I paused and then asked, "Have you read any of the critical race and LatCrit literature that deals with this issue?" Leticia responded, "What works did you have in mind?" I replied, "There's Linda Greene, Derrick Bell, and Reginald Robinson's experiences as Black law professors. n67 Kevin Johnson talks about being a Mexican American law professor in his book. n68 There is also an important article by Gloria Ladson-Billings that focuses on a Black woman professor's experience teaching White students about multiculturalism and race. n69 These five pieces can help put your experience into a broader perspective. They describe the classroom experience you mentioned in much detail. You will see that many of us have and continue to experience these forms of racism in and out of our classrooms. I think our White sister and brother educators deal with some of these classroom problems, but when you add the dimensions of race, ethnicity, gender, language, accent, immigration status, and sexuality to the mix, it gets a bit more complex and I think that is where our experiences divert from theirs."

Leticia responded, "I know that I bring so much to the classroom. I bring the multiple consciousness of being a woman, a Chicana, and from working-class parents. After so many years of thinking these were a burden for me, I have come to view these characteristics as strengths that give me insight into multiple worlds. n70 I have to move and adjust to these worlds on a daily or even hourly basis. But this multiple consciousness isn't valued in the academy. I only get the validation when I meet with other Scholars of Color and feminist scholars at our annual meetings and of course from my family." As we finished our dinner and began looking at the dessert menu, Leticia threw a few more insightful questions at me, "Is there a tipping point? Is there a number or percentage of minority students in the class, a tipping point, when they begin to have a positive or negative impact on the interactions within a class? I have found that I don't get the same degree and types of challenges to my being 'the professor' when there are greater numbers of Students of Color in the class."

I had heard about the tipping point principle of Blacks in public housing projects and law faculties from the works of Derrick Bell, n71 and I replied, "I think there is, but I've never been able to quantify it. Sometimes, when I teach a class that is predominantly White, I can see that they really need interaction with Students of Color. It is one thing to hear about racial and ethnic issues from me and another when it comes from their peers. This interaction among students is a very delicate enterprise and gets even more delicate when issues of race, gender, class, and sexuality are thrown into the mix. But the interaction makes the discussion of theory, method, design, and practice so much more complex and so much more exciting. When I have a good mix of Students of Color and White students in class, our discussions are much more lively, challenging, and complex and we come up with much better action plans for our problems. They truly do learn from each other in some immediate and long-range ways. You plant seeds of critical analysis, and you nurture them, and then they leave. You try to keep up with them, and every now and then, one returns and reminds you of what you and others said or did--for better or worse."

Leticia looked at me and replied, "You've just given an argument for the value of diversity in the classroom. That it benefits both White students and Students of Color." I paused, thinking of my older sister Jesse. n72 I shared this story with Leticia: "My older sister, Jesse, had a way of explaining things that cut right to the core of the argument. When I was still in diapers, Jesse was identified as a bright kid but didn't receive the resources she was entitled to. She should have been in the GATE (Gifted and Talented Education) program, but my parents couldn't drive her to the gifted school, wait for an hour and a half while she took a special class, and drive her back to her neighborhood school. They both had to work. Jesse is one of the smartest people I've ever known. Her street smarts, eclectic knowledge base, common sense, and critical analysis skills weren't recognized or seen as strengths. Jesse ended up graduating from high school and going to cosmetology college to become a hair stylist. She's earned a well-deserved reputation for telling her clients 'what's really going on.' Many years back, I remember Jesse told me 'what's really going on' with the
affirmative action struggle. She shared with me her ideas: 'There's diversity and then there's diversity. Racial diversity means racial groups are merely present on the campus. On the other hand, real diversity, or I guess you could call it pluralism, would mean the different racial groups are not only present on the college campus, but are considered equals. This means they affirm each others' dignidad humana (human dignity) and are ready to benefit from each others' experience. And also it means they acknowledge each others' contributions to society in general and to the common welfare of students and faculty on the campus. Other than that, they're just taking you for a long walk off a short pier, thinking you have diversity when what's really going on is that you have a handful of people with darker skin color allowed to just sit near White people, learn about the great achievements of White people, and be reminded that they are not as 'qualified' as White people.' Leticia, I've always wondered, if given the opportunities I had, what kind of scholar Jesse would have been. In many ways, my work is an acknowledgment of her influence on me. And truth be told, she influences a lot of people from that stylist chair. As you can see, my ideas come from many different sources." I made a mental note to get my hair cut next week.

Leticia's looked at me and said, "You're right Professor, racial diversity benefits both People of Color and Whites, yet we need to push beyond the idea of diversity. In the college context, racial diversity is simply the presence of underrepresented students and faculty in colleges. On the other hand, we need to consider Jesse's words, that we must go beyond diversity, toward racial pluralism. That means we must include these underrepresented groups in the college and also integrate their culture and experiences into the mission, curriculum, and pedagogy of the college. The problem is that most educators know this, but the courts, in deciding affirmative action cases, want to see it in quantifiable form and don't react favorably to stories that challenge the majoritarian mindset--the belief that decisions on admissions should be based on a 'colorblind' or 'meritocratic' basis. n73 If the stories we told reinforced those notions, we would probably see more stories. But counterstories challenge majoritarian beliefs, and it is to the benefit of those vested in the system to [*620] ignore or silence the voices and stories 'at the bottom.'" I shot back, "Then we must tell the stories, the counterstories."

Leticia continued with a nuts and bolts question, "What other ways can I begin this process of incorporating critical pedagogy into my courses?" I responded, "You can begin by teaching an independent study or specialized course and work it into that format. You can also incorporate it into an existing course as an optional case study or an individual or group project. You can always incorporate it into the totality of a course and make it become the centerpiece. You have to experiment first and see what works best for you." Leticia jumped in again, "Time also seems to be a problem. If you are having students get involved in action projects, you probably have to work longer than one quarter or semester." I responded, "Ideally, it would nice to work with a group of students for at least three quarters, two semesters, or one academic year. That is ideal but improbable."

Leticia looked at her watch and said, "It's already 9:30; I have to make final preparations for my symposium tomorrow. But if you don't mind, I have a last comment to make." I shook my head no, and Leticia continued, "Professor, I am in a constant struggle my first year. I realize that I'm the first Chicana teacher that many of my students have ever taken. I am seen as a role model by some and an interloper by others, but regardless, I feel this pressure to be there for them." I thought about this important comment and replied, "Leticia, you're going to make mistakes and hopefully you can learn from them. I wish we veteran teachers would honestly tell the new teachers about all the mistakes we made along the way. Knowing that you are not alone can make a lot of difference at anytime, but is probably more critical in these first years of teaching and research." Leticia eyed her watch again, stood up, and said, "We probably should save this topic for our next discussion. It gives us a place to begin the next time we meet. As always, I have a list of readings and a lot to think about. I have to go now, maybe I'll see you at the symposium tomorrow? It always helps to see a smiling face or a head nodding in encouragement. I know I should be used to this, but I still get nervous--kinda like the nerves I get the first day of each semester with new classes."

"Hey," I reminded her, "I still get nervous. I think it's the passion for the work, the excitement of sharing your dreams of social justice and facilitating others' goals to effect social change. After all these years, I think the nervousness is a good thing. I think that when I'm no longer nervous, I need to get out of the business."

"Thanks Professor. Lucky for me you still get nervous because that means you're still around to guide and encourage. I'll buy dinner at the NACCS (National Association for Chicana and Chicano Studies) Conference in the Spring. But hopefully I'll see you soon."

I sat there for a minute and reflected on my own first year of teaching. I'm glad that an unanswered question in a panel brought Leticia and I together to discuss
these issues related to critical pedagogy. I rarely get that opportunity. I too had struggled and I continue to struggle with many of the same issues that Leticia shared. I remember Paulo Freire came into my life at a time when I needed some guidance. His book, Pedagogy of the Oppressed, and old mimeograph sheets from his Harvard University seminars came in just the nick of time for a struggling high school teacher. With other young teachers, I read, discussed, analyzed, critiqued, reflected, and utilized this very important work. While difficult to read, it's beauty for me was in its simplicity. It made things so clear for me. To this day, Freire's problem-posing method has a parsimony, pragmatism, and poetry that makes for good teaching. Leticia is going to do fine. She has the heart, determination, and vision to be a good social justice educator. She would make Paulo Freire proud.

FOOTNOTE-1:

n1 This article is a response to question posed by a participant at the opening plenary session of LatCrit V in Breckenridge Colorado, May 4-7, 2000.


n3 See generally Bell Hooks, Teaching to Transgress: Education as the Practice of Freedom (1994).


n5 Brian Fay, Critical Social Science: Liberation and Its Limits (1987).


NOTE: The authors rely on, and substantially quote from, these two works in explaining these five elements in the five immediately following sections. For the sake of clarity, quotation marks and block quotes have been omitted from these sections. All quotations to other works have been verified.


n15 For this study, the terms People, Faculty, Scholars and Students of Color are defined as those persons or scholars of African American, Latina/o, Asian American, and Native American ancestry. Chicanas and Chicanos are defined as female and male persons of Mexican ancestry living in the United States. These terms contain a political dimension that this paper does not discuss.


n19 Introduction to Critical Race Theory: The Key Writings that Formed the Movement, at xix (Kimberle Crenshaw et al. eds., 1995).


n21 See generally Matsuda, supra note 9.


n23 See generally Delgado, Storytelling for Oppositionists and Others, supra note 22.


n25 See generally Matsuda, supra note 8.

n26 See generally Matsuda, supra note 9.

n27 Richard Delgado and Jean Stefancic have defined the majoritarian mindset as "the bundle of presuppositions, perceived wisbons, and shared cultural understandings persons in the dominant group bring to discussions of race." Delgado & Stefancic I, supra note 11, at 462.


n29 See generally Bell, supra note 22; Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992) [hereinafter Bell, Faces at the Bottom of the Well]; Derrick Bell, Gospel Choirs: Psalms of Survival for an Alien Land Called Home (1996) [hereinafter Bell, Gospel Choirs]; Berkeley Art Center, Ethnic Notions: Black Images in the White...

n30 See generally Delgado, The Coming Race War?, supra note 22; Critical Race Theory: The Cutting Edge, supra note 22; Delgado, Storytelling for Oppositionists and Others, supra note 22; Olivas, supra note 22; Americo Paredes, On Ethnographic Work Among Minority Groups: A Folklorist's Perspective, 6 New Scholar 1 (1977).


n32 Delgado, Storytelling for Oppositionists and Others, supra note 22, at 2436.


n34 See generally Louis B. Barnes et al., Teaching and the Case Method (3d ed. 1994).

n35 See generally Solorzano & Yosso, Toward a Critical Race Theory of Chicana and Chicano Education, supra note 33.

Professor Leticia Garcia and Professor Sanchez are composite characters based on information from numerous interviews, focus groups, biographical, humanities, and social science literature, and personal experiences of the authors. These characters are influenced by Geneva Crenshaw and Rodrigo Crenshaw, the primary characters in several of the works of Derrick Bell and Richard Delgado. See, e.g., Derrick Bell, Afrolantica Legacies (1998); Bell, supra note 29; Bell, Faces at the Bottom of the Well, supra note 29; Bell, Gospel Choirs, supra note 29; Delgado, The Coming Race War?, supra note 22; Delgado, The Rodrigo Chronicles, supra note 22.


n37 See generally Derrick A. Bell, Brown v. Board of Education and the Interest Convergence Dilemma, in Critical Race Theory: The Key Writings that Formed the Movement 20 (Kimberle Crenshaw et al. eds., 1995).

n38 See, e.g., Lawrence, supra note 29.

n39 Id. at 2259.


n41 See, e.g., Paulo Freire, Education for Critical Consciousness (1973); Freire, supra note 2.


n43 See generally Solorzano & Delgado Bernal, supra note 33.

n44 See generally Freire, supra note 41.

n45 See generally Freire, supra note 41.

n46 See generally Samuel Bowles & Herbert Gintis, Schooling in Capitalist
America: Educational Reform and the Contradictions of Economic Life (1976).

n47 See generally Solorzano & Delgado Bernal, supra note 33.

n48 See Gov. Davis: Meet with Us!, at


n49 Id.

n50 Los Tigres del Norte, Jaula De Noro, on Los Tigres del Norte 16 Super Exitos (Profono, Inc. 1988).


n52 See generally id.

n53 A reformist reform "subordinates its objectives to the criteria of rationality and practicability of a given system and policy. Reformism rejects those objectives and demands--however deep the need for them--which are incompatible with the preservation of the system." Id. at 7.

n54 A non-reformist reform "does not base its validity and its right to exist on capitalist needs, criteria, and rationales. A non-reformist reform is determined not in terms of what can be, but what should be." Id. at 7-8.

n55 A revolutionary reform makes an "advance toward a radical transformation of society." Id. at 6.

n56 Gil Scott-Heron, The Revolution Will Not Be Televised, on The Revolution Will Not Be Televised (Flying Dutchman Productions 1974).

n57 See Richard Montoya et al., Culture Clash: Life, Death and Revolutionary Comedy (1998).

n58 LatCrit Primer, from the LatCrit IV Planning Committee to all Participants in the LatCrit IV symposium (Apr. 29, 1999) (on file with author).

n59 Hooks, supra note 3.

n60 Id. at 167 (quoting Adrienne Rich).


n62 Sweet, supra note 36.

n63 Lawrence, supra note 29.

n64 Id. at 2245.

n65 See id. at 2243-48.

n66 Sweet, supra note 36, at 101.


n68 See generally Kevin R. Johnson, How Did You Get To Be Mexican?: A White/Brown Man's Search for Identity (1999).


n71 See generally Derrick A. Bell, Jr., Application of the "Tipping Point" Principle to Law Faculty Hiring Policies, 10 Nova L.J. 319 (1986).

n72 Jesse is a composite character whose name is inspired by the Jesse B. Simple character from Langston Hughes' work. Hughes first introduced this character in the Chicago Defender newspaper in 1943. See generally Langston Hughes, The return of Simple (Akiba Sullivan Harper ed., 1994). Derrick Bell re-introduced him as Jesse B. Semple. See generally Bell, Faces at the Bottom of the Well, supra note 29.

n73 See supra note 27.
n74 Freire, supra note 2.

n75 Charles Lawrence argues that "pragmatism helps the scholar avoid elitism by forcing her always to judge the efficacy of theory by its usefulness in righting the everyday wrongs committed against those who are most oppressed." Lawrence, supra note 29, at 2260.


n77 Paulo Freire died in 1997 but his work lives on.
Although Critical Race Theory ("CRT") and Latino/a Critical Race Theory ("LatCrit") were originally legal movements, both have picked up popularity in the field of education, especially amongst race and ethnic studies scholars. As a student and scholar in education, I find LatCrit's transdisciplinary framework especially appealing. Many of us in education have begun to ask questions about the use and implications of LatCrit for education policy, pedagogy, and reform. In fact, several of us organized a reading group in which issues of identity, education, and politics were rigorously discussed. The following fictional dialogue reflects some of these conversations.

This discussion is presented in the form of a conversation because it aims to meet the story-telling tradition of LatCrit theory and the dialogue style of critical pedagogy. My story is unraveled in the interaction between the two fictional characters, two graduate students, in the context of an academic setting. The words and ideas discussed draw from the rich resources that are my classmates, colleagues, professors, and friends. I, like critical race theorist Charles Lawrence, acknowledge that "Every new and important understanding or insight that I have reached and found a way to articulate in my writing has come from dialogue with my [classmates, friends, family] . . . and with teachers [both outside and inside the classroom]." It is a critical dialogue in that it questions and critiques the ideologies and theories in which the students have been immersed.

The Dialogue

Delia: In education, we categorize ourselves into different theoretical camps, such as Latina/o Critical Race Theory, critical pedagogy, popular education and critical race theory or critical race pedagogy. However we all fall under the same umbrella because we recognize the need for social and institutional change. The assumption of different political identities creates divisions between us. It doesn't make much sense. Aren't we all pretty much doing the same thing? We're all interested in liberation and empowerment of the oppressed. We just do it in different ways.

Apolinar: CRT, critical race pedagogy, LatCrit, popular education and critical pedagogy seem to fall under the same political umbrella because they are all rooted in the struggle to abolish social injustice, but my exposure to these different frameworks suggests to me that our liberatory efforts fall primarily into two separate categories, those that use race as the primary lens through which to understand and address social injustice and those that use class. Although some theorists purport to incorporate race, class, gender, and sexuality into their antisubordination efforts, their political engagements usually prioritize one of those elements. It is also my understanding that critical theory originated in a class analysis of power and oppression, and that LatCrit, and, to a lesser extent, CRT centralize the experience of race and racism while seeking to explore the intersections of race, class, and gender. While some work in critical pedagogy explores issues of race and gender as well as class, a huge criticism of Paulo Freire's work is that it does not address the issues of race or gender effectively.

Delia: But there are many teachers who use critical pedagogy as a tool for dealing with racial and gender oppression in educational institutions. In fact, the people who I have known to take critical pedagogy into the classroom are usually teachers of color.

Apolinar: Yes, but I believe that critical theory does not adequately address the needs of students and teachers of color because most critical pedagogues do not deal with the very real effects of racism as a construct of power. Critical pedagogy tends to manifest itself in the classroom as dialogue that leads to the development of voice. If the teacher recognizes that racism affects his or her students, then there may be a discussion about race. But critical pedagogy does not necessarily recognize that racism is endemic in American society and that it affects all people, especially students in schools. This is why I favor LatCrit and CRT frameworks and encourage their development into pedagogical practices: they
specifically deal with the effects that racism has in American society. If teachers were exposed to the literature of LatCrit, then their curriculum and teaching practices would reflect the struggle for social justice embedded in that literature. I am especially concerned about scholars who believe that because race is a social construction, the next logical move is to ignore race, as if this alone will end racism. In LatCrit, Ian Haney Lopez writes about the social construction of race. He says that while race is a social construct, we cannot deny the fact that race functions as a real source of oppression in society. We must deal with it, as it exists in present structures and discourses. There are many white postmodernists pushing the social construction of race argument, but in very different ways and for different reasons. I think that their intention in deconstructing race is to avoid dealing with their own privilege, primarily as white males. The arguments about class oppression play a similar role in that they take the focus off of white privilege and they push it onto capitalist powers outside of person-to-person interactions.

Delia: I agree with Peter McLaren that "centrism" and nationalism can create new boundaries that prevent the creation of social and political alliances. He advocates for solidarity, and he encourages people to move away from the tendency to stay within race-based struggle. I am sure that his critique would extend itself to LatCrit because it maintains a primarily Latina/o focus.

Apolinar: First, I would argue that McLaren and other neoMarxist/critical pedagogues leave the discussion of race too quickly. Racial nationalism is often the first step toward a critical consciousness. Many people do not jump into a discussion of solidarity until they have explored the power dynamics of their everyday social interactions. For people of color, their social relations are racialized. Solidarity proponents have probably forgotten the process of race consciousness that led them to advocate for solidarity-based political organization. This is why, in addition to discussing the social construction of race, LatCrit scholars also analyze the ways in which the socially created categories have become destructive and enforced by the law through policies against people of color. I fear that some critical educators are attempting to create a space where people don't necessarily have to face the implications of race oppression. Secondly, the objectives of LatCrit are very different from traditional identity-based scholarships because both legal and education scholars make it clear that their purpose is not to create boundaries based on ethnic identity; rather the intention is to ensure that the voices of all "out" groups are heard and interconnected.

Delia: But you cannot deny the overwhelming effect of class oppression. As popular and critical educators, we choose to involve the oppressed in movements from the ground up. We want people to be involved in a critical analysis of the world around them so that they can address the injustices that affect their lives. The reason we analyze class oppression is because it crosses race and national boundaries and it forces us to examine our own politics as members of a capitalist system. Critical pedagogues and Marxist scholars have drastically affected the way I perceive racial justice. They, and especially Antonia Darder, have actually pushed me to look more at the issue of economic justice. Antonia believes that identity politics leads us to our quest for social justice, but that we will never get there if we only explore our own identity struggle. She believes that a plan for social justice that does not demand economic justice is a faulty plan, and I totally agree with her. Again, I believe that this poses a strong critique of LatCrit and CRT because the literature that I have seen, for the most part, does not address the need for a more just economic system, rather the focus seems to remain on the advancement of "minority" groups.

Apolinar: I agree. I'm not against the evaluation of different forms of prejudice and injustices. But what I fear is that people outside of LatCrit and CRT are moving further away from issues of race because they believe that other areas must be dealt with before they focus on race oppression. I agree with Omi and Winant that our "central work is to focus attention on the continuing significance and changing meaning of race." Race has become a subsidiary problem in the struggle for class justice. And just as Darder suggests that social justice without an economic element is inappropriate, so is social justice void of a racial dimension.

Delia: I believe that popular educators abroad do deal with race and ethnicity, but it's not their sole focus. For example, in Mexico, Latin America, the Caribbean, and other areas, their work is very much tied to race and ethnicity because people in these particular countries confront ethnic or racial oppression. Of course, since the political process of racial formation works differently across national boundaries, the dynamics of international work changes. And perhaps race appears to be a secondary element in the work that popular educators do in those countries because of that distinction.

Apolinar: Well, I'd be interested to learn more about the racial dynamics abroad that we often do not discuss in U.S. classrooms. Many serious racial problems exist but are ignored in many other countries. At least that is the perception here in the U.S. But still, when you
compare popular educators' work abroad to the work of critical pedagogues in the United States, it is evident that race is not central to the work. When Freire wrote of the oppressed in 1970, he meant the economically oppressed. It wasn't until much later in life that his race and gender consciousness was raised. n18 As a result, many critical pedagogues that have followed his work make the mistake of not centralizing race and racism in their work.

Delia: Are you denying that Critical Race Theorists do the same thing to class and even gender when they discuss race? Certainly, you don't believe that CRT adequately addresses class oppression. This has been my primary criticism of the field. Even before I read some of the CRT literature I was beginning to question whether racial equality meant racial and economic empowerment because it is unusual for people who speak [*628] about the fight for equity to do so without the language of empowerment, opportunity, and access. Power has become an extremely suspicious thing to me. Does it really matter if people of color gain access into the middle class or positions of power if, essentially, another working class person that will also be exploited by the capitalist system will replace them in the bluecollar job that they leave behind? Without classconsciousness, we inevitably recreate oppressive class structures.

Apolinar: The woes of capitalism are tremendous. There is no doubt about that, but does that mean that we should give up on the study of race and the analysis of racism in the U.S.? Furthermore, do we give up trying to get people of color, specifically Chicanos and Chicanas in your own community, into higher education and positions of power?

Delia: At the very least, we must recognize these contradictions. I can not pretend that I do not know that in our capitalist society the social mobility of any population comes at the expense of the exploitation of another population; it doesn't matter what color they are. In order for the capitalist system to thrive, a labor force must be exploited. This idea, that in order for my family to have wealth someone else's family must be subject to poverty, upsets me. People of color, especially students, get offended when I say this. I have been asked, "Are you saying that we shouldn't aspire to be CEOs, doctors, lawyers, entertainers, athletes, or even professors?" What I want people to understand is that those professions are elite and not everyone has access to them. And I don't believe that we should push young people to pursue those professions for the sake of economic "success". And I most definitely do not agree with the gross disparities of pay in our country. Why should an architect make so much more money than a construction worker? I believe that a more egalitarian society can exist, even in a capitalist society, but first there must be an awareness of the fact that workers are being discriminated against and that no one is really making an effort to rectify that situation.

Apolinar: While you might believe this, you certainly are not practicing it in your daily life because you are at an elitist institution of education that rallies behind capitalism, and you participate in it in full force.

Delia: True. This is my hugest contradiction, but a higher education is not the enemy. The important thing to consider is the purpose of the education that I receive and the way in which I use this education. This is why my work focuses on labor and class struggles. My intention in the field of education is to raise consciousness and help facilitate social movements that will lead toward the democratic participation of the oppressed. n19 I recognize and value the resources and ideologies of the oppressed. I believe that education will lead to liberation. [*629]

Apolinar: Can you really just raise consciousness amongst workers and expect liberation? I guarantee you that a noncapitalist society is not a race-free society. Nor is it free of racism, sexism, or homophobia. If the consciousness that you speak of does not truly address the intersections of class, race, gender, and sexuality, then how can we move toward solidarity?

Delia: Yes, this is the bigger question, how do we get past microlevels of transformation and move toward a vision of social change? I do not believe that any of us can claim that we have a complete vision of liberation, a vision of justice that will work for all people for all time. Consider this tension: people believe that the more you invest in freedom, the less equality you have, and, conversely, the more equality you have the less freedom you have. In other words, equality of economic resources indicates to some people that there will be less freedom to indulge in wealth, leisure, and independence. This is why some racial equity advocates adamantly oppose social stratifications based on race but believe it is perfectly fine to have social stratifications based on class. n20 I think that many scholars, for example, are unwilling or unable to analyze class oppression because as professors in elitist institutions, they are very much entrenched in a capitalist structure.

Apolinar: So what of the plan for social justice, what can we do now to ensure that we are working toward a positive end?

Delia: Well, I agree with Eagleton that, "The feminist, nationalist, or labor unionist [has to] come to recognize that in the long run none of their desires is realizable
without the fulfillment of the others." n21 Kobena Mercer says, "solidarity does not mean that everyone thinks the same way, instead it begins when people have the confidence to disagree over issues of fundamental important precisely because they 'care' about building a common ground." n22 But even as I talk about this in terms of solidarity, I question how realistic that is. What comes to mind is Carlos Torres' book in which he describes his hope for a democratic multicultural citizenship. n23 A democratic multicultural citizenship calls for the participation and acceptance of multicultural people in a nation that values the numerous perspectives of the people. One of the virtues that he believes is critical for a multicultural citizenship is the ability to dialogue [*630] and "the possibility of reaching a rational agreement." n24 Does this seem realistic to you? Do you think that you and I can ever come to a rational agreement about social justice or liberation, for example?

Apolinar: That depends. While I recognize the class-based prejudice that pervades this country, I agree with West and Ladson-Billings, and Crits in general, that race matters. Short of a social revolution, I believe that the best way to tackle the problems of social inequality in our society is to expose the role race and racism play in circumscribing people's access to higher education and their overall social mobility. I agree with Danny Solorzano that, "There's a racial dimension that middle class and elite people of color experience called racism. You may have class privilege, but racism provides a sting" n25 to your everyday life as a person of color. To what extent do you think race matters?

Delia: I agree that it does, but I maintain that until people move beyond race and examine the other large-scale structural elements that foster the oppression of people of color and poor people, you cannot say that you believe in equity. You might believe in equitable opportunities, but you most certainly don't believe in equity and equal value of all people. It's interesting that you bring up the concept of "revolution," as so many activists have continued to do since the civil rights movement. My research examines people's visions of social change that utilize the language of revolution. I don't see revolution as merely a historical, romanticized, or naive idea; instead I see it as means to discuss both reform and transformation of the United States. People have been talking about revolution in this country for ages, and there's a reason that the language of revolution remains with us even to this day. While it is students that primarily "romanticize" revolution, it is nevertheless a concept that many activists (non-academic and academic) still hold up as a goal. For example, the Raza Women's organization on campus hosted their Fourth Annual Chicana/Latina conference this year, and the theme of the conference was "El Fuego de Nuestro Espiritu Continua la Llama de Revolucion Colectiva: The Fire of our Spirit Continues the Flame of Collective Revolution." The conference invited women to participate in a day filled with educational workshops and cultural activities that dealt with Latino issues of all sorts. In the conference program they wrote, "This years sic theme...represents our internal passion, the ability to motivate ourselves and create change. It is the fire that burns within us to destroy the many "isms," such as sexism, racism, homophobia, and classism that attempts to dismantle our communities." n26 They believe that revolution has to do with the ways that they try to examine their own lives and how [*631] they "continue the flame of collective revolution." n27 They indicate that their "sisters, mothers, great grandmothers, the neighbor across the street, the women at the bus stop, and the women half way across the world, all carry on the tradition of struggle of economic, political, and social justice." n28

Apolinar: Those women are not talking about a violent revolution. When you say revolution, I think of a violent uprising. Which one are you referring to?

Delia: There are some who believe that violence is the only way that revolutionary or transformative change can take place, and historically this is the way social change has been accomplished. But my research explores ways in which consciousness raising and paradigm shifts are efforts toward a non-violent revolution. People should be able to envision large-scale transformative social change without being made to feel that they're being too idealistic. What's wrong with thinking that the U.S. political structure should value the well being of the human being, the laborer, more than it values the development of capital?

Apolinar: Have you ever seen or heard of a capitalist system that would rather close down a bank than lay off a worker? That will never happen here.

Delia: Perhaps, but that's my vision of social justice. For me, it isn't enough to struggle for opportunity and access anymore. I feel that too many people are content with opportunity, and they forget about the masses of people who remain exploited while a few gain access to capitalist gains. n29 We need social movements if we expect change to occur.

Apolinar: Yes, but these movements must be based on a notion of intersectionality, n30 in which we recognize multiple forms of oppression that should be part of the struggle as well.

Delia: Furthermore, it is fundamental to the struggle for social justice that we stop blaming poor people, people of color, Queer people, and women for their refusal to assimilate or adopt the values of the
dominant power structure in the U.S. We have to revolutionize our perception of what is good, valid, and "successful" to move forward in this struggle. [*632]

Conclusion

This dialogue has summarized and drawn from many conversations that I have had at school, in my home, in my community and in numerous other locations. As a student and teacher, I have been able to engage in discussions that have pushed the boundaries of the classroom and the academic structure. As a result my vision of social and economic justice expands as I strive to make sense of my purpose in academia. The exploitation and destruction of the lives of millions of people due to social and economic injustice is what keeps me situated within the walls of academic institutions. I am hoping that the dialogues that I engage in daily will lead me to a better understanding of liberation. Education has indeed been the tool that has provided the basis for much exploitation; thus, I dedicate myself to challenging the dominant oppressive ideologies in schools and educational policies. Latina/o Critical Theory and Critical Race Theory are tools of analysis and calls for action now active in the field of education. Scholars in these fields are not only theorists, but also leaders and advocates of the struggle against inequality, and hence of great importance to the field.

FOOTNOTE-1:

n1 Ph.D. candidate UCLA, Graduate School of Education and Information Studies.


n3 Richard Delgado, Legal Storytelling for Oppositionists and Others: A Plea for Narrative, in Critical Race Theory: The Cutting Edge 64 (Richard Delgado ed., 1995). Delgado writes, "The story invites the reader to alienate herself or himself from the events described, to enter into the mental set of the teller, whose view is different from the reader's own. The oppositional nature of the story, the manner in which it challenges and rebuffs the stock story, thus causes him or her to oscillate between poles." Id. at 73; see also Paulo Freire, Pedagogy of the Oppressed 75-118 (Myra Bergman Ramos trans., 1970).

n4 Charles R. Lawrence, III, The Word and the River: Pedagogy as Scholarship as Struggle, in Critical Race Theory: The Key Writings that Formed the Movement 336, 337 (Kimberle Crenshaw et al. eds., 1995).

n5 I am referring to people that utilize Paulo Freire's ideologies to analyze power dynamics in society and education, but I knowingly overgeneralize that their main focus is class instead of race for the sake of comparing a race and class perspective. This generalization is widely based on observations of dialogues that have taken place at the Graduate School of Education at UCLA.


n9 See Daniel Schugurensky, The Legacy of Paulo Freire: A critical review of his contributions, 31 (1&2) Convergence Tribute to Paulo Freire, 17-26 (1998) (stating "[Freire's] attempt to overcome the fragmentary effects of identity politics was based on a 'unity in diversity' strategy, although in his analysis of oppression, the variable of 'class' seems to have pre-eminence over others.") Id. at 23.

n10 See generally Ian F. Haney Lopez, The Social Construction of Race in Critical Race Theory: The Cutting Edge, supra note 3, at 191-201. Lopez indicates, "the categories of race previously considered objective, such as Caucasoid, Negroid, and Mongolid, are now widely regarded as
empty relics, persistent shadows of the social belief in races that permeated early scientific thought. Biological race is an illusion. Social race, however, is not ... Race has its genesis and maintains its vigorous strength in the realm of social beliefs." Id. at 200.

n11 See generally Peter McLaren, Critical Pedagogy and Predatory Culture 201-28 (1995). McLaren writes, "Dominant strands of the postmodern critique also tend to delegitimize the recent literature of peoples of color..." Id. at 206.

n12 See McLaren, supra note 11. McLaren writes, "Attempting to abandon all vestiges of the dominant culture in the struggle for identity can lead to a futile search for premodern roots that in turn leads to a narrow nationalism ...." Id. at 215.

n13 See generally Francisco Valdes, Outsider Scholars, Legal Theory & OutCrit Perspectivity: Postsubordination Vision as Jurisprudential Method, 49 DePaul L. Rev. 831 (2000). Francisco Valdes' discussion about 'OutCrit' coalitions is particularly important for envisioning a theoretical umbrella group that adequately embraces all social justice movements.

n14 See Foley, supra note 6, at 139-53.

n15 An idea she discussed on February 17, 1999, while conducting a three-day workshop on critical pedagogy at the 1999 California Association for Bilingual Education conference at the Los Angeles convention center.

n16 Michael Omi & Howard Winant, On the Theoretical Status of the Concept of Race in Race, Identity and Representation in Education 3 (Cameron McCarthy & Warren Crichlow eds., 1993).

n17 See Chan Lean Heng, Talking pain: educational work with factory women in Malaysia," in Gender in Popular Education: methods for Empowerment 202-25 (Shirley Walters & Linzi Manicom eds., 1996); Elie Ghanem, Social Movements in Brazil and their Educational Work, 44 Int'l R. Educ. 177-89 (1998); Foley, supra note 6, at 139-53.

n18 Asserted by Antonia Darder at California Association of Bilingual Education conference on February 20, 1999; see also Schugurensky, supra note 9, at 23.

n19 See Thomas J. La Belle, From Consciousness Raising to Popular Education in Latin America and the Caribbean, in 31(2) Comp. Ed. Rev. 201-17 (1987).

n20 A UCLA law student in a Critical Race Theory seminar yelled, "If you think capitalism is the enemy, then you're staring at the enemy right now!" She refused to consider the negative repercussions of class systems based on capitalism (1999).

n21 Terry Eagleton, Nationalism: Irony and Commitment, in Colonialism and Literature 37 (Univ. of Minn. Press 1990).


n24 Id. at 258.

n25 Daniel Solorzano, remarks in his Chicanos and Education class at UCLA (May 18, 1999).


n27 Id.

n28 Id.

n29 See McLaren, supra note 11, at 172.

Within the contours of critical Latina/o (LatCrit) Theory, "comparative racialization" analyzes how society constructs, or racializes, or "others," various Latin American national origin groups in different ways. Such comparisons in no way seek to demonstrate that one group is "more" disadvantaged than another, but rather strive for a deeper understanding of racial formation and the roots of racial subordination. In so doing, we must recognize the vast differences between various Latina/o communities.

This cluster of essays directly and indirectly investigates the comparative racialization of Latina/o national origin groups. Several essays devote attention to the growing popularity of certain aspects of "Latin" culture among Anglos. Their rich cultural analysis teaches much about the Latina/os able to achieve mainstream popularity, the hierarchy among Latina/o national origin groups, and the stereotypes that they reinforce.

Another contribution focuses on the tragic case of Elian Gonzalez, in which a young Cuban boy who journeyed by raft to the United States, lost his mother on the way, and became the center of a controversy over whether the United States should return him to his father in Cuba; this analysis considers how immigration law creates distinctions between Latina/o national origin groups--effectively racializing them differently--and reinforces their differential treatment.

The fluidity of racial constructions can be seen in the differentiation of immigrants of Mexican and Cuban ancestry over time, and the evolving legal responses to each group.

I. "Latin" Dance and Music: Promoting Cultural Appreciation or Reinforcing Negative Stereotypes?

Multiculturalism teaches tolerance of racial and cultural diversity. The relationship between race and culture has been the subject of increasing legal analysis. Contrary to popular belief, "culture is not some monolithic, fixed, and static essence." Any culture is constantly changing, affected by interaction with other cultures, especially in an era of globalization. We must acknowledge, for example, that Anglo American culture in this country has been indelibly influenced by Mexican culture while Mexican culture has been forever transformed by its interaction with Anglo culture.

Indeed, with technological innovation over the last century, "American culture" has influenced the world. To add to the complexity, culture in any society is also the subject of continuing internal dissent and debate over its contours.

This line of analysis, of course, represents a gross over-simplification. In fact, no single "Mexican", "Latin," or "American" culture exists. Consistent with Critical Latina/o Theory's commitment to anti-essentialism, care must be taken not to
homogenize cultures from Latin American nations, which vary dramatically across and within national borders.

A. Latin Dance and Music: Lessons from Anglo Popularity

1. Salsa Dancing

LatCrit inquiry has analyzed "Latina/o communities, cultures, and concerns," including "the Ricky Martin and Jennifer Lopez hysteria of contemporary pop culture." In this vein, Professor Nancy Ehrenreich explores how Latina/os view Anglo participation in salsa as part of the larger "Latin Music Craze," which generates "mixed reactions" from [*636] observers. Her fundamental premise is that "one should reject any impulse to interpret Anglo/a interest in Latin cultural productions as either unequivocally good or unequivocally bad." n17

The need to investigate Anglo interest in Latina/o culture results from the dramatically different possible explanations for that interest. Cultural tolerance may help make it possible for mutual understanding. In contrast, the embrace of Latina/o culture may reinforce popular stereotypes. Importantly, the Anglo embrace of certain aspects of Latina/o culture has not ended anti-Latina/o sentiment in the United States. Although salsa has emerged as the most popular condiment in the United States, traces of animosity directed at persons of Mexican ancestry persist. The specific subject of Professor Ehrenreich's essay, salsa dancing, presents particularly perplexing complexities. n23

a. Deconstructing "Latin"

At the outset, Professor Ehrenreich observes that there is no "pure" or "true" version of "Latin music." Nor am I precisely sure how to define "Latin music," as that phrase is currently used in the popular media. [*637] Latina/os come from many national origin ancestries and popular music varies by country. The "Latin music craze" thus reflects the homogenization of many Latin cultures and peoples, including indigenous ones.

Moreover, the "Latin" music currently popular in the United States has been distinctly Caribbean in flavor. Puerto Ricans, such as Ricky Martin, Jennifer Lopez, and Marc Anthony, and Cuban Americans, including Gloria Estefan, have been at the forefront. Musicians of Mexican ancestry and U.S. citizenship, such as Ritchie Valens and Selena, both the subject of movies, became more well-known after their lives met tragic ends. Mexican American artists like Los Lobos have received critical acclaim for decades but have failed to attract mass appeal or generate anything resembling a "craze"; indeed, Los Lobos was not invited to perform at the first Latin Grammys in 2000, n29 which was marred by [*638] controversy concerning the alleged exclusion of Mexican musicians. A veteran of the 1960s music watershed known as Woodstock, Carlos Santana arguably represents an exception to the exclusion of Mexicans from popular circles, but he only attained commercial acclaim after decades in the music business. n31

In fact, the band of popular "Latin" music is rather narrow. Relatively little public attention has been paid to artists like Kid Frost, a rapper from East Los Angeles who analyzes the Chicana/o inner city experience marred by violence, police brutality, and desperation, Los Tigres del Norte, a group composed of undocumented immigrants whose music documents the Mexican immigrant experience, Tish Hinojosa, a TexMex folk singer whose corridos offer insights about the place of Mexican-American and Mexican immigrants in the U.S. borderlands. n34

The interrogation of the "Latin" in the "Latin music craze" is critical. Although portrayed by the media as generic Latina/os, Ricky Martin and Jennifer Lopez are not generally seen by Mexican-Americans as one of them; Puerto Ricans understandably may view them as Puerto Rican. [*639] In a country in which many, if not most, Latina/os identify primarily on the basis of national origin ancestry, not as Latina/o or "Hispanic," the appreciation of the diversities among Latin musical artists is critically important.

Importantly, the nature of the "Latin music craze" teaches much about Anglo society. We would expect, for example, Anglo acceptance of "Latin" music and dance that most easily fit into conventional Anglo norms and sensibilities. The popularity of the "Macarena," described as a "line dance that looks like a Simon Says routine and doesn't involve too much compromising action below the shoulders," among the public and politicians in the mid-1990s is an apt example. The mainstream generally does not embrace "too different," or, put more gently, significant deviance from the norm. We also would expect less popular appeal generated by cultural representations that are deeply critical of the status quo or focus too specifically on the Latina/o experience.

b. Cultural Appreciation, Appropriation, or Commodification?

Professor Ehrenreich expresses concern with cultural appropriation of "Latin music," which has been a concern of minorities seeking cultural survival. "Cultural appropriation" is a term used to describe the phenomenon of...
not one's own--of intellectual property, cultural expressions or artifacts, history and ways of knowledge."

Professor Ehrenreich discusses how the salsa dance clubs in Denver currently attract a large Anglo audience, and expresses concern about how this dancing fits into stereotypical Anglo notions of Latino/a sexuality. Professor Ehrenreich further observes that "Latin music," including the music and public persona of Jennifer Lopez, might reinforce stereotypes of Latina/o hyper-sexuality and a happy-go-lucky approach to living "la vida loca." Professor Ehrenreich acknowledges how her appreciation of salsa dancing, and frequenting salsa clubs, enhanced her understanding of the greater Latina/o community. She learned about the significant Afro Latina/o population in the United States, the heart-wrenching immigration experiences of many Mexicans, and the political situation in Mexico that contributed to the migration. LatCrit scholarship has considered these important subjects with rigor.

In considering her concerns with the Anglo embrace of salsa, Professor Ehrenreich raises interesting questions about who possesses standing to raise objections to cultural representations, such as whether a Latina/o who does not dance salsa or speak Spanish may object to their alleged appropriation. One certainly can understand why a Latina/o non-Spanish speaker or U.S. citizens would object to English-only rules or restrictionist immigration laws. Such rules arguably represent subtle attacks on Latina/os generally cloaked in nonracial terms. LatCrit theory has been inclusive in terms of allowing Anglos, Asian Americans, African Americans, Native Americans, and others to criticize the status of Latina/os and other people of color in the United States. Just as in the realm of constitutional law, standing in this context is difficult to define. One often does better by focusing on the merits of the argument than on who is making it.

2. "Latin" Pop Music

Professor Steve Bender critically analyzes the "Latin music craze," concluding that the Latin Pop emerging in the late 1990s reinforced negative stereotypes about Latina/os. Popular "Latin music," for example, promotes the myth of Latin lovers and bandidos. This stereotyping damages the greater Latina/o community in two distinct ways; the music contributes to Latina/o internalization of negative self images about themselves, while Anglos see their popular stereotypes confirmed.

As Professor Bender correctly observes, this music is "more American 'pop' than Latin(o/a)." Consistent with the popularity of the English-only movement, most of the "Latin" music that currently captures the hearts of the country is performed in English. Music in Spanish generally fails to make it high on the charts. Similarly, Latin artists continue the long history of Anglicizing their names (e.g., Enrique Martin Morales a/k/a Ricky Martin and Marco Antonio Muniz became Marc Anthony). Just like Richard Valenzuela transformed into Ritchie Valens in the 1950s, The Anglicization of "Latin" music should not be surprising given that Anglos wrote many of the popular songs and design them to appeal to a mass--beyond Latina/o--audience.

LatCrit scholarship from its inception has challenged the classification of Latina/os as perpetual foreigners. Professor Bender observes that the categorization of Enrique Iglesias, a Spaniard, as Latino based on Spanish surname is consistent with the treatment of Latina/os as "foreigners." Even U.S.-born artists,
such as Jennifer Lopez, Marc Anthony, and Ricky Martin, find themselves classified as natives of another country. n70 Latino/a entertainers find themselves homogenized as a generic foreign influence on U.S. culture, as represented by the bizarre (from the perspective of a Mexican-American) association of jalapenos and tamales (Mexican foods) with Puerto Rican artists. n71

Importantly, the Latina/o artists most likely to ascend to the top of the pop music charts are those that best approximate the Anglo norm. n72 Afro Latina/o and Mexican artists, for example, are not a prominent part of the "Latin music craze." n73 Latina/os who seek to cross-over into the mainstream, such as Ritchie Valens and Selena, must exhibit assimilationist tendencies. n74 Consequently, Latina/o artists at the core of the modern Latin pop scene are presented and received as "bilingual, young, attractive ('eye candy'), lightskinned middle to upper class, and [*644] heterosexual." n75 The monolingual Spanish speaker, middle aged, average looking, dark and indigenous appearing, poor and working class, out-of-the-closet gays and lesbians, are not among the popular Latin pop artists in the United States.

Professor Bender recognizes that none of the top Latina/o Pop artists, except Carlos Santana, are of Mexican ancestry, "by far the most populous of the group that comprise Latino/as in the United States." n76 He innocuously attributes this to being a function of the fact that there are few Latina/o stars in popular music. n77 However, coming on the heels of an era of deep public concern with Mexican immigrants in the 1990s, n78 combined with a long history of treatment of Mexicans as inferior, n79 we should not expect to see a Mexican-American pop culture icon. Ironically, dead Mexicans seem to achieve greater popularity in the United States than live ones. n80

The lack of entertainers of Mexican ancestry in the "Latin music craze" suggests a hierarchy of Latina/o racialization. n81 Different Latina/o groups and different aspects of Latina/o culture may be more attractive to Anglos than others. This difficult question, which is easily evaded if we do not affirmatively recognize the diversity of the Latina/o community, requires future exploration.

Perhaps more troubling, as is true for African Americans, n82 while certain types of Latina/os are visible in the music industry, few can be seen in other prominent places in U.S. culture, n83 such as television, film, [*645] and literature. n84 Although efforts have been made to increase Latina/o visibility in popular culture, n85 change has been glacially slow. Latina/os are even rarer at the highest levels of government, academia, and business. n86 With that in mind, Latino/as in the music industry might be equated to the minstrel show of the days of old.

B. Lessons from Puerto Rican Culture

Professor Pedro Malavet specifically analyzes the Puerto Rican culture on the island from the perspective of an "exile" on the United States mainland. n87 In considering "two Puerto Rican cultures," n88 he implicitly recognizes that living in the United States transforms people; people and cultures change in response to their surroundings. n89 He looks nostalgically upon his own transformation, including the slow loss of his Puerto Rican-ness as he continues life in the United States. In discussing "mi [*646] cultura puerto riquena" (my Puerto Rican culture)," Professor Malavet implicitly acknowledges the multiplicity of Puerto Rican culture, with divisions based on class and other lines. In this vein, he acknowledges the "many diverse forms of Puerto Rican popular music." n90

Professor Malavet's "looking glass of exile" is not limited to Puerto Ricans. n91 Other Latina/o national origin groups share a duality in their experiences. Many Mexican immigrants in the United States, for example, face difficulties adapting to life in this country but change in innumerable ways. n92 Those who develop transnational identities n93 may live a life straddling two nations. Their children born in the United States, in turn, view the world in entirely different ways than they do and parents did.

Professor Malavet's observations raise important questions. Namely, is the individual transformation that he describes for "exiles" something "good" or "bad"? Such individual changes may be inevitable in a globalizing world marked by increasing movement of people and capital across national lines.

Like other contributions to this cluster of essays, n94 Professor Malavet recognizes that the current popularity of "Latin" music may reinforce [*647] negative stereotypes about Latina/os. n95 Nonetheless, he considers the popularity to be beneficial to Puerto Ricans in the United States "especially because three of the most famous performers (Ricky Martin, Jennifer Lopez and Marc Anthony) are Puerto Ricans and they identify as Puerto Rican." n96 One must question, however, how positive it is to have visible Puerto Rican performers who reinforce negative Latina/o stereotypes. n97 Although the presence of Puerto Ricans in the public eye helps remedy Latina/o invisibility in American social life, such visibility may on the whole have negative consequences. n98

C. Conclusion
These three essays demonstrate that LatCrit inquiry has much to offer cultural analysis. At any historical moment, a society's political, economic, and social institutions tend to be mutually reinforcing. The popular portrayal of Latina/os in ways that confirm Anglo stereotypes helps circumscribe Latina/o membership in U.S. law and society. Importantly, we would be surprised to see the law dramatically out of step with the conceptions of Latina/os found in popular culture.

II. The Impact of Immigration Law on the Racialization of Different Latina/o National Origin Groups: The Case of Elian Gonzalez

An influential critical Latina scholar, Professor Berta Hernandez analyzes one of the most newsworthy events of the year 2000 in the United States, perhaps only overshadowed by the presidential election. She shows how the Elian Gonzalez case implicated two deeply held Cuban American values--the rule of law and family--that called for Elian Gonzalez's return to his father in Cuba when partisan anti-Castro politics did not. Analyzing the court of appeals decision in that case, Professor Hernandez demonstrates that the rule of law compelled the result. As Legal Realists and Critical Race Theorists might hypothesize, Professor Hernandez's interviews with Cuban American law professors confirm that their migration experiences from Cuba, including whether they left with the nuclear family intact, shaped their views on the U.S. government's response to the Elian Gonzalez case.

A. The Cuban Migrant Experience

Professor Hernandez observes that Cuban Americans historically have been viewed as an immigrant success story, with the community known for its work ethic and economic, social, and political mobility. As political commentator Linda Chavez has stated, Cuban American "accomplishments in the United States are attributable in large measure to diligence and hard work." Frequently ignored was the fact that, as Professor Hernandez acknowledges, this first wave of Cuban immigrants was largely white, middle and upper class, professional, and educated. U.S. citizens more easily accepted this immigrant cohort into the mainstream than other Latin American immigrants. Consequently, many Cuban Americans over time successfully integrated themselves into south Florida socially, economically, and politically.

For its part, the law fully supported Cuban refugees, offering them advantages unavailable to other migrant groups. At least until 1980, the U.S. government classified Cubans as "political refugees" and virtually all that reached the United States were allowed to remain in this country. In addition, Cuban migrants received special immigration benefits, including refugee resettlement assistance, under congressional legislation enacted specifically for their benefit.

B. Changing Demographics, Changing Law Enforcement

Popular perceptions, and the legal response to Cuban migrants, changed dramatically in 1980. In that year, the Mariel boatlift brought many poorer, Afro-Cubans to the United States; media characterization of the Marielitos as criminals, mentally ill persons, and homosexuals provoked public concern, even within the Cuban American community in south Florida. Depictions of crime brought by Cuban migrants, exemplified by the movie "Scarface," starring Al Pacino as a murderous Cuban American drug kingpin, reflected popular views about the new refugees. In response, the U.S. government's open embrace of Cuban refugees shifted to mass detention and slow admission of Cuban migrants.

In the 1990s, with the threat of a mass migration looming on the horizon after an influx of rafters from Cuba, the U.S. government offered even harsher treatment. In 1994, "the U.S. and Cuban governments signed an unprecedented agreement . . . , whereby the two governments recognized their common interest in preventing Cubans from leaving by sea" and allowing for interdiction, repatriation, and return of Cubans; the United States also agreed to accept a minimum of 20,000 Cubans per year.

Beginning in 1994, the U.S. government has interdicted Cuban rafters before reaching U.S. shores. Under the U.S. Coast Guard's "feet wet/feet dry" policy, only Cubans who make it to shore (feet dry) are
permitted to pursue their rights to apply for asylum while those interdicted (feet wet) are returned to Cuba. n122 In the summer of 1999, the Coast Guard was captured on camera using pepper spray and force, to keep Cuban rafters from making it to land and asylum in the United States. n123 The Supreme Court's 1993 decision upholding the Haitian interdiction policy served as the principal legal precedent for the feet wet/feet dry policy. n124

The changing racial demographics of the Cuban migrants unquestionably affected their shifting legal treatment by the U.S. government. n125 Viewed more recently as economic migrants than political refugees, class, fears of mass migration, and related political concerns also came into play. Consequently, for better or worse, the U.S. government now treats Cuban migrants more like other Latin American immigrants.

C. A Comparison: Mexican, Central American, and Haitian Migrants

Over the last half of the twentieth century, Mexican and Central American migrants have been classified as "economic migrants," not political refugees, and consistently been subject to harsh border enforcement measures. n126 In the 1980s, for example, the Immigration and Naturalization Service (INS) detained Salvadorans and Guatemalans fleeing political violence and affirmatively encouraged them to forego their legal claims to apply for political asylum and return "voluntarily" to their homeland. n127 The 1990s saw a dramatic escalation of the use of military force along the border resulting in the death of hundreds of Mexican migrants, which has provoked little public concern. n128 Similarly, Haitians, classified as economic migrants even though they fled the political turmoil of their homeland, historically have been subject to much harsher treatment than Cubans. n129

Interestingly, the U.S. government has begun to treat Cuban migrants in the way that it long has treated those from other Latin American nations. This has been facilitated by the changing demographics, and racialization, of Cuban migrants. n130

D. Elian Gonzalez

Against this historical backdrop, the Elian Gonzalez controversy arose. After months of controversy, negotiations, and political hand-wringing, the United States government returned Elian Gonzalez, a young boy whose mother tragically died at his side as they traveled by raft to the United States, to his father in Cuba. n131 The Cuban American community's history of special treatment under the immigration laws inevitably influenced views on the matter. n132 The fact that in the wake of Castro's revolution some Cuban parents sent their unaccompanied children to the United States in the hopes that they could live a better life, surely did as well. n133 To many Cuban Americans, it must have been a rude awakening to see Elian Gonzalez suffer the indignities at the hands of the U.S. government that it regularly doles out to other immigrant groups. n134

In some ways, however, Elian Gonzalez's extended family's request that the child remain with them in the United States received extraordinary treatment. n135 Observers have noted that, if Elian Gonzalez were from any other Latin American country, he would have been returned to his father in a matter of days, if not hours. n136 The sensitive nature of Cuban American politics in south Florida resulted in more deliberate action by the INS, under the watchful eye of Attorney General Janet Reno, than one typically would see. The Cuban American vote, generally in the pocket of the Republican Party, n137 was cherished in a Presidential election year. n138 Despite the care taken in the decision, the negative political fallout with Elian Gonzalez's return to Cuba may have cost Vice President Al Gore the 2000 Presidential election. n139 The dawn INS armed raid in which Gonzalez was taken from his uncle's home, outraged vocal segments of the Cuban American community. n140

The vociferousness of the Cuban American political resistance to the return of Elian Gonzalez to his father in Cuba, which was out of step with popular public opinion, may have permanently damaged Cuban American political power. n141 At least during the time of the controversy, Cubans were marginalized by the media and the general public, thus moving away from being perceived as the "model" Latina/o minority. n142

E. Future Latina/o Coalitions

A silver lining may exist to the Elian Gonzalez controversy. The Cuban American reaction to the INS conduct in the Elian Gonzalez matter, as well as unhappiness with Coast Guard conduct in the Cuban interdiction program, n143 demonstrates that Latina/os share common ground in addressing immigration as a civil rights issue. n144

In the past, some Cuban leaders stated that the "Mexican problem" with immigration in the southwest had nothing to do with Cubans in Florida. n145 Recent events shed new light on such assertions. In these times, the U.S. government often focuses immigration enforcement on persons of Latin American ancestry. n146 Conduct like that seen in Elian Gonzalez's case--namely, use of force--occurs with regularity in immigration enforcement against Mexican and Central American immigrants. n147
the course of the 1990s, Cuban Americans have begun to get a glimpse of how harsh the U.S. government can be if it wants to focus its power on a particular immigrant community. Organized politically, Cuban Americans may join forces with other Latina/os to challenge the inequities inherent in INS enforcement policies.

F. Immigration Law and Racial Formation

The sea change in popular attitude toward different groups, and the law's response, reveals volumes about racial formation. Specifically, immigration law and its enforcement affects the differential racialization of various Latina/o national origin groups. Efforts to keep some groups out of the country while welcoming others reinforce popular conceptions about the groups. At least at one time, positive stereotypes about Cubans as a "model minority" justified their generous treatment under the law. When viewed as white, educated, middle and upper class, and refugees of communism, Cubans fared well. When the popular construction of the migrants changed around the time of the Mariel boatlift—as Blacker, poorer, and undesirable, the legal treatment became stricter. Similarly, the racialization of Mexican immigrants as dark, poor, and uneducated, long has rationalized their harsh treatment under the immigration laws. Thus, over time, we see the evolving racialization of Cubans in a way that makes them more resemble Mexican migrants. Changes in the racialization of Cubans creates the potential for future political coalitions challenging immigration law and enforcement.

Conclusion

In analyzing "Latino culture," we must take care not to ignore the diversity of the Latina/o communities. Such an approach violates the fundamental anti-essentialist core of LatCrit theory. By considering the variety of different Latin cultures, we are better able to appreciate how various Latin American groups are differentiated in law and popular culture. Specifically, LatCrit analysis of the "Latin music craze" allows for the study of the comparative racialization of different Latina/o national origin groups. The popularity of performers of Caribbean ancestry, combined with the relative marginalization of persons of Afro Latina/o and Mexican ancestry, is most revealing.

At its core, the "Latin music craze" reinforces negative stereotypes about Latina/s, including that they are foreigners. It promotes assimilationism in that the music promotes acceptance of certain types of Latina/os, those whom are viewed as most assimilable. Crossover appeal in fact rests on assimilation potential. The current "craze" therefore should be viewed critically.

Similarly, we should pay attention to how law racializes various Latina/o national origin sub-groups. Differential treatment between different immigrant groups affects how those groups are viewed by Anglos and those groups are racialized, in the United States. The Elian Gonzalez matter highlights the racialization of different Latina/o national origin groups in U.S. immigration law and policy, and how racial constructions change over time.

FOOTNOTE-1:

n1 See generally Michael Omi & Howard Winant, Racial Formation in the United States from the 1960's to the 1990's (2d ed. 1994) (analyzing racial formation in United States). In this essay, I use "racialization" in the context of "comparative racialization" broadly to refer to the different social constructions as "others" of persons of Mexican, Cuban, and Puerto Rican ancestry; such differentiation may be based on perceived class and cultural, as well as phenotypical (physical appearance), differences. See Kevin R. Johnson & George A. Martinez, Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship, 53 U. Miami L. Rev. 1143, 1155-57 (1999) (advocating scholarship analyzing the distinctive racialization of Chicano/as in the United States); Kevin R. Johnson, Celebrating LatCrit Theory: What Do We Do When the Music Stops?, 33 U.C. Davis L. Rev. 753, 764 (2000) ("The process of racialization is complex, affecting different groups in different ways. Latina/os comprise a truly complex racial mixture of peoples . . .") (footnote omitted).


n3 See infra text accompanying notes 6-98.

n4 See infra text accompanying notes 99-153.

n5 See infra text accompanying notes 105-30.

n6 See, e.g., Nathan Glazer, We Are All Multiculturalists Now (1997).


n17 Ehrenreich, Salsa Dancer, supra note 16, at 797.

n18 See id. (contending that Anglo appreciation of Latin dance can facilitate "true multicultural understanding").

n19 See infra text accompanying notes 48-50, 58-61, 68-75.


n21 See 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, 1093-94 (1999). Actually, the increased popularity of salsa in fact is an increased popularity in salsa that is not too spicy. See infra text accompanying notes 37, 48-52, 72-75 (analyzing cultural representations likely to be embraced by Anglos).


n24 Ehrenreich, Salsa Dancer, supra note 16, at 800.


n26 See infra text accompanying notes 62-71. Others, such as Christina Aguilera, a blond mixed Ecuadoran, Irish singer raised in a Pittsburgh suburb, have also attracted popular attention. See Christopher John Farley, Christina Aguilera; Building a 21st Century Star, Time, Mar. 6, 2000, at 70 (reporting that "now that [Aguilera's] a mainstream star, she wants to be a Latin star too"); Steve Sailor, Not Hispanic Enough, Wash. Times, Jan. 8, 2001, at
A15 (stating that "somebody of Irish American upbringing who couldn't resist cashing in on her Spanish surname is the blue-eyed and blond teen diva Christina Aguilera").

n27 See La Bamba (Columbia Pictures, 1987); David Reyes & Tom Waldman, Land of a Thousand Dances: Chicano Rock 'n' Roll From Southern California 41-42 (1998) (discussing the various efforts to "remember" Valens and his music after his death); Michael A. Olivas, I'll Just Cry - "96 Tears," 24 Bilingual Rev. 292, 293 (1999) (noting that Valens "is remembered today as much for dying in the ill-fated flight with . . . the Big Bopper . . . and Buddy Holly as for his music" and that his song La Bamba did "not become a huge hit until the movie" of his life was released almost three decades after his death); see also Sheila Benson, Accent on the Latino Market, L.A. Times, July 24, 1987, Calendar, at 6 (noting that movie on Valens life, La Bamba, overlooked the difficulties that Valens faced, including the perceived need to Anglicize his name to succeed in the music business, and complications caused by the fact that the love of his life, Donna, was Anglo).


Lopez argued that she was well-suited to play Selena because they shared an ethnic identity as Latinas beyond their "national" identities. "I don't think the actress who played her had to be Mexican-American because Selena was," Lopez said. "Selena and I are both Latinas and both had the common experience of growing up Latina in this country. This is good enough."


n30 See Mireya Navarro, Latin Grammys' Border Skirmish; New Awards Face Complaints About Slighting a Mexican Genre, N.Y. Times, Sept. 29, 2000 (reporting that two groups refused to accept Latin Grammys because of alleged bias against Mexican music); David Bauder, Santana Wins 3 Latin Grammys; Inaugural Awards Offer Emotion, Controversy, Commercial Appeal (Memphis, Tenn.), Sept. 14, 2000, at A10 (reporting that television producers of Latin Grammys favored artists who sang in English and are better known in United States).


n33 See, e.g., Los Tigres del Norte, 16 Grandes Exitos (Fonoriso 1991); Saldivar, supra note 32, at 1-8 (analyzing group's focus on undocumented Mexican experience); George Lipsitz, Dangerous Crossroads: Popular Music, Postmodernism and the Poetics of Place 131 (1994) (noting that, despite their popularity in Mexico, Los Tigres de Norte
"have secured almost no 'mainstream' commercial recognition in the U.S.A., perhaps because they sing in Spanish..., but also perhaps because their lyrics contain values that threaten vested interests too much.").

n34 See, e.g., Tish Hinojosa, Frontejas (Rounder Records, 1995); Saldivar, supra note 32, at 187-91 (analyzing cultural significance of Hinojosa's music); Timothy O'Hara, The Power of Music; Songs Tell Workers' Tale, Sarasota HeraldTrib., Apr. 21, 2000, at B1B (reporting that Hinojosa's songs touched on plight of farmworkers and Mexican immigrants and that "though she has won the praises of music critics and other song writers, major commercial success has eluded her.").

n35 See infra text accompanying notes 94-98. In fact, some Puerto Ricans attended the movie "Selena" to watch Puerto Rican actress Jennifer Lopez play the real life subject of the movie, Selena, a Mexican-American. See Negron-Muntaner, supra note 28, at 181. Lopez seems to claim a Latina, as opposed to a Puerto Rican, identity. See supra note 28.


n38 See Ehrenreich, Salsa Dancer, supra note 16, at 796.


n40 See supra text accompanying note 14.

n41 See infra text accompanying note 67.

n42 See Ehrenreich, Salsa Dancer, supra note 16, at 795, fn 5.

n43 Id. at 796, fn 6.

n44 Id. at 799.


n46 See Margaret Jane Radin, Contested Commodities 154-63 (Harv. University Press 1996); see also Peter Halewood, Law's Bodies: Disembodiment and the Structure of Liberal Property Rights, 81 Iowa L. Rev., 1331, 1332-33 (1996) ("Commodification, the process of transforming an object, quality, or capacity into something with a recognizable market value, occurs in several ways. The human body is commodified by wage labor, by advertising, by commercial exploitation of women's bodies, by biotechnology's reduction or fragmentation of the body into marketable parts, and by the conceptual and ideological shift in our society toward thinking of the body as something marketable or alterable."). Consider, for example, the commodification of Mexican cuisine. See Victor M. Valle & Rodolfo D. Torres, Latino Metropolis 67-99 (2000).


n48 See Ehrenreich, Salsa Dancer, supra note 16, at 795.

n49 See id. at 806.

n50 See id. at 805: (stating that Anglos "tend to reduce salsa to a crass form of commercialized sexiness ('hot tamale,' 'hot Latin rhythms,' etc.'): Elizabeth M. Iglesias, Rape, Race and Representation: The Power of Discourse, Discourses of

n51 See Ehrenreich, Salsa Dancer, supra note 16, at 795.

n52 See id. at 803.


n54 See Ehrenreich, Salsa Dancer, supra note 16, at 809.

n55 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) (analyzing how language can be employed as a proxy for race); supra note 22 (citing authority discussing anti-Latina/o edge to California's Proposition 187, which would have eliminated public benefits to undocumented immigrants); see also Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Racism, 39 Stan. L. Rev. 317 (1987) (advocating "cultural meaning" test for claims of racial discrimination).

n56 See, e.g., supra note 2 (citing examples).

n57 See William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221, 221 (1988) (characterizing standing doctrine developed by Supreme Court under Article III of Constitution as "incoherent").


n59 See Bender, Latino Pop Music, supra note 58; see also George Lipsitz, Time Passages: Collective Memory and American Popular Culture 159 (1990) (stating that Mexican-Americans in Los Angeles "suffer from the anguish of invisibility" and that the mass media rarely portrays "their world . . . sympathetically or even accurately" and "reinforces and legitimates Anglo cultural hegemony"); Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 Cornell L. Rev. 1258 (1992) (analyzing stereotypical depictions of different minority groups in media); Jerry Kang, Cyber-Race, 113 Harv. L. Rev. 1131, 1208 nn.162, 163 (2000) (observing that racial stereotypes are common to advertising and film); Roman, supra note 28 (analyzing stereotypical representations of Latina/os in film).


n61 See Roman, supra note 28, at 49-65; see also Laura M. Padilla, Social and Legal Repercussions of Latinos' Colonized Mentality, 53 U. Miami L. Rev. 769 (1999) (analyzing damage caused by Latina/o internalization of society's negative stereotypes about them).

n62 Bender, Latino Pop Music, supra note 58, at 732.

n63 See, e.g., Bender, Language Vigilantism, supra note 58 (analyzing various English only language laws); Christopher David Ruiz Cameron, How the Garcia Cousins Lost Their Accents:

n64 See Bender, Latino Pop Music, supra note 58, at 722.

n65 See id. at 743.


n67 See Bender, Latino Pop Music, supra note 58, at 737.


n69 See Bender, Latino Pop Music, supra note 58, at 733.

n70 See id.

n71 See id. at 729-30.


n73 See supra text accompanying notes 24-36.

n74 See supra text accompanying note 66 (noting that Valens Anglicized his name); see also Beverly Mendheim, Ritchie Valens: The First Latino Rocker 136 (1987) (observing that the "majority of fans, even those of Mexican heritage, did not know [Ritchie Valens] was of Mexican descent until well into the 60's"); Olivas, supra note 66, at 211 (telling story of Chicano author who did not know that Valens was Mexican until after his death); Ehrenreich, Salsa Dancer, supra note 16, at 815 ("The versions of Latino/a cultural productions that tend to gain entry into the mainstream (white) 'American' consciousness are often the more whitewashed ones.").

n75 Bender, Latino Pop Music, supra note 58, at 731. Of course, the role of the marketing of sex appeal affects the popularity of entertainers of all races and ethnic backgrounds.

n76 Id.; supra text accompanying notes 24-36 (discussing fact that no entertainers of Mexican ancestry are at center of "Latin music craze").

n77 Id.


n80 See supra text accompanying notes 27-28 (discussing careers of Ritchie Valens and Selena).
n81 See infra text accompanying notes 105-30 (analyzing how U.S. immigration laws racialize various Latin American national origin groups in different ways).


n83 See Gerald P. Lopez, Learning About Latinos, 19 Chicano-Latino L. Rev. 363, 367 (1998); see also George A. Martinez, Philosophical Considerations and the Use of Narrative in Law, 30 Rutgers L.J. 683 (1999) (contending that minority stories must be told to secure social change).


n86 For example, the highest levels of government have few, if any, Latina/os. The Supreme Court never has had a Latina/o Supreme Court Justice. See "Toward a Supreme Court Appointment" Conference, Harvard Law School, Apr. 7, 2001. Similarly, despite activism over decades, Harvard Law School still lacks a Chicana/o law professor. See Luz Herrera, Challenging a Tradition of Exclusion: The Push for Latino Faculty at Harvard Law School, 5 Harv. Latino L. Rev. (forthcoming 2002). The difficulties experienced by Henry Cisneros in the Clinton administration reveal the public scrutiny of high profile Latina/os. See Deborah L. Rhode, Conflicts of Commitment: Legal Ethics in the Impeachment Context, 52 Stan. L. Rev. 269, 347 (2000) ("Taxpayers paid seven million dollars to learn that former [U.S. Housing and Urban Development] Secretary Henry Cisneros lied, not about paying money to a former mistress (which he acknowledged), but only about the precise amount paid.") (footnote omitted). More recently, because she had employed an undocumented worker from Guatemala, Linda Chavez, President Bush's original nominee for Secretary of Labor, was the only new Cabinet nominee forced to withdraw. See Steven A. Holmes & Steven Greenhouse, Bush Choice for Labor Post Withdraws and Cites Furor of Illegal Immigrant Issue, N.Y. Times, Jan. 10, 2001, at A1.


n88 See Malavet, Looking Glass of Exile, supra note 87.

n89 See supra text accompanying notes 9-13.

n90 Malavet, Looking Glass of Exile, supra note 87, at 776.

n91 Professor Malavet employs narrative to relay his thoughts as a Puerto Rican exile. The narrative in places proves

n92 See supra text accompanying notes 10-11. This transformation can be viewed in different ways. Anglos view assimilation positively. See supra note 72 (citing authorities). In contrast, the derogatory term used by Mexicans to refer to assimilated Mexican immigrants is "pocho," see Jose Antonio Villarreal, Pocho (Doubleday 1970) (1959); see also Richard Delgado, Rodrigo's Fourteenth Chronicle: American Apocalypse, 32 Harv. C.R.-C.L. L. Rev. 275, 299 & n. 115 (1997) (mentioning "pocho" as slang for person of Mexican ancestry "who does not speak Spanish and has lost touch with his or her roots"), or "gabacho," see, e.g., Rick P. Rivera, A Fabricated Mexican 79-81 (1995) (telling story of Mexican-American accusing another one of being a "gabacho," slang for Anglo). The desire not to be seen as becoming "too" American may help explain the history of relatively low naturalization rates among Mexican immigrants. See Kevin R. Johnson, Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century, 8 La Raza L.J. 42, 52-54 (1995).

n93 See Rachel F. Moran, Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990's and Beyond, 8 La Raza L.J. 1, 19-24 (1995); 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, 1064-66 (2000) (contending that concept of citizenship must change with emergence of transnational identities); Maria de los Angeles Torres, Transnational Political and Cultural Identities: Crossing Theoretical Borders ("With increased contact between people and cultures, we may be witnessing the rise of transnational identities. Such identities are likely to be more visible in communities where people have crossed many borders."), in Borderless Borders: U.S. Latinos, Latin Americans, and the Paradox of Interdependence 169, 181 (Frank Bonilla et. al. eds.,1998).

n94 See supra text accompanying notes 48-50, 58-61, 68-75.

n95 See Malavet, Looking Glass of Exile, supra note 87, at 789.

n96 Id. at 44 (footnote omitted); see supra text accompanying notes 26, 35-36.

n97 See supra text accompanying notes 58-61.

n98 See supra text accompanying notes 58-61.

n99 See, e.g., Emile Durkheim, Education and Sociology (1956).


n105 See Hernandez-Truyol, supra note 101, at 689.


n110 See id. at 438 ("The first waves of Cuban immigrants came to Miami in the 1950s as model immigrants and soon became model minorities."); see also Lisandro Perez, Cubans in the United States, 487 Annals 126 (1986) (studying demographics of Cuban refugees and studying relative Cuban economic success); Alejandro Portes & Robert L. Bach, Immigrant Earnings: Cuban and Mexican Immigrants in the United States, 14 Int'l Migration Rev. 315 (1980) (analyzing differences between Mexican and Cuban migrations to United States). Somewhat like Cubans, Asian Americans also have been cast as the "model minority," even though only certain segments of this diverse community have enjoyed economic and social mobility in the United States. See, e.g., Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 81 Cal. L. Rev. 1242, 1308-12 (1993); Pat K. Chew, Asian Americans: The "Reticent" Minority and Their Paradoxes, 36 Wm. & Mary L. Rev. 1, 2433 (1994).

n111 See Chavez, supra note 106, at 139-59.


n113 See supra text accompanying notes 105-09; see also Berta Esperanza Hernandez-Truyol, Nativism, Terrorism, and Human Rights - The Global Wrongs of Reno v. American-Arab Anti-Discrimination Committee, 31 Colum. Hum. Rts. L. Rev. 521, 551-54 (2000) (studying how Cuban-American groups seeking to overthrow Fidel Castro, who were involved in Elian Gonzalez matter, were not classified as "terrorists" under immigration laws while those loosely affiliated with Palestinian groups are). For example, Cuban Americans successfully pushed for early bilingual education programs in Florida. See James Crawford, Bilingual Education: History, Politics, Theory and Practice 35-37 (3d ed. 1995).


n117 See Portes & Bach, supra note 114, at 88 (noting the changing demographics of Cuban migrants to the United States, including that less than five percent of Cuban refugees before 1980 were Black compared to 30 percent after); Garcia, supra note 107, at 44 (noting that only 3 percent of Cubans in United States in 1970 were Black, compared to 30 percent of population in Cuba); see also Susan Martin, Andy Schoenholtz, & Deborah Waller Meyers, Temporary Protection: Towards a New Regional and Domestic Framework, 12 Geo. Immigr. L.J. 543, 556-57 (1998) (discussing changing Cuban American attitudes toward Cuban rafters in the 1990s); SandrinoGlasser, supra note 112, at 89 (discussing "popular images" of the Mariel refugees as "undesirables - poorer, less educated and mostly black or mixed Cubans, with a large percentage being either criminal or mentally ill") (footnotes omitted).

n118 See Roman, supra note 28, at 42-43.


n124 See infra text accompanying note 129.

n125 See Richard A. Boswell, Throwing Away the Key: Limits on the Plenary Power, 18 Mich. J. Int'l L. 689, 705-08 & n.52 (1997) (book review). Race also affects Cuban migrants' experience in the United States. See Mirta Ojito, Best of Friends, Worlds Apart, N.Y. Times, June 5, 2000, at A1 (reporting that two Cuban immigrants - one Black, one not --who had been friends in Cuba had dramatically different experiences in Miami with one associating with white Cubans and the other with African Americans).

n126 See infra text accompanying notes 127-28.

n127 See, e.g., Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990); see also Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) (settling case in which Salvadoran and Guatemalan asylum-seekers claimed that asylum claims were subject to improper bias in adjudication).


n130 See supra text accompanying notes 117-25.

n131 See supra note 102 (citing authority recounting controversial events).

n132 See supra text accompanying notes 110-16.

n133 See Garcia, supra note 107, at 23-26. Other factors affecting Cuban American opinion include the political situation in Cuba, see Berta Esperanza Hernandez Truyol, Out in Left Field: Cuba's Post-Cold War Strikeout, 18 Fordham Int'l L.J. 15 (1994), and the fact that the Cuban government in the past had persecuted persons returned there who had sought asylum in the United States, see, e.g., Rodriguez-Roman v. INS, 98 F.3d 416 (9th Cir. 1996) (holding that Cuban asylum applicant fearing punishment for leaving Cuba was eligible for asylum).

n134 See supra text accompanying notes 126-30.


n137 See Garcia, supra note 107, at 146-47.
n138 For a literary account of Miami's complex politics, see Joan Didion, Miami (1987).

n139 See Dexter Filkins & Dana Canedy, A Mayor, Once Vocal for Gore, is Silent, N.Y. Times, Nov. 25, 2000, at A11 (reporting that Democratic mayor of Miami, Alex Penelas, who did not actively support Vice President Gore because of the Clinton administration's handling of Elian Gonzalez matter, may have taken steps during ballot recount that adversely affected Gore).


n141 See Rick Bragg, Fight Over Cuban Boy Leaves Scars in Miami, N.Y. Times, June 30, 2000, at A12; see also Victorino Matus, The Slanderers of Cuban-Americans; There's One Ethnic Group It's Still Politically Correct to Smear, Wkly. Standard, Apr. 17, 2000, at 14 (contending that politicians and journalists during the Elian Gonzalez controversy viciously attacked Cuban-Americans as an ethnic "mob" with many anti-Cuban slurs).

n142 See supra text accompanying notes 105-06.

n143 See Hernandez-Truyol, supra note 101; supra text accompanying notes 121-23.

n144 See Johnson, supra note 68, at 115-16, 117-29.

n145 See id. at 133-34 (footnote omitted).


n147 See Elvia R. Arriola, LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids, 28 U. Miami Inter-Am. L. Rev. 245 (1996-97); see, e.g., INS v. Delgado, 466 U.S. 210 (1984) (holding that workplace raids by INS failed to constitute "seizures" subject to the constraints of the Fourth Amendment); see also supra text accompanying note 128 (discussing increased border enforcement efforts in 1990s).

n148 See supra text accompanying notes 100-47.

n149 See supra text accompanying notes 100-16.

n150 See supra text accompanying notes 100-16.

n151 See supra text accompanying notes 117-24.


Tayyab Mahmud*

* Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. I want to thank the dynamic and ever-expanding LatCrit community for creating a space where critical legal scholarship can flourish and friends at South Asian Network (SAN) in Los Angeles, who are fighting the good fight, for providing sustaining inspiration.

Review Essay


"Heights is for Whites."

White teenagers after the beating death of a South Asian in Jersey Heights, New Jersey, October 1987. n1

"It is merely in the night of our ignorance that all alien shapes take on the same hue."

Perry Anderson n2

Introduction

Nearly a century ago, addressing the fissures of race that run deep in the terrain styled the United States of America, W.E.B. Du Bois asked Africans (dis)located here, "How does it feel to be a problem?" n3 Vijay Prashad, addressing South Asian Americans, asks "How does it feel to be a solution?" n4 He then proceeds to show how the answer to this question is tangled in a web woven of histories, cultures, economies, and political projects. On this wide canvas, he brings into sharp relief desires and anxieties of a set of immigrants in this "land of immigrants" as they negotiate new ways of life underwritten in subtle and not so subtle forms by hierarchical constructions of race. Prashad's project is an ambitious one, and he delivers. His is not a disengaged, cold, or distant reporting. Passion, engagement, and purposefulness, clad in humor and irony, animate his penetrating analysis. Law review scholarship, often rendered lifeless by its wooden form and guarded substance, would do well to take note of his readable and lively style, explicit identifications, and multilayered canvas. For critical legal scholars in general, and critical race scholars in particular, this remarkable book implicitly forwards agendas of productive inquiry. For activists of racial justice and human liberation, it is a call for action.

I. Identity Formation and the Grammar of Imperialism

The anti-essentialist project of critical social inquiry teaches us that identities, of immigrants or otherwise, are protean; they are always in the making. The foundation of identity is selfperception rooted in affiliations and alterity. Adoption and deployment of identity, however, is neither uni-dimentional nor some simple act of unencumbered volition. Contextual determinants, both material and discursive, demarcate the spatial and temporal frameworks, within which identities are constituted. Within such frameworks identities are forged along the fault lines between operations of power and strategies of resistance. This process, of necessity, is a dynamic one. Prashad's project is to lay bare the genealogy and anatomy of the "model minority" discourse, whereby particular identities are assigned to, and often adopted by, various social groups. South Asian Americans are one such group. Prashad, himself a South Asian, in a succinct distillation of the "model minority" syndrome, asks how, as "brown folk[,] we can live with ourselves as we are pledged and sometimes, in an act of bad faith, pledge ourselves, as a weapon against black folk." n5 In the search for an answer, Prashad takes us on a journey though the interconnected thickets of American Orientalism, South Asia's colonial encounter, racialized immigration regimes of the U.S., dynamics of class formation, "model minority" mythologies, and the challenges and prospects of racial justice and human dignity.

A. Universalism and Its "Others"

Prashad identifies appropriation of South Asian desis n6 for the "model minority" discourse as resting on two images: one, of being inherently hard-working
high achievers; and two, of being spiritual and pliant. The two images then form the composite stereotype of yet another "not-white-but-good" immigrant community. This stereotype furnishes white ["659" suppemacist ideology with yet another weapon to assign degradation of African Americans to their supposedly inherent incapacities and deficiencies. To excavate the genealogy of this discourse, Prashad first turns his searching analysis to the career of American orientalism.

Hegemonic self-understanding of the U.S., buttressed by "manufactured consent," rests on the notion of American exceptionalism. n7 This belief posits that American history and society are immune from the foundational problems that plagued the "Old World," particularly entrenched class divisions and colonialism. The historical record that the U.S. is itself a colonial settler state, whose foundations rest on genocide of indigenous peoples and slave labor from Africa, and whose extra-continental colonial expansion and entrenched imperial hegemony have given it a defining mould, is largely unacknowledged. n8 After all "forgetting . . . is a crucial factor in the creation of a nation." n9

Prashad catalogues a representative sampling of American socio-historical thought, which for over four hundred years has maintained a purportedly ontological divide between the "East" (the Orient) and the "West" (the Occident). n10 The Orient is seen as "poor and unfree, with an especial endowment of ahistoricalness." n11 These immutable and timeless deficiencies of the Orient were seen as the natural consequence of racial incapacies. For example, Ralph Waldo Emerson, that canonical American essayist of the human condition, had no doubt that "it is race, is it not? that puts the hundred millions of India under the domination of a remote island in the north of Europe." n12 The "West," and of course America, is seen as everything that the "East" is not: rich, free, and dynamic--attributes often seen as issuing from natural endowments of a superior race.

It is in and through this discourse that America partook of the mutually constitutive role of colonialism and modern Europe, whereby many ["660"] foundational constructs of modernity--reason, man, progress, and the nation--were developed in contrast with a racialized "non-Europe," with the later posited as not quite human, irrational, and outside history. Prashad recognizes that this process created "a marked (not quite) human subject, one who is like the Subject of so much European philosophy, but such a choice is not available as long as 'race' continues to be a searing category through which we are so habitually forced to live." n13

Any explicit and detailed analysis of modernity clothed in purportedly universal ideas of equality, freedom, rule of law, and representation is not Prashad's project. But his encapsulation of American Orientalism substantiates Denise da Silva's evocative location of modernity's promise of universality as always positioned against "the other side of universality . . . a moral and legal no man's land, where universality finds its physical limits . . . a region of modern space that lies beyond the domain of 'Universal Justice'." n14 This ever-present "no man's land" adjacent to grounds of universality was built upon the foundation of posited essential difference. n15 Universality could relate to those excluded from its reach only by positing them as qualitatively different; as "not-quite-human." n16 The very scaffolding of the identity of modern, civilized, and disciplined Europe rests upon grounds of difference from the "not-quite-human Others." n17 Implicated here are foundational norms of cognition and eligibility embedded in modernity's universality that render the category of "human" recognizable only in counterdistinction to a persistent category of "not-quite-human." In order to appreciate the underlying architecture of these norms and the myriad ways in which they continue to furnish the scaffolding for cultural practices and public policies, it is indispensable that we locate the genealogy of modern universality in the colonial career of modernity.

The rise and consolidation of modernity and colonial expansion of Europe being temporally coterminous, the "axiomatics of imperialism" inform the foundational vocabularies of modern universality. n18 As a result, modern universality rests upon a conceptual partitioning and corresponding transformation of human populations into a divide between, as ["661"] Jean-Paul Satre put it, "men" and "natives." n19 The canonical "dark-skinned savage," constituted as the "not-quite-human" "Other," furnished the grounds to constitute the universal subject of modernity, i.e., the civilized, rights-bearing European. n20 In this maneuver, one can see in operation ostensive self-definition by negation, the assumption of identity by reference to what one is not. n21 This inaugurates modern constructions of race and the braiding of the latter with truncated operationalizings of universality. This mutually constitutive relationship leads Peter Fitzpatrick to posit that modern construction of race produces universality and supplies the grounding for modern law. n22 Undergirding the posited divides between culture/nature, civilized/savage, progressive/stagnant, modern constructions of race supply the common conceptual denominator that inform global distributions of privilege and subordination. n23
The global reach of this posited essential difference issued from the fact that colonialism lies at the heart of the construction of modern Europe. n24 Modernity's promise of equality, liberty, and representation could co-exist with colonial subjugation only by constituting the colonized as fundamentally different from the colonizer, as "not-quite-human," with race supplying the dividing marker. n25 The rule of essentialized racial difference, the animating principle of colonialism, furnished the grounds for exclusions built at the very heart of liberalism, the hegemonic political ideology of modernity. n26 It is important to underscore [*662] that exclusions based on race are not incidental and exceptional to modern universality and liberalism. While deployment of racial difference facilitates specific regimes of exclusion, the positing of originary racial difference is a strategy of engulfment foundational to the construction of the modern subject and the architecture of modern law. n27 Consequently, any inquiry of race positioning and race relations in the United States, such as the one Prashad undertakes, must address the "political horizon of Western culture, namely imperialism." n28 More specifically, we need to locate the intersections of immigration regimes and race relations within the hegemonic "epistemic graphing of imperialism." n29

B. Modern Power/Knowledge and Racing n30

Hegemonic modern discourses posit race as a preconceptual, pre-political category. This elides the fact that race as constituted today is a modern category, one that partakes of the distinctive feature of modernity: the interpenetration of power and knowledge. Race, as an operational category of power/knowledge, constitutes a particularized variety of a modern subject amenable for appropriation and positioning in modern material and discursive structures. In the modern imagery, the category of race helps suture history and science, time and space, nation and the rights-bearing subject. n31 Modern power/knowledge constitutes and deploys race as a suturing category that connects body, place of origin, and consciousness to facilitate assignment of eligibility for rights-bearing subjecthood. It may be productive to designate this process as racing: the constitutive process that connects the body and place of origin with consciousness, thereby constituting subjects available for insertion into hierarchical grids of domination and subordination. In this process subjection and marginalization is rationalized and legitimated on grounds of professed biological and immutable characteristics of the subordinated. n32 [*663]

Racing, then, is a modern technology of power/knowledge that facilitates insertion of the body into the population in a subordinated position, with such positioning assigned to "natural," pre-political deficiencies. This insight can furnish a very productive point of departure for the critical projects of anti-essentialism and anti-subordination: when you want to see racism, look for racing not race. The concept of racing underscores that the law does not act upon preformed subjects; it inescapably partakes of the process where subjectformation and subjection are inescapably intertwined. n33 Critical legal scholars must remain mindful of the facts that all human ideas and that all fields of knowledge are structured by "the laws of a certain code of knowledge." n34

A question remains: under what "code of knowledge" can universality coexist with its raced other side while professing fidelity to ideas of Enlightenment? The answer is suggested by the observation that Enlightenment's "untruth consists . . . in the fact that for it the process is always decided from the start." n35 Here one is confronted with "the willed (auto)biography of the West that still masquerades as disinterested history." n36 Universality is tainted by the consolidation of History--the unilinear, progressive, Eurocentric, and teleological history--as the dominant mode of perceiving and experiencing time and being. n37 The problem of order in modernity is one of "time-space distanciation--the conditions under which time and space are organized so as to connect presence and absence." n38 Modernity's complicity with colonialism, however, forces it to assign the "other" to a "space without places, time without duration." n39 In History, the canonical progeny of the colonial career of modernity, time overcomes space--a process whereby, in time, the distant "other" is supposed to become like oneself. n40 The "other's" present [*664] becomes Europe's past, while Europe's present becomes the "other's" future. History furnishes the foundational grammar of colonialism/imperialism: What can be, and what cannot be, properly spoken of, conceptualized, even thought, within the ontology and epistemology of progressive, linear time, and the difference between civilized Europe and its uncivil "other." Linear History choreographs "the mirror dance of colonial meaning-making," n41 and enables "the linear, progressivist claims of the social sciences--the major imperializing discourses." n42 The grammar of History furnishes the license for Europe to "save" and "uplift" the "other." It defines the "world-historic mission," the "burden" of the sovereign, rights-bearing subject of History, the European, to civilize the "other" and bring it into History. n43

Linear History, the self-professed condition that makes modernity possible, designates the nation-state as the agency that will realize modernity. The very birth of nationalism was "coeval with the birth of universal history." n44 The nation, however, is a
"capital paradox of universality." n45 While universality imagines the nation as unbound, its actualization situates it in particularities of belonging. Consequently, the process of nation-building is a process of exclusion; coherence of the nation rests on exclusion of what is its "other," destruction or domestication of the other." n46 Due to this compulsion, "the discourses of race and nation are never very far apart." n47 Where nation-building rests on "othering" of difference, this "othering" in the final analysis is raced—the body, the place of origin, and consciousness are sutured to [*665] assign eligibility to membership in the nation (i.e., citizenship), the key to representation and the protections of the law. In this light, the concept of racing helps us appreciate that "race" is a relational concept that does not have fixed referents. It reminds us that "naturalization of social phenomena and the suppression of the historical process which are introduced by its appeal to the biological realm can articulate a variety of different political antagonisms." n48

C. American Orientalism and the Exotic "Other"

American orientalism catalogued by Prashad has to be located in the context of the grammar supplied by History and by universality coterminous with its racialized other side. It is this grammar that facilitated pervasive deployment of modern categories of race, racial difference and race types, and the essential difference between Europe(an) and its "others."

This grammar enabled Thomas Jefferson, the author of the American Declaration of Independence, to pronounce that an "unfortunate difference of color, and perhaps of faculty, is a powerful obstacle to the emancipation of these Negro people." n49 James Madison, a founding father of the republic, deploys this grammar to opine that "the freed blacks ought to be permanently removed beyond the region occupied by, or allotted to a White population. . . . If the blacks, strongly marked as they are by Physical & lasting peculiarities, be retained amid the Whites . . . [they will] always secretly confederate against the ruling and privileged class; and be always uncontrolled by some most cogent motives of moral and respectable conduct." n50 Abraham Lincoln, the celebrated emancipator of slaves, uses this grammar to declaim that "I will say then that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races . . . that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with the people; and I say in addition to this that there is a physical difference between the white and black races which I believe will for ever forbid the two races living together on terms of social and political equality." n51

In Plessy v. Ferguson, this grammar facilitated the U. S. Supreme Court's pronouncement that "the object of the [14th A]mendment was [*666] undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either." n52 Validating the fruits of the modern constructions of race, the Court declared that "legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly and politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane." n53

Prashad recognizes "the resilience of race in our lives cannot be easily dismissed in favor of an imputed universalism," n54 an understanding that both undergirds and is substantiated by his study. While South Asia, or India as it was known then, found itself positioned on the racialized other side of universality, Prashad effectively brings into focus another constant theme of American Orientalism, namely to see India as mysterious and spiritual. Here the exoticised "other" was posited as desirable. Alongside the "ahistorical" and materially degraded India lay another India: "the real India was the spirit . . . [which may furnish] the solution to modern alienation." n55 If the "soul" was a casualty of modernity, it could be rejuvenated "through an engagement with this thing called 'India.'" n56 This engagement, indeed, was orchestrated without much delay, but only on the margins of "real" life. The "oriental menagerie" n57 was the site, with morbid pleasure the mode and self-confirmation the product. Prashad takes us on a tour of the circus, the vaudeville house, the Great Asiatic Caravan, Museum, and Menagerie of 1849, the Congress of Nations of 1874, the Ethnological Congress of 1884, and, of course, Hollywood, to see India as, in the Detroit Journal's words, "a land of ghastly and beautiful mysteries." n58 Here, one was supposed to see the non-Christian Indians' "essentially depraved natures," n59 so much in need of Christian salvation and the manifestly destined despotic paternalism of colonialism, that world-historic "white man's burden." The resilience of these images and longevity of this discourse still shines through travel [*667] guides, development models, and the neoliberal restructuring projects orchestrated by managers of globalization. n60
But even in the clamor of de-humanizing spectacles, one could hear the faint voices of struggles for human dignity and solidarity from both sides of the divide. Prashad notes that, where The Nation wondered when "our impressions of the East will cease to be derived from the 'Arabian Nights," n61 an Indian activist dedicated his 1873 tract to the "good people of the United States," hoping that the struggle against slavery will be taken up by his compatriots "as their guide in the emancipation of their Sudra [oppressed castes] Brethren from the trammels of Brahmin thralldom." n62 Du Bois saw parallels between the struggles of African Americans and the colonized people of India, and reminded Indians that, "European exploitation desires the black slave, the Chinese coolies and the Indian laborer for the same ends and the same purposes, and calls them all 'niggers.'" n63 Supporters of Irish independence and founders of the American Civil Liberties Union joined Indian revolutionaries to found the Friends of Freedom for India in 1920. The seeds of solidarity of desis with the oppressed and the marginalized in America had been sown, even if in temporarily infertile soil.

The demand for India's mysterious spirituality as an antidote for alienation spawned by materialism survived the freak shows peddled as science fairs. If a glimpse of Bhagwan Shree Rajneesh, as he rode by in the "pick of the day" from his Rolls Royce stable, did not uplift your spirit, you could always consult Deepak Chopra's practical guide on "spiritual laws of success." n64 Prashad, armed with wit, humor, and above all remarkable facility for social inquiry, turns to uncover the genealogy and function of this phenomenon. Labeling it "New Age orientalism," n65 he locates its origins in the post-World War II period when the American [*668] economic juggernaut and imperial hegemony ran into demands for racial justice, gender equality, youth autonomy, and sexual liberation. While the truly marginalized joined the struggle and built solidarity, others chose to step out to the sidelines and turn inward. The later, mostly white and affluent, sought remedies for alienation induced by material abundance--remedies that would not threaten their privileges, but would help drown the noise of protest from the other side of the tracks. Enter yoga, EST, TM, Zen, Krishna Consciousness, organic food stores, and of course, India. Prashad zeros in on Deepak Chopra, the latest poster boy of this reactionary move. Prashad succinctly distills the Chopra remedy: "work hard and be as self-interested, selfindulgent, and selfish as possible." n66 Never did the contemporary hegemonic forces find a more slick message or a more sly messenger. While celebrating consumer indulgence, Chopra wants the dispossessed to take responsibility for their own predicament: if you don't have access to medical coverage, turn inward and purify your soul. No threat to designer stores in shopping malls, Chopraism "allows the isolated individual to forget the historical production of inequality and of suffering and, tragically, to take complete responsibility for the detritus history." n67 Prashad shows how Chopra borrows uncritically from an eighth century B.C. text, misogynist in content and belonging to an era of hierarchically fixed status groups. The product, then, is a "snake oil" of "escapism that not only trivializes the conundrums of the people in the United States but . . . also mocks the real crises of people in South Asia." n68

Prashad's critique of Chopra raises a question about our evaluation of passages between the "West" and the "rest," between "here" and "there." The problematic issue is not the very act of "going" or "coming," but the terms on which one does so. Under the dictates of modernity's world-historic mission, one is supposed to go "there" to make "there" like "here," to "save-help-uplift" the "natives." This passage has assumed many guises over time--"saving souls," "civilizing mission," "diffusion of modernization," "promotion of human rights," "neo-liberal restructuring," and "globalization." On with the march of History, orchestrated by the ever-sovereign, always eligible, subject of History. On the other hand, people come from "there" to "here" to usually "save-help-uplift" themselves, not the "natives." In this passage there is no illusion of being the sovereign agent of historical change. Problematic passages from "there" to "here" issue when they form part of the project to deploy labor power of "others" in the "West"--slaves from Africa, coolies from China, and indentured labor from India. There is a desirable mode of passage from "here" to "there," too. Many go "there" to help [*669] themselves. They go in search of a virgin beach, an exotic aroma, an oriental rug, erotic sex, even friendship and solidarity. Conversely, when one "comes" from "there" to "here" in order to "save-help-uplift" the "native," morbidity issues quickly: Bhagwan Shree Rajneesh and Chopra furnish examples of such passages. So the principled position should be that any passage between "here" and "there" is fine as long as the project is not to "save the natives," as long as one does not appropriate all agency either under the delusion of being the sovereign subject of History or of being the sole custodian of any secret elixir of life.

II. Modern World-System's First "Model Minority"

Prashad then turns to the genealogy of affixing the "model minority" label onto South Asians in America. This is not an unbroken story of some unilinear "natural" progression. His rendering of this fractured tale substantiates that constructions, adoptions and
deployments of identities are not simple acts of unencumbered volition, but emerge along the fault lines between operations of power and strategies of resistance. This process, of necessity, is a dynamic one. South Asians are no exception to the rule that identities are protean and are always in the making.

n69 Contests about identity implicitly rehearse two different approaches of conceptualizing identity. One approach posits identity as consisting of "one, shared culture, a sort of collective 'one true self, hiding inside the many other, more superficial and artificially imposed 'selves,' which people with a shared history and ancestry hold in common." n70 The result is an understanding of identity as stable, trans-historical, and unchanging. A more productive approach posits similarities of identity trumped by differences, discontinuities, and fractures. Rather than excavation of any essence, then, locating identity entails a re-telling of the past. Under this approach, "far from being grounded in a mere 'recovery' of the past, which is waiting to be found, and which, when found, will secure our sense of ourselves into eternity, identities are the names we give to the different ways we are positioned by, and position ourselves within, the narratives of the past." n71 Seen through the latter lens, insertion of South Asia into the modern global world system furnishes the primary coordinates to locate diasporic South Asian identities. [*670]

A. The Colonial Indentured System and South Asian Identities n72

Prashad alludes to, but does not examine in any detail, the global forces of accumulation and migration unleashed by capitalism as it reached beyond its European origin to bring the whole world under its sway. South Asia has been historically known for its continental expanse and kaleidoscopic diversities. In the pre-modern milieu, affiliations of identity were grounded within particularities of narrow spatial contexts. Family, clan, tribe, caste, religion, region, occupation, etc., furnished the primary coordinates of a sense of belonging. As colonialism linked South Asia to an increasingly global economy, with outmigration of labor from the region being the pivotal component of this linkage, an alternative identity, one sutured with the subcontinent of origin, came to be dominant in the diaspora. This process gave a foundational and lasting form to a composite "Indian" identity. The construction of this identity is also the story of the modern world system's first "model minority." The indenture system, "a new system of slavery," n73 furnished the particular context for this process of identity formation and deployment. n74

The indentured system formed part of unfree labor systems deemed "an anomalous necessity" n75 of the global expansion of capitalism and the resulting articulation of varied modes of production. It served as a bridge between slavery and "free" contract labor. Slavery was abolished in the colonies of Europe in a first half of the nineteenth century. This resulted in a crisis in the plantation colonies in the Caribbean, South Pacific and Africa, where profitability issued from a favorable ratio between abundant land and slave labor. The solution was found in the indenture system, whereby South Asia was to furnish laborers that "cost not one-half" [*671] that of a slave. n76 In the one hundred years between 1830 and 1930, over 30 million South Asians were dispatched to other British colonies as indentured labor. n77 In order to deploy South Asian labor as a means of control and subordination of the recently freed slaves of African origin, a prototype of the "model minority" discourse was inaugurated. While Africans were increasingly portrayed as lazy, unreliable, violent, and unable to understand and honor contracts, South Asians were extolled for their docility, industriousness, family ties, and fidelity to contracts. However, these constructions of subjects and identities remained contingent and responsive to availability of alternative labor sources and patterns of negotiation with conditions of production adopted by different groups. Once hitherto purportedly submissive and docile South Asian indentured labor fashioned strategies of resistance and self-preservation, n78 they were quickly designated as being effeminate, filthy, avaricious, and unreliable. n79 As new opportunities to recruit "coolies" from China unfolded, South Asians were positioned unfavorably in the colonial imaginary in distinction with the "fully alive to the necessity of authority . . . tractable and manageable" n80 Chinese. Here one can discern racing in operation, with contingency and contradiction always attendant: the behavioral characteristics assigned to different labor groups were posited as natural and immutable; suturing of body, mind, and place of origin to assign eligibility and exclusion. The fact that the assigned characteristics and resulting identities were subject to repeated reconstructions did not impede entrenchment of the racially informed ideology of biological determination. [*672]

This rapid rise and fall of the modern world system's first "model minority" within the political-economy of plantation colonies left a lasting imprint on South Asians, particularly those in the diaspora. An imprint that partook of grammars of modernity and "epistemic graphing of imperialism." n81 Within the heart of the colonial indentured system, modern constructs of race, culture, and nation furnished the building blocks to forge a composite "Indian" identity. n82 Identity rests upon alterity--one is the other of the other. In pre-colonial South Asia, identities coalesced around
spatially limited differences such as family, clan, language, religion, region. Labor drawn from the kaleidoscopic heterogeneity of South Asia was positioned similarly in the global economy through the indenture system. Material and discursive structures accompanying the indenture system constituted the heterogeneity of South Asian labor as a singularity. Diversity of identifications also yielded to a collective identity forged in resistance to a shared experience. Thus, both technologies of power and strategies of resistance attending the indenture system furnished the field of possibility for a composite "Indian" identity.

B. Global Political-Economy and Construction of Identities

In the global political-economy, the composite "Indian" identity was constituted and sustained particularly by the positioning of South Asians as sandwiched between white colonial settlers and the "natives." Racial hierarchies informed by the grammar of History and colonial technologies of divide et impera combined to design this positioning. In Africa, the Caribbean and South Pacific, South Asians were deployed as "colonial auxiliaries," "colonial middlemen," an "ethnic group" occupying an intermediate niche in the economy as traders, shopkeepers, moneylenders, and professionals. n83 South Asians were also often positioned at the middle rungs of colonial administrative apparatuses with tripartite salary structures. As legislative councils were formed in some colonies to placate demands for representation, white settlers, South Asians, and the "natives" were often allocated one-third of the seats each, in complete disregard to their respective numbers. Colonial reconstruction and recognition of differentiated customary laws for different "racial groups" again set the "Indians" apart from the "natives." These colonial regimes of governance, on the one hand, furnished the framework for systems of apartheid, and on the other, sowed seeds of lasting conflict and resentment between "Indians" and the "natives." The fusion of orientalist constructions of India with racialized global placements of labor had a defining effect: "Gradually the word 'Indian' came to imply 'race', even before it clearly meant 'nation.'" n84 As a result, conflicts of interest between "Indians" and the "natives" engendered by colonial technologies of control came to be constituted and exacted as racial animus between the two groups. These conflicts continue to animate many a polity in the Caribbean, South Pacific, and Africa. A telling example of this phenomenon is the chronic and continuing constitutional crisis in Fiji, animated by political conflicts between ethnic Fijians and ethnic Indians. n85

As I turn to the induction of South Asian Americans in the American "model minority" discourse of the late twentieth century, this encapsulation of the earlier "model minority" career of South Asians in the global colonial order should help us appreciate the purposes, processes and consequences of such positionings. It reminds us of "the need to think beyond narratives of originary and initial subjectivity and to focus on those moments or processes that are produced in the articulation of cultural difference." n86 Labor migrations orchestrated by colonialism as part of the global economy, in particular the indentured system, gave foundational and lasting form to a composite "Indian" identity. This identity, enveloping the heterogeneity of South Asians, continues to animate the reception of South Asians in diaspora, particularly in Europe and in European colonial settler societies like the United States.

III. South Asians Come to America

In the U.S., reinforcement of the composite "Indian" identity issued through interpellation by the primary American structure of recognition, racial difference assigned on grounds of visible physiological (phenotype) features. This suturing of bodies with their place of origin was further accomplished by American immigration regimes, operating as "one of the central disciplinary arms of the U.S. state." n87 Prashad picks up the story at the turn of the nineteenth century when South Asians started coming to the U.S. in any appreciable numbers. n88 During the hay day of Indian indentured presence in the Caribbean, between late 1800s and early 1900s, a few thousand Indians, mostly Sikhs from the Punjab, came to the West Coast and were engaged as farm labor. Confronted with anti-miscegenational legal frameworks and social conventions aimed at "protecting" white women from nonwhites, many married Mexican women, adding another hue to the mosaic of South Asian presence in the U.S. n89 Their attempts to normalize this presence were thwarted by a racist social milieu and legal regimes aimed at stemming the perceived "tide of Asians." In response to the arrival of the Punjabi immigrants, the Japanese and Korean Exclusion League changed its name to the Asiatic Exclusion League. The rise of Asian exclusionary forces fostered the first anti South Asian riots, first in Washington (1907) and then in California (1910). n90 The victims of these riots were overwhelmingly those immigrants who had the entered the agricultural labor force or were engaged in lumberyards and railroad construction. The few South Asian professionals and businessmen did not confront similar hostility. n91 This was an early example of the intersection of race and class in the lives of South Asians in the U.S., which was to have profound implications for the
fashioning of the "model minority" discourse in the twentieth century. Far from being a model for anything, at this point, as Prashad reports, California Bureau of Labor Statistics concluded that "the Hindu has no morals. . . . He is the most undesirable immigrant in the state. His lack of personal cleanliness, his low morals and his blind adherence to theories and teachings, so entirely repugnant to American principles, make him unfit for association with American people." n92

Public policy mirrored the racist and nativist tenor of the society. The Alien Land Act of 1913, the National Origin Act of 1914, and the "Pacific Barred Zone" of the 1917 Immigration Act combined to effectively shut the door on immigration from South Asia. n93 In response to the Ozawa Case, n94 where the U.S. Supreme Court decided that a Japanese native was not eligible for citizenship because he was not "Caucasian" [*675] and therefore not "white," some South Asians claimed eligibility on account of being Caucasians; a claim resting on pronouncements of Arian race theorists. n95 The Supreme Court, speaking through Justice Sutherland, held in United States v. Bhagat Singh Thind, n96 that "in accordance with the understanding of the common man from whose vocabulary they were taken," the words "white persons" meant Caucasians from Northwestern Europe. Consequently, immigration from South Asia was reduced to a trickle, and, until the mid-1960s, the very small South Asian presence in America remained marginal and largely invisible.

The Immigration and Nationality Act of 1965, ushered in the second phase of South Asian immigration to the U.S. Prashad shows how this new immigration regime formed part of the American response to Soviet launch of the Sputnik space rockets and a perceived "science gap." Besides, this regime sought to meet the demand for medical personnel to staff the Medicaid and Medicare programs recently put in place. Over the next twentyfive years, the new regime, designed primarily to attract skilled labor from around the world, resulted in a substantial migration of highly skilled South Asians, particularly in the fields of science, engineering, and medicine. For example, between 1966 and 1977, 20,000 scientists with Ph.D.s, 40,000 engineers, and 25,000 doctors came from India alone. n97

Prashad shows how broader global developments informed immigration to the U.S. during this phase. American need for skilled [*676] workers was met, on the one hand, by Indian investment in scientific education and, on the other hand, by Britain's increasing restrictions on immigration for South Asia. n98 This contributed significantly in making highly skilled South Asian labor available for the American economy. The progeny of the marriage between American "state engineering through immigration controls and . . . the beneficence of more socialized systems of education in South Asia" n99 was a substantial influx of highly educated, highly paid, professionals from South Asia. They became increasingly visible within their professional and class milieus. This phase came to an end by the late 1980s, as a combination of prolonged recessions and rising anti-immigrant sentiment resulted in restrictive immigration policies.

The Immigrations and Nationality Act Amendments of 1976, the Health Professionals Education Assistance Act of 1976, and the Immigration Act of 1990, erected stringent barriers to immigrants' entry into the labor pool. The immigration of highly educated professionals continued but at a greatly reduced rate. Recently, rising demand for skilled labor in the information technology sector has prompted some temporary modifications in the immigration control regime. By virtue of these modifications, a sizable number of information technology professionals from South Asia came to the U.S. But, by virtue of their mode of immigration and positioning in the economy, they are best seen as part of the second phase migration.

The third, and current, phase found its opening in the family reunification provisions of the Immigration and Nationality Act of 1965. As the skilled immigrants of the second phase secured a footing, the family reunification regime facilitated immigration of their extended families. Just as the immigration of highly skilled labor steadily decreased, immigration of less educated and economically vulnerable South Asians increased. For example, in 1996, of the 65,599 immigrants from South Asia, only 12,315 entered under employer preference provisions, while 47,091 entered under family preference provisions. n100 The third phase also witnessed an influx of political and economic refugees. Expulsion of South Asians from East Asia and dwindling demand for labor in the oil-producing region around the Persian Gulf combined with increased economic transformations and political instability in South Asia to furnish the push factor of this migration. Other than professionals, the third-phase South Asian immigrants, at best, occupied working class jobs. Running cheap motels, small neighborhood stores, marginal gas stations, and taxi-driving came to define their existence. Their socioeconomic vulnerabilities started to become visible. For example, among the immigrants from India between 1987 and 1990, eighty percent only had a high [*677] school education, nine percent were unemployed, and twenty percent lived below the poverty line. n101
Adding to the South Asian presence is a new generation, mostly children of the second-phase immigrants who are born and raised in America. They have become an increasingly visible presence in schools and colleges across the land.

IV. Power, Resistance, and South Asian Immigrants

Having identified the three phases of South Asian immigration to the U.S., Prashad turns to these immigrants' engagements with their respective broader socio-political milieus. The first-phase immigrants, few in number and concentrated on California farms, remained socially marginal in their new home. Ostracized by the Whites, many of the men married women of Mexican origin. Their preoccupation remained to gain a toehold to sustain existence in a context of blatant racism and anti-Asian hysteria. Having witnessed the emergence of the nationalist movement in India, living in proximity to the unfolding Mexican Revolution and having struggles of the indenture system under their belt, many responded to legally sanctioned racism and exclusionary regimes through political activism. Protests against exclusion and discrimination, often in concert with other Asian immigrant working class, became common. The high water mark of these struggles was the formation of the Ghadar (Rebellion) Party in San Francisco in 1913 by South Asian immigrants. This political initiative, which drew its inspiration and name from the 1857 anti-colonial rebellion in India, had an agenda of anti-racism and anti-colonialism. Branches of the party soon sprouted among Indian indentured laborers in many plantation colonies and in India itself. In the U.S., the initiative was ruthlessly crushed. Many of its leaders were tried for sedition and deported. Memories of these struggles remain alive among the South Asian farmers in California and South Asian political activists.

The second-phase highly skilled immigrants had come of age in South Asia in the period after decolonization. They had been spared discriminations of colonial rule and had not participated in the independence movement. They came to the U.S. starting in the late 1960s, after civil rights legislation had been enacted. They did not have to live under Jim Crow regimes and legally sanctioned racial segregation. Not having participated in, or even witnessed, the civil rights movement, they had had no occasion to build solidarity with other people of color. Their earning capacity, class affiliations, and proficiency in the English language facilitated joining the white flight into the security of suburbia, where they settled into a fractured existence. They participated in the "public" domain of employment and wealth accumulation and concurrently retreated to the "private" domain of home and culture. During this phase, in Prashad's words, "the desi sundered the world into two: the outside world, the world of the workplace, is a world of capital that must be exploited as much as possible, and the inside world, the world of home, is a world of culture that must be protected and cherished." The identities of these South Asians were marked by their entering an implicit "social contract with a racist policy by making a pledge to work hard but to retain a social life at some remove from U.S. society." Prashad shows convincingly how their class position and isolation from significant cross-sections of American society facilitated the "most enduring and efficient rite of passage into American culture: negative appraisals of the native-born black population." Anti-Black racism among desis is increasingly being commented upon. Desi racism appears to follow the pattern whereby "some members of recent immigrant communities have used Blacks as a kind of 'welcome mat,' as a way of affirming, through anti-Black hostility, their own insecure sense of American identity." Commentators recognized the debate among South Asians as late as the 1970s about whether or not South Asians should seek or accept a majority status and give up "the emotional and psychological advantages of being considered 'Caucasians,' as they were then classified by the Census Bureau." Visibility of South Asians in high-skilled professions quickly gave rise to "the stereotype of the Indian American as techno-migrant." The emerging racist discourse of "model minorities," the post Civil Rights white supremacist device of blaming the victims of racial oppression for their predicament, was quick to designate these South Asians as yet another model for racial minorities, particularly African Americans. Identities are malleable indeed. The South Asian in whose hands "a threshing machine . . . would be like an elephant in the hands of an American," now was posited as one whose "enduring belief is that hard work brings rewards. That is why he pursues higher education . . . and places great value in individual responsibility and entrepreneurship." While Representative Richard Gephardt praised South Asians for being both "highly talented and very successful," for racist ideologues of the Right, who are quick to credit supposedly inherent deficiencies of African Americans for their plight, a new position of attack became available. For Denesh D'Souza, the notorious desi apologist for American racism, the predicament of African Americans had been rendered "more acute by the embarrassing fact of Asian American success which has become evident to most people in recent decades."
Prashad sees through the maneuver, and succinctly brings the bottom line into sharp relief: the "model minority" discourse turns South Asians in America into "not simply a solution for black America but, most pointedly, a weapon deployed against it." n115 Prashad demonstrates how this discourse conveniently ignored the fact that these desi immigrants were screened, selected, and deployed exclusively in high productivity sectors of the economy by a specific legal regime. He is unequivocal that these "attainments are not caused by natural or cultural selection; rather, they are the result of state selection whereby the U.S. state, through the special-skills provisions in the 1965 Immigration Act, fundamentally reconfigured the demography of South Asian America." n116

Before immigration, they mostly belonged to the elite or urban upper middle classes, an affiliation that facilitated access to higher education, English language, and marketable cultural capital. n117 Predictably, many [*680] among the second phase desis came to subscribe to this racist mythology and implicitly to the reactionary political project of which this myth is a constitutive element. Prashad notes with regret that many South Asian Americans find merit in the claim that "immigrants of the right sort are a special breed," n118 and imagine themselves positioned "outside the racist hermeneutic circle." n119 Isolation from and even opposition to movements seeking economic opportunity, social justice, and human dignity was the logical outcome. Prashad captures the positioning of second-phase South Asian American in the race matrix of America well:

Desis realize that they are not "white," but there is certainly a strong sense among most desis that they are not "black." In a racist society, it is hard to expect people to opt for the most despised category. Desis came to the United States and denied their "blackness" at least partly out of a desire for class mobility (something, in the main, denied to blacks) and a sense that solidarity with blacks was tantamount to ending one's dreams of being successful (that is, of being "white"). n120

But this state engineered "model minority" remained "not quite/not white." n121 The message from white America was "we want your labor, we don't want your lives." n122 It was from this position that second-phase South Asian Americans signed "a social contract with a racist policy by making a pledge to work hard but to retain a social life at some remove from U.S. society (one that is sanctified as specially spiritual and thus an acceptable, even if lesser, lifeworld)." n123 In this fractured existence, desis "anxious about the capacity of U.S. cultural forms to entrance them . . . cherish what they conceptualize as their cultural forms in the home (and impart these with persistent care to young children)." n124 The desire to turn the [*681] "private" realm of "home" into a site to stage "authentic" culture quickly trained on "family values." Prashad notes that "many desis concede that the West is superior in the art of technomanagement but hold that it is inferior in the art of family management." n125 The woman is then posited as the repository of "authentic" culture, and her subordination in general, and control over her sexuality in particular, becomes the primary agenda of protecting "family values."

Isolated from the profound changes that are unfolding in gender and sexual relations in South Asia itself, n126 the drive for cultural "authenticity" imprisons desis's imagination in the gendered ethos of feudal aristocracies of yesteryears, augmented by orientalist renderings of the same. Frowning upon dating and inter-racial marriage, promotion of "arranged marriage," and the search for a "traditional" (read submissive) wife become the norm. As Prashad points out, "when one accepts that men are culturally authorized to dominate women, it is not far before even violence is sanctioned." n127 The "culture defense" for domestic violence, increasingly heard in the courts of law in relation to many exoticised "others," comes in the train. n128 This imagined "authentic" culture, however, as Prashad rightly observes, "will not be culture as the lives of the people but as something of a fantasy culture, a nostalgia of distance, without the creative contradictions that provide the lively cultural forms negotiated by the peoples still on the subcontinent." n129 Far from recommending a divorce with South Asia and assimilation of desis with mainstream America, an impossible task in itself for anybody "not quite/not white," Prashad suggests that rather than worrying about importing desi culture tout court, migrants must worry about which aspects of desi culture to select. They need to imaginatively account for the origins of the various "cultural" resources and draw from them with care to solve our contemporary problems. [*682] There are other visions of the homeland (and consequently of desi culture). n130

He substantiates the last remark by reminding us of the antidiscrimination and anti-colonial struggles of the first-phase desis. After recounting the heroic careers of the leaders of the Ghadar Party, Prashad bemoans how second-phase desis see struggle and radical political activism as being "antidesi." n131 For this group, desi traditions are imagined to be dedicated hard work and cultural conservatism. The ideas of social justice are rarely considered. . . . Conservative thought is wedded to the idea that history has ended and that now
people must get on with the job of making a living and ensuring a similar future for their children. n132

The history of South Asia has a different conclusion for Prashad: "Radicalism is as South Asian as Gandhi." n133

The second-phase desis, partially un-homed in their new home, then reach back to reconnect with the homeland. In recent years, this connection has taken a particularly reactionary form: "the turn to religion, especially a syndicated form of Hinduism." n134 While Prashad focuses on desi Hindus, the same is true of some other religious groups, particularly desi Muslims. n135 The political ascendancy of reactionary religious forces in South Asia is facilitated in no small measure by financial contributions by the well-heeled second-phase desis.

The demographic changes wrought by the third phase is changing all that. The context of the lived experience of the economically vulnerable and more visible desis brings them face to face with issues that second-phase desis were able to avoid. Unemployment, job discrimination, hate crimes, police brutality, lack of access to adequate health care, poverty, and overt racism have become everyday experiences. These problems are accentuated by the "forever immigrant and foreigner" construction that desis share with other Asian Americans. n136 [*683]

Moreover, the generation born and raised here has felt compelled to give voice to silences within the desi communities that surround issues of gender equity, domestic violence, sexuality, cultural chauvinism, and self-determination. Young desis on college campuses are increasingly exposed to curriculum reform debates, controversies of multi-culturalism, identity politics, resurgent student activism, and innovative strategies to combat racism, sexism, and homophobia. n137 Many live and work in spaces where interaction with other people of color, the working class, and the marginalized is the norm. One outcome is a mushrooming of political initiatives, both organized and informal, to build solidarities with similarly placed non-desi communities, and to design strategies to protect economic, political, and human rights of vulnerable sections of desis. Examples of desi progressive initiatives include organizations like Sakhi, Narika, Manavi, Trikone, New York Taxi Workers Association, SAMAR, and the South Asian Network. While the progressive initiatives are growing rapidly under the leadership of the young and the marginalized, the second-phase desis' practices of isolation, racism, and reactionary political alignments also persist. The economic wherewithal of second-phase desis facilitates their continued control over the mainstream desi media and cultural and political associations. This control ensures that the class interests and political alignments of second-phase desis continue to define the agenda of the desi communities at large. While increasingly challenged by the third-phase desis, the hegemony of second-phase desis remains entrenched.

V. Building Solidarities, Achieving Justice

The model minority discourse constructs desis as apolitical and docile. This portrayal conveniently elides the deep roots of radicalism in South Asian history, both as it unfolded in the subcontinent and in North America. Prashad notes salient examples of this phenomena. He highlights the anti-colonial struggle initiated by the Ghadar Party in California in the early 1900s, which quickly spread throughout the plantation colonies of the Caribbean. He lists the progressive initiatives taken by groups of desis in response to political developments in South Asia. Lastly, he identifies desi women, youth, and gay and lesbian organization that are attempting to create social spaces to resist patriarchy, sexism, homophobia, and racism within the desi communities. Prashad underscores the fact that children of desi immigrants are increasingly refusing "to submit to . . . disciplinary regimes set in place for their parents." n138 He notes that the increasing visibility of desis on college campuses has set in [*684] motion a process of "'reverse assimilation', the rediscovery of one's ethnicity and the urge to engage that difference in one's social life." n139

While all these are positive building blocks, the task remains committing "model minority suicide," n140 and "to forge a politics of identification" n141 with other subordinated groups. Prashad endorses the call for "creation of a 'racial project,' that is 'simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along racial lines.'" n142 Prashad cautions that mobilizing in terms of identities towards collective action is not easy, as prejudices between communities of color are formidable obstacles. The key to building solidarity is participation in political struggle, because "the most profound bonds are built in the heat of the struggle, especially when one demonstrates to the collectivity that one is prepared to share the burden of other's misery." n143

Prashad substantiates this proposition with two examples of successful multi-racial workers' rights actions. In one case, when the Korean owners of a hotel in Los Angeles fired a group of workers in 1992, many of them Latinos, the hotel workers' union formed an alliance with Korean immigrant workers' advocacy group to bring pressure on the hotel owners. The other case is the successful taxi workers' strike in New York.
during the Summer of 1998, where a rainbow of races, ethnicities, and national origins came together for better working conditions in the "sweatshop on wheels." n144

The key lesson here is that the anti-subordination struggle must move from politics of identity to "a politics of identification." n145 Commitment, sacrifice, and fellowship are the essential building blocks of such a politics. The rapidly changing demographics of the United States furnishes a fertile ground to build such politics. We should celebrate the fact that "the third world, far from being confined to its assigned space, has penetrated the inner sanctum of the 'first world' in the process of being 'third worlded'--arousing, inciting, and affiliating with the subordinated others in the first world." n146 [*685]

Conclusion

The anti-essentialism and anti-subordination tenor of critical legal scholarship is often enriched by empirical and theoretical work in other disciplines. The Karma of Brown Folk can help invigorate the focus of critical legal scholarship on questions of race, culture, language, and nation. This remarkable book underscores that questions of construction and subordination of races must be examined in expanded spatial and temporal frameworks. The global history of the colonial encounter between "the West and the Rest" and its attending grammar of imperialism furnish a productive viewpoint to interrogate the race question in the United States and elsewhere.

Prashad's study of South Asian Americans also demonstrates that all ethnicities, like all cultures, are fractured contested spaces within which hegemonic and subaltern forces engage in perpetual conflict. No ethnic or national group is immune from internal conflicts around questions of race, class, gender, and sexuality. This study reminds us that sustained coalition-building between subordinated groups through joint struggles is indispensable to achieve justice and human dignity.

Prashad's interrogation of immigration regimes and "model minority" discourse substantiates that, when engaging hegemonic mythologies, we must be alert that "bad history is not harmless history but dangerous." n147 Writing counter-histories is an indispensable project of critical legal scholarship. Part of this project is to excavate genealogies of material and discursive structures of domination and to inventory traces of subjection on any legal subject. We must see subjectivities not as a pre-political essence, but rather as constituted by the accumulating processes of sedimentation and accretion of power and resistance. It is through such analysis that we can effectively challenge hegemonic modes of ethical and cultural judgment to their cognitive core: an ontology and epistemology born of historical modernity complicit with colonial subjugation. Such an analysis furnishes a sharp instrument to pierce the veil of racing, in all its forms and at all sites of its operation. The realization that the law is both complicit with racing and a site where power and resistance contend has a particular implication for critical legal scholarship.

While the legal academy remains the primary site of engagement for critical legal scholars, we must ensure that our scholarship and pedagogy also operates beyond the boundaries of the academy. The struggle for peace, justice, and community is not a spectator sport. The privileges that accrue to us on account of being part of the legal academy can be an invaluable resource in building solidarity and coalitions among the subordinated. As we engage with the law in its institutionalized settings, we [*686] should also hear an eloquent voice from behind the prison walls: "The solution is not in the courts but in an awake, aware people." n148

FOOTNOTE-1:


n5 Id.

n6 The word desi means "of or from the homeland" in several South Asian languages. It derives from the word des, which means "homeland." It is now commonly used by South Asians in the Diaspora to identify themselves and each other. I adopt it, Prashad does, and will use it interchangeably with South Asian Americans. See id.


n10 See also Edward Said, Orientalism (1978) (for a canonical exposition of orientalism).

n11 Prashad, supra note 4, at 12.


n13 Prashad, supra note 4 at ix (citing Walter Rodney, The Groundings with My Brothers 16 (1969)).

n14 Denise Ferreira da Silva, Interrogating the SocioLogos of Justice: Considerations of Race Beyond the Logic of Exclusion 1-2 (paper presented at 2000 Summer Institute of the Law and Society Association) (manuscript on file with the author).


n16 Id.

n17 Id.


n19 Jean-Paul Sartre, Preface to Frantz Fanon, The Wretched of the Earth 38 (Grove Press, Inc., 1963) (1961). As Fanon put it: "The colonial world is a world cut in two. . . . The settlers' town is a town of white people, of foreigners . . . . [The native town] is a town of niggers and dirty Arabs . . . . This world divided into compartments, this world cut in two is inhabited by two different species." Id. at 38-40.

n20 Kapur & Mahmud, supra note 15, at 1014.


n23 See Anne mcClintock, Imperial Leather: Race, Gender, and Sexuality in the Colonial Contest (1995); Pierre L. van den Berge, Race and Racism a Comparative Perspective (2d ed. 1978).

n24 For a detailed discussion of the role of colonialism in the modern constructions of race, see Tayyab Mahmud, Colonialism and Modern Constructions of Race, 53 U. Miami l. Rev. 1219 (1999).

n25 See J.M. Bluat et. al., 1492: The Debate on Colonialism, Eurocentrism, and History (1992). Modern Europe "came to see itself as a 'planetary process' rather than simply a region of the world." Mary Louise Pratt, Humboldt and the Reinvention of America, in Amerindian Images and the Legacy of Columbus 589

n27 See Fitzpatrick, supra note 22; see also Peter Fitzpatrick, Modernism and the Grounds of Law (2001).


n29 Spivak, supra note 18, at 65.

n30 This subsection draws on part of a previous work by the author and Professor Ratna Kapur. See Kapur & Mahmud, supra note 15 at 1014-16.


n32 The connection of the law with the body is, of course, a broader one. For example, Giorgio Agamben posits that, "the production of a biopolitical body is the original activity of sovereign power." Giorgio Agamven, Homo Sacar: Sovereign Power and Bare Life 6 (Daniel Heller-Roazen trans., 1998). Michel Foucault speaks of "bio-power," a concept he fashioned to address inescapable linkages between micro and macro operations of modern power. See 1 Michel Foucault, History of Sexuality (1978). Bio-power, for Foucault, designates a politics concerned with subjects as members of a population, a form of power exercised over persons specifically as living beings. See id. This helps Foucault to further develop his position that modernity renders human life a discrete object of identification and regulation, both protected and eliminated by operations of power. See id. at 143. Perception and naming of the body are preconditions for its positioning by and subjection to modern power.

n33 In order to highlight the interpenetration of designation and subjection within modern legal regimes, Foucault, for example, eschews the category of "the law," and speaks instead of a "scientifica-legal complex" or of a "epistemologocojuridical formation." Michel Foucault, Governmentality 6 I & C 5, 23 (Colin Gordon trans., 1979).


n35 Max Horkheimer & Theodor W. Adorno, Dialectic of Enlightenment 24 (John Cumming trans., Continuum 1993); see also, Depish Chakravorty, Provicializing Europe (1999); Mapping Subaltered Studies and the Postcolonial (Vinayak Chaturvedi ed., 2000); Geographies of Resistance (Steve Pile & Michael Keith eds., 1997).

n36 Spivak, supra note 18, at 208.

n37 See generally Robert Young, White Mythologies: Writing History and the West (1990).


n39 Louis Althusser, Politics and History: Montesquieu, Rousseau, Hegel and Marx 78 (Ben Brewster trans., 1972).


n42 Homi K. Bhabha, The Location of Culture 32 (1994).


n46 See Fitzpatrick, supra note 22 and Peter Fitzpatrick, 'We Know What It Is When You Do Not Ask Us': Nationalism as Racism, in Nationalism, Racism and the Rule of Law 3 (Peter Fitzpatrick ed., 1995.)


n51 Abraham Lincoln, Negro Rights (1858), in Racial Thought in America, supra note 49, at 380, 380-01.

n52 Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

n53 Plessy, 163 U.S. at 551-52.

n54 Prashad, supra note 4, at ix.

n55 Id. at 16, 18.

n56 Id. at 20.

n57 Id. at 21.

n58 Id. at 22 (quoting the Detroit Journal, Feb. 14, 1894).

n59 Id. at 24, (quoting the Rev. Isador Lowenthal, The Revolt of the Sepoys, in Biblical Repository & Princeton Rev. 30 (1858)).


n61 Prashad, supra note 4, at 27 (quoting Hindu Literature, The Nation, May 23, 1878).

n62 Id. at 26 (quoting Jotibhai Phule, Collected Works xxix (1991)).

n63 Id. at vii-ix (quoting W.E.B. Du Bois, Pittsburgh Courier, May 30, 1938, in 1

n65 Prashad, supra note 4, at 53.

n66 Id. at 48.

n67 Id. at 59-60.

n68 Id. at 48.

n69 As Stuart Hall puts it: "Cultural identities come from somewhere, have histories. But, like everything which is historical, they undergo constant transformation. Far from being eternally fixed in some essentialized past, they are subject to the continuous 'play' of history, culture and power." Stuart Hall, Cultural Identity and Diaspora, in Identity, Community, Culture, Difference 225 (Jonathan Rutherford ed., 1990).

n70 Stuart Hall, Cultural Identity in Cinematic Representation, in Black British Cultural Studies 211 (Houston A. Baker, Jr., et al., eds. 1996).

n71 Id. at 212.

n72 This subsection draws on parts of a previous work by the author. See Tayyab Mahmud, Migration, Identity, & the Colonial Encounter, 76 Or. L. Rev. 633, 636-653 (1997).


n76 S.G. Checkland, The Gladstones: A Family Biography, 1764-1851 318 (1971). In a striking parallel to the situation in the Caribbean, in the 1860s following abolition of slavery in the United States, it was contemplated to "flood the U.S. South with South and East Asian workers to shift the blacks from the land and to undermine their power as newly freed peoples." Prashad, supra note 4, at 71.


n79 See Kale, supra note 74; Madhavi Kale, Projecting Identities: Empire and Indentured Labor Migration from India to Trinidad and British Guiana, 1836-1885, in Nation and Migration: The Politics of Space in the South Asian Diaspora (Peter van der Veer ed., 1995). These characterizations built in particular upon colonial constructions of Bengali identity following the 1857 anti-colonial revolt spearheaded by Bengali regiments of the colonial army. Colonial reports in India had suddenly discovered "well-known defects of the national character of the Bengali; . . . his cunning, . . . indolence, . . . procrastination, and . . . proneness to

n80 Kale, supra note 79.

n81 Spivak, supra note 18, at 65.

n82 See Mahmud, supra note 72, at 639-656, for a detailed account.


n84 Peter Robb, South Asia and the Concept of Race, in The Concept of Race in South Asia 32 (Peter Robb ed., 1997).


n86 Homi K. Bhabha, The location of Culture I (1994).


n88 The first South Asians, who came here in the late 1700s were sailors on ships plying between India and New England. These few "jumped ship, married black women, and disappeared from the historical record." Prashad, supra note 4, at 71.

n89 Karen Leonard, Marriage and Family Life Among Early Asian Indian Immigrants, in From India to America: A Brief History of Immigration; Problems of Discrimination; Admission and Assimilation 71 (S. Chandrasekhar ed., 1982); see also John Kuo Wei Tchen, New York Before Chinatown: Orientalism and the Shaping of American Culture 1776-1882 (1999); Henry Yu, Thinking Orientals: Migration, Contact, and Exoticism in Modern America (2001).


n91 See id.


n95 For the construction and deployment of the Aryan race theory in India, see Thomas R. Trautmann, Aryans and British India (1977); Joan Leopold, British Applications of the Aryan Theory of Race to India, 1850-1870, 89 English Historical Rev. 578 (1974); Mahmud, supra note 24. Dr. Thind's claim formed part of the response of some South Asians to the Ozawa Case, namely, "instead of challenging racism, the . . . struggle became an individualized and personalized mission to prove that [they were] of 'pure-blood Aryan stock.'" Mazumdar, supra note 1, at 30. In Harold Isaac's perceptive encapsulation "those Indians . . . who really think of themselves as more 'white' than 'whites,' indeed, as descendants from that 'pure Aryan family' of prehistoric time. This endows them with a sort of Mayflower status in relation to 'whiteness' or 'Aryanism' which they deny to many of their own darker-skinned countrymen. This Indian, peculiarly outraged, is not challenging the white man's racism as such. He is crying: 'How dare you assume your air of Aryan superiority over me when I am just as Aryan as you, even more so!' This was the substance of the Indian
claim in that 1923 court case . . . and it is still the substance of many an Indian response to American racism." Harold R. Isaacs, Images of Asia: American Views of China and India 290 (1972), quoted in Muzumdar, supra note 1, at 30. American public policy did not help matters either. The U.S. Immigration Commission in its Dictionary of Races and Peoples (1911) broadly defined an "East Indian as any native of the East Indies . . . from the inhabitants of the Philippines to the Aryans of India." H. Brett Melendy, Asians in America: Filipinos, Koreans, and East Indians 186 (1977). According to the Commission, any native of India was called "Hindu," while Indian Parsees were viewed as "white." Id. at 186, 217-19. The 1930 and 1940 census added "Hindu" to the classifications; the 1950 census placed South Asians in the "white" category; in 1960 and 1970 South Asians were "Other;" 1980 census saw them become "Asian Indian;" for the 1990 census, they were "Asian and Pacific Islander." Sharon M. Lee, Racial Classifications in the US Census: 1890-1990, in 16 Ethnic and Racial Studies 75 (1993)

n96 261 U.S. 204 (1922).

n97 See Prashad, supra note 4, at 75.

n98 See id. at 75-77.

n99 Id. at xiii.

n100 Id. at 79 (reproducing INS, Annual Statistical Reports).

n101 Id. at 80.

n102 For a comprehensive account of the resistance struggles of the first-phase South Asians in the North America, see Joan M. Jensen, Passage from India: Asian Indian Immigrants in North America (1988).

n103 See, e.g., Amitava Kumar, Passport Photos (2000).

n104 Prashad, supra note 4, at 104.

n105 Id. at x.

n106 Toni Morrison, On the Back of Blacks, Time, Sept. 22, 1993, at 57. This is not to imply that South Asians were immune from prejudice hinged upon difference of skin-color. Quite the contrary was the case. The pre-colonial constructions of caste and its interpenetration with class divides were often coterminus with distinctions of skin-color. See Louis Dumont, Homo Hierarchicus: The Caste System and its Implications (Mark Sainsbury et al. trans., Univ. of Chicago Press 1980) (1966); John Brockington, Concepts of Race in the Mahabharata and Ramayana, in The Concept of Race in South Asia 97 (Peter Robb ed., 1997); Dagmar HellmannRajanayagam, Is There a Tamil 'Race?', in The Concept of Race in South Asia 109 (Peter Robb ed., 1997). However, induction of South Asians into modern constructions and deployments of race animated by a global hierarchy of humans postulated by modern constructs of civilization, reason, and History is a qualitatively different phenomena than pre-modern color prejudice. For a perceptive analysis of the difference between pre-modern and modern constructions of race, see the chapter entitled "Race-thinking Before Racism" in Hannah Arendt, The Origins of Totalitarianism (1951). For racism within desi communities, particularly as directed against African Americans, see Mazumdar, supra note 1.

n107 See Binita Mehta, Emigrants Twice Displaced: Race, Color, and Identity in Mira Nair's Mississippi Masala, in Between the Lines: South Asians and Postcoloniality 185 (Deepika Bahri & Mary Vasudeva eds., 1996); Amritjit Singh, African Americans and the New Immigrants, in Between the Lines: South Asians and Postcoloniality 93 (Deepika Bahri & Mary Vasudeva eds., 1996).


n109 Singh, supra note 107, at 94.

n110 Prashad, supra note 4, at 82.

n111 Id. at 32.

n112 Id. at 69.

n113 Id. at 70.

n114 Id. at 4.

n115 Prashad, supra note 4, at 4.
n116 Id. at 4.


n118 Prashad, supra note 4, at 3.

n119 Id. at 94.

n120 Id.

n121 Homi Bhaba, Of Mimicry and Man: The Ambivalence of Colonial Discourse, 28 October 125, 132 (1984). Bhaba uses Lacan's concept of mimicry to characterize the construction of the colonial other as a subject who becomes recognizably the same as the colonizer but still remains different; hence "not quite/not white." Id. at 127. Bhaba also uses the example of Indians who were educated in English, worked in the civil service, and mediated between the colonizers and the colonized. For Bhaba, mimicry by the elite among the colonized was "at once resemblance and menace . . . a process by which the look of surveillance returns as the displacing gaze of the disciplined." Id. at 129. In the case of South Asians in the United States, one could argue that it took a whole generation for mimicked resemblance to make the turn towards becoming a menace to white supremacy.

n122 Prashad, supra note 4, at 87.

n123 Id. at x.

n124 Id. at 121.

n125 Id.


n127 Id. at 125.


n129 Prashad, supra note 4, at 126.

n130 Id.;

n131 Id. at 131.

n132 Id.

n133 Id. at 194.

n134 Id. at 134.


n138 Prashad, supra note 4, at 193.

n139 Id. at 190.

n140 Id. at 193.

n141 Id. at 194.

n142 Id. at 195.

n143 Id. at 198.

n144 Prashad, supra note 4 at 201.

n145 Id. at 196.


I. Introduction: The Dream--Cubans' Arrival in the United States

The course traveled towards becoming an "other" is necessarily culturally relative, sometimes individualized, and always complex. Finding out who we are, where we belong - or as Paula Gunn Allen articulates it, the journey to ascertain "who is my mother?" - is an arduous task. The "othering" path depends on our original location. The journey will differ if we are born into a designated minority within the majority culture or if we are born into a majority culture that becomes a minority when its members migrate across culturally, linguistically, racially, and/or ethnically identified geographic borders.

The discovery of "othering" is an experience that varies greatly not only among individuals but also among groups; it differs in time and space. For me, realizing my "otherness" has been a work long in progress. n1 I was born in Cuba and raised in Puerto Rico. Culturally I was raised as the normative. n2 Within mi cultura latina, however, I am/was a second class citizen with limited privilege because I am female. n3 So [*688] when I traveled north to go to college, I was clueless that I would be an "other"--a racialized and ethnicized "other"--simply because I am Latina.

My knowledge or understanding of that status was not immediately apparent; indeed, the experiences that have led me to awareness and comprehension of my "other" status have spanned decades. My awareness started taking root in college when a career counselor told me that I should not be a lawyer, but rather should be a teacher so I could help my people. n4 It continued in law school when after the first year, friends would not call, presuming that I, like the rest of the minorities in our section, would not be back. My full awareness of my latinidad making me an "other" took place when I took a job at the Justice Department, and was quickly placed on the recruitment committee, and it grew more rapidly when I learned that I was the twofcer that the "regular" committee members were anxiously and curiously waiting to meet. n5 Much more recently, I became aware that in identifying my otherness as my latinidad I was also effecting erasures of my native origins. n6 Thus, this discovery process is ongoing.

In this context of self-identification, Cuban peoples' lack of awareness of being "others" within these fronteras estado unidenses has become an increasingly interesting phenomenon to me. I have resolved the conundrum with various possible explications. For one, the Cuban migration to the United States was initially a rather economically privileged, educationally accomplished, and racially light one. n7 Facilitating this socioeconomic and racial acceptability, the migration took place in the context of the Cold War's anti-communist fervor. n8 These super educated, highly motivated, and hard working people were arriving in this country as proof of the desirability of freedom over exploitation, civil rights over economic rights (after all they were leaving material well-being behind in order to have freedoms like speech, travel, and vote), and capitalism over communism.

The rule of law in the United States dovetailed the socioeconomic, political, and racial ambients that facilitated acceptance of cubanas/os within these shores. Favorable immigration laws were crafted so as to render the Cubans' abandonment of their homeland--for this land of the free--possible. n9 Indeed, the privileges afforded cubanas/os are reflected in the preferential immigration treatment they have received. n10 Significantly, the preferential embrace of cubanas/os has occurred in an environment of antipathy and disdain for other Latinas/os and caribenas/os seeking entry. This general disfavor of Latina/o migration is reflected in laws--both local n11 and national immigration n12 norms--crafted to
Thus, the image of cubanas/os was formed: a hard working people who followed the rule of law, had strong family values, and had conservative political leanings. n22 In short, cubanas/os behaved well, marched to the tune of estado unidense values, were productive, n23 and were settled in limited geographic enclaves. n24 Thus, cubanas/os were not viewed as much of a threat to majority society. From the transformation of Miami from a sleepy town of old retirees to a thriving cosmopolitan metropolis n25 to our higher than Latina/o average levels of income and education, n26 we seemed to be living the (brown) "American" dream. [*692]

It is difficult to imagine that a cute, little, six-year-old boy n27 would be able to change these favorable socially constructed images of cubanas/os virtually overnight. But that is precisely what happened with Elian and the comunidad cubana en Miami en estos estados unidos. The story is sad and poignant, heart-wrenching and surreal, human and political, civil and social, cultural and economic. It reaches into the souls of all who have fought and lost after having thought that they had fought and won.

The following sections of this essay explore the transformation of the Cuban community in the eyes of the estado unidense majority in the context of the Elian experience. Following this introduction, the piece develops the Elian facts and explores the impact of the case on Cuban-United States relations in Miami. Next, the work reviews the law--the complex of norms we call the "rule of law"--that applies to the Elian facts. Finally, the piece engages in a LatCritical analysis of the application of the rule of law. It directly engages the reality that our personal experiences influence, and indeed may well control, how we read the law and apply it to the facts. This analysis reinforces critical scholars' attacks on normativity and its faux objectivity.

II. Framing the Conversations

I remember the first time I had to face the reality that I did not agree with the popular narrative of the Cuban party line, i.e. that there is no way an innocent child should be returned to Cuba to live under communism. I had received a call from a national newspaper for an interview. Were I to speak with them, my position would be public. Mind you, I was not at all naive about the fact that my position as one of the few Cuban law professors in the United States, who left Cuba when she was Elian's age, offered a bit of the sensationalism that the media seeks these days. But mostly I wondered how mi mami y papi would react to my public comment on the case.
So, upon receiving a heads up on the media call, I telephoned my parents (who habitually are both on the phone for 3-way conversations) to ascertain their take on Elian and to let them know my position--which I will develop more fully below as the "rule of law." But I am getting ahead of myself in two respects. With respect to the conversation with mami y papi, I was not initially so forthcoming. In regard to my position, the above statement that I follow the so-called "rule of law" is an oversimplification considered in the context of the LatCrit project.

First, before getting to my chat with mami y papi, it is important to set the time framework. All of the disruption started not at the moment [\*693] of the boy's rescue by two fishermen from a boat (makeshift raft) wreck, but later. n28 The rescue was heroic. The boy, whose mother had not survived the wreck, was taken to a hospital for medical treatment. n29 While he was in the hospital, his Miami relatives, specifically Lazaro Gonzalez, a great-uncle, contacted the Immigration and Naturalization Service (INS). n30 Upon Elian's release from the hospital, the INS, having deferred his immigration inspection, paroled the boy into the care and custody of his distant Miami relatives. n31 All was well until the conflict arose.

Shortly after the parole, the relatives in Miami decided to file an asylum application with the INS on Elian's behalf, which was followed by a second application that was signed by the boy. n32 In the meantime, the family requested and obtained custody of the boy in the state family court--a grant of custody that was subsequently dismissed. n33 The relatives filed a third asylum application after the award of temporary custody. n34

All of the applications were virtually identical and reflected the political position of the relatives, n35 which dovetails the popular Cuban community narrative: they did not want the boy growing up in communism when he could be free in the United States. n36 In fact, they claimed that the father, who had been divorced from the now-deceased mother, wanted the child to stay in the United States and had suggested as much to them. n37 Their assertion was based upon an alleged conversation with the father who supposedly asked that they take care of Elian, a conversation which they understood as expressing a desire that the boy not return to communism. n38

More formally, however, the asylum applications claimed that Elian had "a well-founded fear of persecution." n39 To support this claim, the [\*694] applications recited that family members had been persecuted by Castro, including not only incarceration of some relatives for political acts but also harassment of the now deceased mother. n40 The applications also suggested that Elian would be used as a pawn by the Castro government and "would be subjected to involuntary indoctrination in the tenets of communism." n41

The father in Cuba, on the other hand, while grateful that the relatives had cared for his son after Elian's near-drowning experience, wanted his child back. n42 In fact, after the rescue, the father sent Cuban officials a letter requesting Elian's return--a request that was forwarded to the INS. n43 Because of the conflicting narratives regarding Elian's desire to remain in the United States, the INS engaged in a factual investigation, which included interviewing both Lazaro, the Miami great-uncle, and Juan Miguel, Elian's dad. n44

In their interview with the INS, the Miami relatives challenged Elian's father's credibility in requesting his son's return on various grounds. n45 First, in order to challenge the father's request that Elian be returned to him, the Miami relatives reiterated the father's request that they take care of the child. n46 Second, the Miami relatives, joined resoundingly by the self-appointed portavoces (mouthpieces/representatives) of the Cuban community, claimed that the father was being coerced by the powers that be in Cuba to say that he wanted his child returned to him. n47 They insisted that in Cuba's totalitarian environment, the father had no right, ability, or freedom to speak his mind, implying of course that no father in his right mind would opt to raise his child in communism when the opportunity existed for the child to be free. n48 They also focused on the boy's life that, they contended, would be impoverished and unfree if he returned to Cuba. n49 Finally, the Miami relatives suggested that the father, who had been divorced from the [\*695] mother when the child was only three years of age, was not involved in the boy's life and was not an appropriate custodian.

As it turned out, contrary to claims that after the divorce the father had not been involved in Elian's life, he had "significant" contact with his son who often stayed with him overnight. n51 Moreover, during his interview, the father insisted that the relatives had no right to seek asylum on behalf of Elian, refused to consent to an attorney, denied that he was being coerced into his position, and confirmed that he wanted Elian back home. n52

At a second meeting with an INS agent, Elian's father reiterated his free and uncoerced desire to have his child returned to Cuba. n53 After this meeting, the INS determined that Juan Miguel, in fact, "genuinely desired his son's return to Cuba." n54
Subsequently, on January 5, 2000, INS Commissioner Doris Meissner, rejected the asylum applications filed by the relatives, explaining that Elian, as a six-year-old child, lacked the capacity to file on his own behalf against the wishes of his parent. n55 Given that a minor needs an adult to file for asylum on his/her behalf, the Commissioner cited to "the custom that parents generally speak for their children" and found "that no circumstance in this case warranted a departure from that custom." n56 Therefore, she "concluded that the asylum applications submitted by Elian and Lazaro were legally void and required no further consideration." n57 Janet Reno, the Attorney General, declined the Miami relatives' request that she overrule the Commissioner's decision. n58 After this refusal, Elian, through his Miami relatives, filed a complaint in federal district court attempting to compel the INS to decide Elian's asylum application on the merits. n59

This is the background against which that first conversation with mami y papi took place. After our usual hellos and catching up on our lives in minute detail (our last call had been at most three or four days before), I popped the question: "Oye vieja/viejo, que es lo que piensan ustedes de esto de Elian?" n60 "Bueno, mi'ja, te voy a decir lo que pienso," said papi. "Ambas partes se estan portando mal." n61 "But," he continued, "I agree with what President Clinton has said: it is important to follow the rule of law, so we will be patient and wait and see."

After my initial shock that papi would ever agree with anything President Clinton said, let alone admit it out loud, I smiled and said to dad, "Well, papi, I agree with you. The important thing is that we follow the rule of law." At that point I proceeded to share with him my view of the rule of law. As the next section will detail, my analysis is likely not what he wanted to hear. Nonetheless, after sharing with them my views, I felt much more comfortable returning the media calls I was receiving.

But before going to the rule of law, it is important to underscore two ostensible ironies of the Elian case vis-à-vis the Cuban community's popular narrative about the boy. First, this is a community that came to this country because it religiously followed the rule of law, a condition that after the Castro revolution was, at least in the exiles' eyes, wholly missing. n62 With the Elian developments, while still seeking to couch their arguments within the parameters of "fear of persecution," the community's position was plainly that it wanted to keep the boy from Castro's claws regardless of what the law ostensibly says. n63 The community rebelled against the rule of law as it was being pronounced, in the name of, and for the sake of, living under the rule of law in this country. Second, the community is one deeply committed to family and family values. n64 In Elian's case, the community's position was one that sought to break up the family-separate a little boy from his father--not because of who the dad was, but because of where the dad was. Politics seemed to trump family values.

III. The Rule of Law

Given my agreement with mami y papi that it was appropriate to follow the rule of law, ascertaining what that rule is becomes the next [*697] building block in analyzing this case. That analysis, however, is nothing less than complex.

A. The Legal Norm

The intersection of local custody laws and federal immigration laws--both of which are pertinent to the analysis of the Elian case--creates intractable tensions in the analysis. In the end, the INS focused on the immigration and asylum questions while the relatives focused on the quality of the boy's life. These conversations then were in parallel, non-intersecting planes. The result: the parties were talking at or around each other rather than communicating with one another. It was as if they were having separate and quite different conversations.

First, the federalism issue has to be resolved. This requires making the threshold decision concerning what the case is really about. Is it a question of custody, a question properly relegated to the courts of a state (here the state of Florida) and its norms regarding family? n65 Or does the case posit an issue of immigration, which presents a federal question? n66

The plenary power doctrine provides a window for resolving this federalism issue because the doctrine effectively insulates executive immigration determinations, made pursuant to Congressional dictates, from judicial review. n67 The plenary power of the federal government over immigration matters renders any issue arising in the context of an immigration matter subsidiary to the immigration issue itself. n68 Thus, jurisdiction [*698] to resolve the issues raised by the Elian case must lie in the federal system, notwithstanding the existence of issues that, standing alone, would fall within the province of state courts' decisionmaking authority.

Once it is settled that federal jurisdiction is proper, it becomes relevant to examine the separation of powers issues that arise in the case, particularly with regard to the standards of review of the administrative decision (i.e. Commissioner Meisner's rulings that are pertinent to this dispute). In essence, the court claim filed by the Miami relatives sought a reversal of the administrative
decision concerning the propriety of filing an asylum application on behalf of a six-year old child by anyone other than his sole surviving parent. n69 To reach her decision, Commissioner Meisner cited custom that provides it is solely the father who should have the right to speak for the minor before the INS. n70 This cited custom, however, takes us in a circle as it is derived from state law providing a strong presumptive claim in the biological parent's ability to speak for their child, which, significantly, is a uniform presumption in various states in the United States n71 as well as around the world. n72 [*699]

Beyond local laws, international laws also presume that, absent exigent circumstances, biological parents have the right to speak for their child. Both the Convention on the Rights of the Child n73 and the Hague Convention on the Civil Aspects of International Child Abduction n74 set up norms, with respect to who has a right to custody of a minor child, that confirm the strong presumptive preference for a biological parent to have custody. n75 The only exception exists where the parent is unfit. n76

Also, both local and international laws adopt the best interest of the child standard which requires that the best interest of the child be served in reaching decisions on custody, presumptively by granting custody to a fit biological parent. n77 [*700]

Plainly, these norms uniformly appear to require that Elian go to his dad. But if so, what is the possible explanation for a community of law-abiding citizens who have a firm commitment to the rule of law nevertheless seeking to retain the boy, thus depriving his father of custody and giving it to distant relatives whom the boy did not even know until the fated day when the makeshift boat sank? The circuit court's decisionmaking process discussed below provides insight into the answer.

B. The Eleventh Circuit Decision

In presenting and evaluating the Eleventh Circuit's decision, it is important to pay close attention to the recitation of facts, as well as to both the evidence proffered and the myths crafted to save the child from a fate perceived to be worse than death: a return to an island where there are no civil or political freedoms. For example, presumption of custody by the father was contested by lawyers who asserted that Elian's father was not free to speak for his son or whether his request "had been coerced." n89 At that December 31, 1999 meeting, the father reiterated that he wanted Elian returned to Cuba, to his custody. n85 Juan Miguel insisted that a child of Elian's age did not have the capacity to make an asylum decision on his own, that the Miami relatives were not authorized to make such a claim for Elian, and that he, as the father, would not allow the child to file any petition on his own behalf. n86 During that interview, "Juan Miguel assured the INS official that his desire for [Elian's] return to Cuba was genuine and was not coerced by the Cuban government." n87

The lawyers also argued that the father was not free to speak. n82 They argued that Juan Miguel lives in a communist, repressive state, where there is no freedom of speech or association (two of the reasons Cubans were offered refuge in the United States). Thus, Juan Miguel's request that his son be returned, and his assertion that he was making such a request free from governmental pressure or intervention, were simply neither credible nor plausible. n83

It is at this juncture that the executive policy, which was reviewed by the Eleventh Circuit court, came into play. In order to reach its decision on who was the proper person to speak for Elian, particularly in light of the relatives' claims that the father could not speak freely in Cuba and [*701] that the father had asked them to care for the boy, the INS twice interviewed the father in Cuba. n84 During the first interview, on December 13, 1999, the father stated that, while he was grateful for the immediate assistance his son received when in need of medical and other attention, he now wanted Elian returned to Cuba, to his custody. n85 Juan Miguel assured the INS official that his desire for [Elian's] return to Cuba was genuine and was not coerced by the Cuban government." n87

The Miami relatives, however, insisted that Juan Miguel lacked freedom to decide the matter without governmental coercion and cited a conversation with Miguel before Elian was found at sea in which the father allegedly asked that the greatuncle take care of Elian. The father's change of tune, the Miami relatives suggested, occurred after the rescue when the father found himself under intense governmental pressure. n88

The INS visited the father in Cuba a second time and interviewed him at the residence of a United Nations official in order to ascertain whether the father was freely requesting the return of his son or whether his request "had been coerced." n89 At that December 31, 1999 meeting, the father reiterated that he wanted Elian returned to him in Cuba and that he was not being forced by anyone to articulate his position. n90

After the interviews, in which the INS also considered the father's conduct, the Commissioner concluded that Elian, as a sixyear-old, lacked the capacity to seek
asylum on his own against the wishes of his parent who would "generally speak for his child." n91 Consequently she "concluded that the asylum applications submitted by Elian and Lazaro were legally void and required no further consideration." n92 The Attorney General declined a request to overrule the Commissioner's decision. n93 At that point, Elian, by and through his Miami relatives, filed a complaint [*702] in federal district court seeking to compel the INS to rule on the merits of the application. n94 However, the district court dismissed the complaint. n95

The Eleventh Circuit court's review of the district court's dismissal of plaintiff's claim under 8 U.S.C. § 1158 is an integral part of the rule of law discussion. In this case, part of the problem arose from the fact that the statute was silent with respect to the validity of Elian's application as a minor whose sole surviving parent wanted him returned and did not consent to the filing of the application. n96 Thus, the court first reviewed the statutory language to evaluate its application to Elian. n97 The Eleventh Circuit concluded that the plain meaning of the statute was clear, and that Elian was covered by the statutory language providing that "any alien . . . may apply for asylum." n98 Next, the court articulated the issue it needed to resolve in light of this conclusion.

The important legal question in this case . . . is not whether Elian may apply for asylum; that a six-year-old is eligible to apply for asylum is clear. The ultimate inquiry, instead, is whether a six-year-old child has applied for asylum within the meaning of the statute when he, or a nonparental relative on his behalf, signs and submits a purported application against the express wishes of his parent. n99

In its analysis, the court noted that although the statute was clear on its face, Congress left numerous gaps, including the way to resolve the question before it. n100 Listing the existing statutory gaps, the court explicitly observed:

The statute does not command how an alien applies for asylum. The statute includes no definition of the term "apply." The statute does not set out procedures for the proper filing of an asylum application. Furthermore, the statute does not identify the necessary contents of a valid asylum application. In short, although the statute requires the existence of some application procedure so that aliens may apply for asylum, section 1158 says nothing about the particulars of that procedure. n101

Following the litany of gaps, the court concluded that "as a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute (here, the INS), to choose how to fill such statutory gaps." n102 [*703]

The court further explained what the context of this case meant with respect to the court's role of review. On the one hand, the circuit court recognized that the executive agency's authority was particularly great in this instance because the subject matter was immigration policy, an area in which the executive agency has plenary power because of its primacy in matters dealing with foreign affairs. n103 On the other hand, the court observed that while it needed to show deference to the executive agency, that deference did not translate to the executive agency having "unbridled discretion in creating and in implementing policy." n104 Rather, executive agencies must comply with statutory and constitutional procedural requirements, and must select a policy that is reasonable in light of the statutory scheme. n105 Thus, the court noted it had the authority to evaluate the agency's compliance with procedural mandates as well as its reasonableness. n106 However, the court "could not properly reexamine the wisdom of an agency-promulgated policy." n107

Having journeyed through the morass of legality, the court was ready to evaluate the INS policy that had led to the decision that Elian be returned to his father in Cuba. n108 Significantly, there was no issue as to whether the policy choice was the INS's to make, only whether it was arbitrary. n109 Central to the court's evaluation of INS policy were the four findings made by the INS in "its gap-filling discretion":

(1) six-year-old children lack the capacity to sign and to submit personally an application for asylum; (2) instead, six-year-old children must be represented by an adult in immigration matters; (3) absent special circumstances, the only proper adult to represent a six-year-old child is the child's parent, even when the parent is not in this country; and, (4) that the parent lives in a communist-totalitarian state (such as Cuba), [footnote omitted] in and of itself, does not constitute a special circumstance requiring the selection of a non-parental representative. n110

Finding that, although the above-stated policy does not "harmonize perfectly with earlier INS interpretative guidelines (which are not law) [footnote omitted]," the court concluded that "no statutory provision, no regulatory authority, and no prior agency adjudication . . . flatly contradicts the policy." n111 Having so found, the court "accepted that the INS [*704] policy . . . came within the range of reasonable choices." n112 Interestingly, the court's language explicitly noted that the court was not wholly comfortable with the INS's choices, even though bound
by rules of procedure to accept the agency's rulings as a matter within the realm of reasonableness. n113

The court analyzed each of the four policy points in order to ascertain its reasonableness. First, it accepted the reasonableness of the finding that six-year-olds lack the sufficient capacity to file for asylum on their own. n114 Next, and flowing from the first point, the court similarly accepted the reasonableness of the holding that such a child needs adult representation. n115

The third policy point, establishing that a parent, even a parent not present in the United States, is the appropriate person to act for his/her six-year-old child, seemed to trouble the court greatly. n116 In the end, however, the court was resigned to accepting the reasonableness of the INS's determination. n117 In the court's analysis of this difficult proposition, it noted that it is "critically important" that the agency policy accounts for the reality that a child may have an "independent and separate interest . . . apart from his parents, in applying for asylum. [citation omitted] . . . Special circumstances may exist that render a parent an inappropriate representative for the child." n118 If such circumstances exist, the agency policy allows for someone other than the parent to represent the child's interests. n119

The court's discomfort in this case was so great that it felt compelled to expressly note that it was "not troubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction." n120 Yet, in the end, while clearly stating its disagreement with and disaffection for the INS's conclusions, the court felt constrained by its role in judicial review of administrative decisions: "we cannot invalidate the policy--one with international-relations implications--selected by the INS merely because [*705] we personally might have chosen another. [citation omitted] Because we cannot say that this element of the INS policy . . . is unreasonable, we defer to the INS policy." n121

The court's analysis of the fourth policy point—that the condition of the parent living in a communist-totalitarian state does not constitute a special circumstance requiring the selection of a non-parental representative—reveals that, in the court's view, this fourth factor is even more troubling than the third. n122 The court, tacitly agreeing with the position of the Miami relatives and the Cuban community, confessed that it was worried about the INS's conclusion of the irrelevance, as a special circumstance, of the parent living in a communist-totalitarian state. n123 The court seemed particularly troubled by the overwhelming evidence—the reality—of ongoing human rights violations in that country. n124 Within that framework, the court recognized that persons may be unable to assert their own or others' legal rights. n125 Indeed, the court tied this political reality to the third consideration and suggested that political climate may well create a tension between the interests of a child and his/her parent. n126 It expressly fretted over the reality of little Elian being sent "to a country with little respect for human rights and basic freedoms." n127

In the end, however, the procedural rules reigned. n128 The court resigned itself to its role of adjudicating reasonableness and, in upholding the plausible reasonableness of the INS actions, lamented that "we could not properly conclude that the INS policy is totally unreasonable in this respect. The INS policy does take some account of the possibility of government coercion." n129 Finally, and most significantly, in reluctantly accepting the INS policy, the court returned to the plenary powers of the executive in international relations and concluded "in no context is the executive branch entitled to more deference than in the context of foreign affairs. . . . We are obliged to accept that the INS policy, on its face, does not contradict and does not violate section 1158, although section 1158 does not require the approach that the INS has chosen to take." n130 [*706]

With the rule of law explicated in detail, the court then applied the norms to the Elian facts. n131 While noting the likelihood that it would not have reached the same conclusion as the INS, the court concluded that the rule of law mandates that it accept the INS policy and conclusion as it is not "arbitrary, capricious, or an abuse of discretion." n132 The court was quite (and uncommonly) forthcoming with its view: "whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here." n133

Thus, with respect to the rule of law, the Eleventh Circuit's opinion paints a rather clear picture of the Elian case. The court was candid about federalism and separation of powers issues. n134 It accepted the limitations imposed by the scope of its power of review of an administrative decision in the context of its plainly stated views that, in setting policy, it would have traveled a road vastly different from that chosen by the INS. n135

The basis of the divergence of views between the INS and the court lies in the third and fourth INS factors: the weight to be given to the type of government that exists in Cuba in making the initial policy determination with respect to a six-yearold child's rights—his independent agency—to seek asylum that
involved the capacity of the child, the best interests of the child, and the congruence of the child's and the non-resident parent's interests. The INS said that the nature of the government where the father lived was not a special circumstance. n136 The court plainly would have held otherwise. n137

In this regard, one observation about international policy that is relevant to this case, but not discussed, is noteworthy. The Estrada Doctrine plainly holds that in foreign relations one government should not interfere with the forms of government existing in other states. n138 To be sure, every state has the sovereign prerogative to deal or not with a state because it approves or disapproves of the form of government. n139 However, it is well settled that the form of government a state adopts is a purely domestic, not an international, matter. n140

As such, it appears that, absent some fear that the child would face serious harm, the form of government should have been irrelevant to the consideration of whether the strong presumption that exists both domestically and internationally favoring a fit biological parent as custodian should have been applicable. Significantly, while initially some issues of fitness as a father were raised with respect to Juan Miguel, n141 the fact finding revealed that he was a loving, caring dad who was involved in his son's life. n142

Nonetheless, this "irrelevance" of the form of government represents a shift in attitude towards Cuba. For example, the Helms-Burton Act, a diaconian law expressly aimed at strangulating Castro's government, suggests that the court's and not the INS's position would have been the prevailing view of the United States government and the Angla/o peoples. n143 But this case shows how putting family rather than trade in the middle of that equation made a difference.

In the end, of course, the issue of the type of government was anything but irrelevant. The decision to return Elian to his father, who had come from Cuba to claim his son with plans that they return together to Cuba, turned on the court deferring to the INS's decision because of standards of review. n144 However, the door is open for a later executive to vary the policy or apply it differently, with the court having already stated that a different interpretation would have been within the zone of reasonableness that it could not disrupt. n145 Such a different outcome would have been based on the form of government, a decision that pursuant to foreign relations notions is not an international, but rather a domestic, matter. n146

As the following section will show, the tension between the INS viewpoint and the court's viewpoint is not surprising; rather it is predictable. It crystallized the reality of the norms in general and the norms as they apply to Cuba and Cubans. While the court's position reflects the historical reality of accommodations being made for Cubans, the INS analysis incorporates no such preferential model. This juxtaposition, as it arose in the context of an unseemly battle over a little boy, that came to symbolize the correctness of choices made--to stay in or try to leave Cuba--not only fractured families, it also recast the image of cubanas/os from law-abiding, model minorities to fanatical freaks seeking to keep a father and son apart. n147

IV. The Transformation: Becoming the Other

Cuban exiles, since Cuba's passing to the zone of Soviet influence during the Cold War, have always been treated somewhat differently--a climate that still prevails with respect to the island. In matters of immigration specifically, Cubans have historically enjoyed preferential treatment. n148 The value of this preferential treatment to the United States in the days of the bipolar world was to have affirmation that capitalism is better than communism. n149 Cubans were then rewarded by being allowed into these borderlands, and being provided with programs that allowed us to become part of this better nation and better way of life. n150

That Cold War tensions persist in Cuba's relations with the United States is reflected in the Helms-Burton Act, which has as a preambular aspirational purpose the toppling of the Castro regime. n151 Notwithstanding the consistent opposition in the UN to the ongoing embargo, which started in the early 60s, the United States stands fast in seeking to isolate Cuba. n152 This differential treatment has been starkly exposed. While insisting on a Cuban embargo, the United States recently passed a law granting China permanent trade status notwithstanding its communist regime and its dismal human rights record. n153 Thus, with respect to Cuba, regardless of the general irrelevance of forms of government, the Cuban community in the United States is accustomed to having the form of government be not only significant, but also outcome determinative with respect to their desires. With the Elian decision, that all changed. It also changed the estado unidenses' majority view of Cubans.

A. Changed Expectations

With respect to the majority's perception of Cubans within these borders, the Elian experience was transformative, affecting not only the individuals directly involved, but also the entire community. The Elian experience--the story of a small sixyear-old
whose own short life has been marred by tumult and tragedy--effected a large-scale transformation.

The Elian narrative--that of a young and severely dehydrated survivor of a boat wreck in which he lost his mother, indeed possibly saw her drown, who was found by two fishermen off the coast of Florida in an almost unconscious state n154--has disrupted the convivial relationships formed over a forty-year period between the Cuban community and Angla/o majority. A palpable consequence of the political battle over Elian is the othering of cubanas/os. Unlike our chicana/o, mejicana/o, puertorriquena/o counterparts, cubanas/os until now have not even been aware that within these United States borderlands we are "others"--racial and racialized, ethnic and ethnicized others--simply because we are Latina/o. n155 With Elian, Cubans for the first time felt the pain of press references which label us members of the "banana republic," "zealots," and people infused with a "fanatical hatred of Fidel Castro." n156 For the first time we are being told to go back where we came from [*710] if we don't like it here. To be sure, we have heard such comments about our puertorriquena/o and chicana/o-mejicana/o and other Central and South American, African and Asian brothers and sisters, n157 but it has never before been leveled on cubanas/os. n158 Indeed, in the past such "go back home" comments were inconceivable with respect to cubanas/os who, it must be recalled, were welcomed from our homeland because communism made it undesirable; because we were capitalism's trophy in the war against communism.

In this context then, it is appropriate to interrogate why cubanas/os have fallen from grace with the Angla/o majority. The answer appears relatively simple. This time the majority did not perceive the exercise of political will by cubanas/os as consonant with the majority's interest. Rather, the perceptions of the majority group and the cubanas/os were wholly divergent. The cubana/o narrative was consistent with our past political activity, which had been warmly embraced and strongly supported by the majority: flex political muscle against the evil Castro regime.

The majority, on the other hand, perceived this as a different story: the incoherent, incongruous, unstable, and misplaced desire to keep a boy away from his family. Cubanas/os could not have been prepared for the result--a total rejection of their position, mind you an overt and wholesale abandonment of their fight against communism. They still viewed their narrative as the same one that had for forty years garnered the support of the majority. In short, for the first time the flexing of their antiCastro political muscle offended the majority in the United States polity who viewed the Elian case as a family concern. n159 [*711]

One should not underestimate the trickle-down effects of this conflict. There have been internal fissures within the Cuban community. n160 Families have been torn apart. I, for example, received an urgent e-mail from a devastated student pleading for help. He was faced with a previously inconceivable family rupture: an aunt and uncle were going on national television to take opposing sides in the debate. Others have been ostracized at their health clubs or jobs by members of the majority who view the entire community as having acted badly.

B. Personal Narratives

In pondering the why's of these developments, I decided to try to find insights in the views that other Cuban law professors hold concerning the Elian saga. n161 I opted to explore the theme with this group because we share the axis of Cubanness as well as the axis of the rule of law. Whether we are critical or traditional scholars, we are familiar with, perhaps even experts at, legal analysis. Thus, it seemed to be an ideal group with whom to explore the Elian puzzle.

My informal conversations with Cuban-American law professors, some of which were in person and others of which were by e-mail, sought to ascertain two matters: first, the circumstances surrounding their and their families' departures from Cuba and second, how they felt about the Elian events. My thesis, not surprising in a critical legal context, was that individually our personal experiences would play a major role in informing our perspective on the Elian story and its development. I was not disappointed in my expectations.

Before I embark o presenting the several variations that emerged in these explorations, I should note that the process was not rigidly empirical or scientific. The conversations were just that: conversations. I make no judgment about the different possibilities nor do I seek to critique them in any way. I did not question, nor do I intend or desire to question, aspects of anyone's story. I simply wanted to hear the stories and ascertain what effect, if any, that the personal migration experience had on perception and analysis.

In that regard, I found one consistent thread: personal experience is outcome determinative. Interestingly, similar to my own experience, two respondents who are internationalists, and whose personal experience, coincidentally, was to leave Cuba with their nuclear families intact, are the strongest proponents of the view that Elian should have been returned [*712] to his father. The thread on the rule of law proposed by these respondents included a strong international strain. For
example, one respondent specifically noted, and disagreed with, the differential treatment Haitian children are receiving in the United States as a strong reason to adhere to the rule of law in the Elian case.

It quickly became evident in this "rule of law" group--as it was a consistent theme among all of the respondents--that the intactness or separation of the family in the migration experience significantly influenced views and perceptions. As one respondent explained, "I left Cuba at about Elian's age because my parents made that decision for me. It is sad my mother died, but given he has a surviving parent who is a fit parent and involved with Elian's life, [the father]--like my parents did for me--should be the one deciding Elian's fate." To be sure, although the outcomes varied between groups of Cuban law professors, experience was paramount in all of our decision-making processes.

Another response, much along the "rule of law" stream but without the internationalist angle, generally supported the parent's right to make such decisions for a minor child, but strongly and specifically questioned the ability of Elian's father to speak freely as to his real wishes. Once the father was on United States soil, however, this respondent's concerns were alleviated and the primacy of the parent's right to speak for the minor child became the paramount consideration. A fifth respondent, who left Cuba with an intact nuclear family, also focused on the rule of law. This professor's succinct conclusion is telling; it confirms the value placed on the rule of law, notwithstanding personal feelings or beliefs:

Regarding Elian, under my value system (I value freedom of speech, capitalism, private property ownership, democracies versus dictatorships), the U.S. could provide Elian with choices denied him in Cuba. However, it is not my value system that counts in this instance - it is that of Juan Miguel, who apparently is a good father and who under our laws decides what is in Elian's best interest. His decision was that a return to Cuba was in Elian's best interest. And so it goes . . . .

The views embraced by the above-discussed respondents, to which I will refer as the "rule of law" group, can be explicated by their personal experiences. Their families left their homeland together; the family unit remained intact. The respondents' migration experience was one determined by their parents at a time they were about Elian's age. The parental decision to migrate kept the family--the most significant structure in a young child's life--together. Thus, each of these law professors' migration experiences meant that as children they had continued stability in an unstable change in environment. Unquestionably, a move to a new country, in which a different language was spoken and in which there are different customs, religious practices, and foods, is a dramatic change for any child to endure. Therefore, it is not surprising that this group, whose [*713] experiences included the constant of their nuclear family, most strongly embraced an approach that viewed the family, in the Elian case the father, as the proper location for decision-making with respect to the destiny of the child. As the rule of law approach supports this outcome, it stands to reason that persons, who could place themselves in Elian's shoes and whose experience was family unity, would support the approach that makes family unity the proper result.

However, other respondents, whose family did not remain intact, but rather whose family life was ruptured, reached the same conclusion--that Elian should go back to his father. In this instance however, the desire for family unity stems from the emotional costs leveled on the respondents by the separation from family. For example, one respondent left ahead of the family with all expectations that family reunification would take place within a few weeks of departure. This respondent was to stay with relatives whom s/he "barely knew" for the short time until family reunification. However, the anticipated reunification did not occur for over five-years, by which time the respondent had suffered through the "culture shock" of migration and its attendant tropes-new language, customs, basic "different ways"--and had come to know distant relatives as a new family.

Compounding the trauma, when the respondent's family did arrive in the United States, they had become virtual strangers. In fact, the much anticipated family reunification never took place as the father passed away merely fifteen-days after his arrival in the United States. The dad never again recognized his child. Under these circumstances too, it is easy to understand why this respondent favored Elian's reunification with his dad. In the response, this professor plainly stated:

my position from the start was that Elian should be returned to his father. The break-up of my family had an indelible effect on my life . . . . Elian is still very young. Despite the nature of the government he will grow up with his father. This, I always believed, was the paramount issue. From a legal perspective, I didn't see any other options.

There was one noteworthy matter with respect to the six respondents whose view was that Elian should be with his father: all agreed both sides acted badly. The examples offered of such "bad conduct" included the unseemly early morning raid to rescue Elian from his relatives and the manifestations in Cuba led by Castro who was making the little boy a cause celebre. One respondent, summarizing many of our thoughts,
Another common observation from these respondents was incredulity at the reactions of the Cuban community with respect to the legal process. One observed, "I was troubled by the widespread ignorance among Cuban-Americans. The undue outbursts of emotion were so [\textsuperscript*714] transparently political. In particular I was stunned that as many lawyers were missing the point . . . or appearing to!!" Similarly, another respondent in the "rule of law" group recalled being told, in reaction to the position that the rule of law requires Elian's return, that the respondent "just doesn't understand communism [since you] didn't live it." Accordingly, that respondent lamented that some Cubans "just do not understand the sacrifices (and possible injustices) that come along with the rule of law."

Another group of respondents' views focused on the failure of the system to recognize, acknowledge, or give effect to Elian's agency. Those taking this position believe that this plainly was an asylum case and that Elian should have been granted a hearing on the merits. The justifications for this perspective included the Eleventh Circuit reading of the statute which included Elian as a person covered under the "any alien" language of the statute, and the INS's sidestepping its own guidelines on interviewing for the purpose of determining the propriety of granting asylum. Interestingly, although this focus on asylum could also be deemed as a "rule of law" approach--albeit one that differs from the emphasis on custody--, the respondents who shared this view all had personal migration experiences that influenced the desire for acknowledging a child's agency.

Two of these respondents had experiences in which their families did not remain intact upon departure from Cuba. Indeed, in both of these cases the father did not join the family for some time. Although ultimately the paternal presence was reincorporated into the family unit, the respondents had formative years without a father figure. Perhaps as a result, these respondents--reflecting on their own experience--felt the paternal voice should not be deemed as the sole relevant voice in deciding Elian's fate. Rather, these respondents focused on Elian's agency as the primary axis on which to ground the determination of his destiny.

Although motivated by different experiences than the two non-intact family situations discussed above, two other respondents, who also focused on the child's agency and voice, had experiences that also explain their view. In these two instances, respondents spent time alone in the United States without either of their parents. Both scenarios were the result of the parents' decision to do what was best for their children--a decision with which the children had disagreed but in which they were not allowed to participate. Having been deprived of agency in the initial decision-making process (which resulted in their being located alone and away from their parents in the United States) caused their subsequent experience within the United States to be one in which they had only their own voice to advance their positions. Ready or not--based on both their age and on political and familial developments beyond their control--they, as small children, were in positions in which they had to exercise their own agency in order to have a voice at all.

Having been denied their own voice, it is perfectly logical that their paramount consideration be that Elian not be denied his voice. One of these respondents, in a powerful assessment, lamented the perniciousness of denying Elian his own voice: "my impression is that neither Elian's father nor mother were acting at any point out of his best interest . . . Elian himself could be the only true arbiter of his own destiny. He should have been interviewed and honored as a participant in his own life." Significantly, it is the outcome urged by the "agency" group's position that is universally identified as the position of the Cuban community.

Certain commonalities are apparent in the views of these two groups--the "agency" group and the "rule of law" group. Both groups deplored the early morning raid. In addition, while agency is the axis of the "agency" group's position, they also focused on the law--although their emphasis was on asylum, and on Elian's right, as per the INS regulations, to speak for himself.

In the end, what is patently apparent in both groups is that the migration experience itself had an indelible impact on the way respondents perceived, analyzed, and related to the Elian saga. In this regard then, it is not surprising that a schism emerged between the popular voice deemed representative of the Cuban community and the voice representative of the Angla/o majority view. That gap in perspective can well be attributed to the sense and sensibility of the migration experience.

Like the "agency" group, those of us from the "rule of law" group had a migration experience that informed our views. In our case however, our parents made the choice to take us away from communism to a land of freedom--civil and political; so too, should Elian's dad speak for him. Significantly, a few of the respondents in the "rule of law" group emphasized that our position, regarding the proper person to speak on behalf of Elian, was just that: a view that a fit parent of a child of tender years is the proper person to speak for

\textsuperscript*78 Denv. U.L. Rev. 687
that child. We underscored that our view did not mean that we believed Elian would be better off in Cuba, or that the Miami family members were unfit caretakers. Rather, our position was that absent extraordinary circumstances—and we did not consider the form of government of the father's domicile to be such a circumstance—Elian's destiny should be articulated by his parent, just like our destiny was determined by our parents.

Although the Angla/o popular view coincided with the conclusion of the "rule of law" group, it was not informed by the migration experience, but rather by a domestic family values concept. Unlike the "rule of law" group, the Angla/o majority did not contemplate the meaning of the child's return to his father—a life of unfreedoms in a repressive, human [*716] rights violating country. Those of us in the "rule of law" group struggled mightily with, as one respondent articulated it, the "sacrifices" the rule of law requires at times. It is these very sacrifices on which the "agency" group centered its analysis to reach a different legal conclusion. Certainly the "agency" group's position is validated by the Eleventh Circuit's disagreement with the INS dismissal of the form of government of Cuba as a relevant concern in the inquiry regarding who should speak for Elian. It is the varied migration experiences of the "rule of law" and "agency" law professors that can be used to explain their divergent viewpoints. Similarly, it is the difference between having the migration experience of the "rule of law" group and the absence of such an experience in the Angla/o majority that explain their different routes to the same result.

V. Conclusion

While both groups of Cuban law professors had the migration commonality, the Cuban community and the Angla/o community did not have a similar experience or commonality. Their differences resulted in dramatically different narratives on the Elian case. Once this schism emerged, given historical reality in United States society, it was inevitable that the othering of cubanas/os would take place . . . as it did. A sense of civility was lost when the name-calling started. Such othering permitted deploying against the cubanas/os of the us-versus-them paradigm from which race dynamics in this country have evolved.

It is noteworthy that this othering of Cubans took place at a time, when politically, it was convenient for various reasons. Primarily, we are supposedly beyond the Cold War era, and communism is no longer perceived to be the threat it once was. Also, flowing from living in the so-called post Cold-War era, is the presence of interest groups within the United States—such as farmers and inventors—who, based on their own economically motivated interests, favor opening up relations with Cuba.

With respect to the wisdom or desirability of the reestablishment of relations with Cuba, the perception of those who have not experienced loss related to communism differ vastly from the perception of those who have been devastated by it. When considering the changes in United States policy towards other communist states such as China, Vietnam, and now even North Korea, it is easy to see how, with respect to Elian's fate, the nature of the receiving government was likely not an issue for the Angla/o majority. However, the nature of the Castro government was central to persons who have been devastated or somehow affected by the ravages of communism. It is those persons, whose lives have been critically altered by Cuba's form of government, who reacted vocally and emotionally against sending the six-year-old boy to live in a repressive and oppressive state. [*717]

To be sure, the Cuban community has been historically vocal and emotional in opposition to Castro's desires and policies. However, for the forty-years prior to the Elian saga, this view was consistent with, even reflective of, the Angla/o majority view. Therefore the Cuban anti-Castro sentiments were heard and embraced. With Elian, however, the Angla/o community reacted differently. The Cubans' excitement was dismissed as zealotry and their displays condemned as irrational. Now, because of the difference in views, with respect to the damnability of Castro's government, we became the unpopular minority, "others" if you will, tidily packaged as a lesser brand of citizen.

These observations show LatCrit in action. The Elian saga and its interpretation by Cuban-American law professors reveal that perspective is a major influence in analysis. Experience informs perspective in an outcome-determinative manner. In the Elian case, experience and perspective informed the popular narratives of both the Cuban community and the Angla/o community—narratives that were polar opposites. Significantly, as the informal conversations I conducted show, some cubanas/os do not agree with the position attributed to the community, just as certainly some in the Angla/o community feel that Elian should not have been returned to Cuba. Nonetheless, the positions of the groups are essentialized and homogenized and then conveyed to the masses as wholly representative.

However, a review of the Elian case elucidates the value and utility of critical review with respect to both facts and law. Indeed, the expressly articulated difference in approach between the Eleventh Circuit and the INS exposes that, but for that court strictly
adhering to procedure-review standards, the same constellation of facts and law would have resulted in a vastly different outcome. In turn, a different outcome from the application of the rule of law that followed the vision of the Eleventh Circuit would have validated the Cuban community’s position, rather than "othered" the community.

This observation reveals the value of critical interrogations. Outcomes are dependent on more than procedural and substantive legal pronouncements and contexts. They are inextricably intertwined with experiences--personal, social, educational--and beliefs--religious, civil, and political--that influence both perspective and analysis. And here, each group, unabashedly affected by personal experience, formed essentialized narratives that resulted in the "othering" of the entire Cuban community. And so it goes, the image of a previously model minority was changed, almost overnight, by the struggle over the destiny of a six-year-old boy.

FOOTNOTE-1:

n1 See Berta Esperanza Hernandez-Truyol, Borders (En)gendered: Normativities, Latinas, and a LatCrit Paradigm, 72 N.Y.U.L.Rev. 882, 892-96 (1997) [hereinafter Borders (En)gendered] (explaining my need to weave my conflicting worlds, my professional (English-speaking) realm and my familia, mi mundo cubano); Berta Esperanza Hernandez-Truyol, Building Bridges I - Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement, 25 Colum. Hum. Rts. L. Rev. 370, 369 (1994) [hereinafter Building Bridges I] (describing how moving to the United States to attend college shocked me with the realization that I was "other"); Berta Esperanza Hernandez-Truyol, The LatIndia and Mestizajes: Of Cultures, Conquests, and LatCrit Possibilities, 3 The J. Gen. Race & Just. 63, 75 (1999) [hereinafter The LatIndia] (describing the hurdles and harsh realizations I encountered in my professional life as a Latina lawyer, and stating "it was not until after I had completed law school that I got my first inkling that the majority's perception of me was that I was outside 'normal'.")

n2 See Borders (En)gendered, supra note 1, at 894 (describing my lack of "otherness" in Puerto Rico). "Growing up in Puerto Rico, I was, except for my sex, normativa. Speaking Spanish was normal. Being brown (all shades) was not only normal, it was the goal of those NLW [Non-Latina/o Whites] (and other foreigners) who visited the island." Id. See also Building Bridges I, supra note 1, at 370 (explaining that "growing up I never felt different . . . . As to the possibility that somewhere, someone might consider me 'different,' I was simply clueless").

n3 See The LatIndia, supra note 1, at 71. I was raised in a traditional extended family in which I was the only girl-child. Id. at 72. In this household, I learned that female identity meant a lesser class citizenship. Id. at 71. For stories about my early encounters with the issue of sex/gender, see Borders (En)gendered, supra note 1, at 911-20; Building Bridges I, supra note 1, at 403; Berta Esperanza Hernandez-Truyol, Building Bridges II: Bringing International Human Rights Home, 9 La Raza L.J. 69 (1996); Berta Esperanza Hernandez-Truyol, Indivisible Identities: Culture Clashes, Confused Constructs, and Reality Checks, 2 Harv. Latino L.Rev. 199, 210-11 (1997) [hereinafter Indivisible Identities]; Berta Esperanza Hernandez-Truyol, Latina Multidimensionality and LatCrit Possibilities, 53 U. Miami L. Rev. 811 (1999).

n4 See Building Bridges I, supra note 1, at 403.

n5 See The LatIndia, supra note 1, at 75.

n6 See id. at 76-78. Luz Guerra encouraged a group of progressive scholars, myself included, to deconstruct the meaning and conceptualization of latinidad. See id. at 76. See Luz Guerra, LatCrit y La Des-Colonizacion Nuestra: Taking Colon Out, 19 Chicano-Latino L. Rev. 351, 351 (1998). I came to realize that using the term latinidad affirms the social order imposed by the Spanish colonists and erases our indigenous history. See The LatIndia, supra note 1, at 76-78. As I struggle to discover and name my great-great-grandmother who my family simply calls "La India," I reclaim the India in my heritage. See id. at 81.

n7 See Alejandro Portes and Alex Stepick, City on the Edge: The Transformation of Miami 104, 207 (1993) (describing the
effects of Latina/o migration on Miami); David Rieff, The Exile: Cuba in the Heart of Miami 26 (1993) (explaining that the Cubans who came to Miami in the first wave of immigration were the most privileged members of the Cuban population); Building Bridges I, supra note 1, at 391; Thomas Weaver, The Culture of Latinos in the United States, in 2 Handbook of Hispanic Cultures in the United States: Anthropology 15, 52 (Nicolas Kanellos et al. eds., 1994) [hereinafter Handbook of Hispanic Cultures] (stating that the first wave of Cuban immigrants to the United States were largely light-skinned).

n8 See Building Bridges I, supra note 1, at 391. Cuban immigrants to the United States were used to bolster the war against communism, and, thus, they received assistance from the United States government and were not subject to quotas. Id. See Portes, supra note 7, at 29, 104. "The daily spectacle of these refugees had political value: what better indictment of Caribbean-style communism?" Id. at 104.

n9 See Joyce A. Hughes, Flight from Cuba, 36 Cal. W. L. Rev. 39, 40-41, 54-58. For a brief history of Cuban migration to the United States, see Building Bridges I, supra note 1, at 391-93.

n10 The United States Government has made it relatively easy for Cuban citizens fleeing Castro's communist government to migrate to the United States. In 1966 the Cuban Adjustment Act gave Cuban immigrants the option of applying for and receiving United States residency after living in the United States for only two years. See Cuban Adjustment Act, Pub. L. 89-732, 80 Stat. 1161 (1966) (codified in part at 8 U.S.C. § 1255 (1988)). In 1980, the residency requirement was lowered to one year under the Refugee Act. See Refugee Act, 8 U.S.C. § 1521 (1988). This policy changed significantly, however, in 1994, when President Clinton ordered that Cuban refugees intercepted at sea should be returned to Cuba (commonly known as the "wet feet/dry feet" policy). See President's Press Conference, 30 Weekly Comp. Pres. Doc. 1682-3 (August 19, 1994). "Today, I have ordered that illegal refugees from Cuba will not be allowed to enter the United States. Refugees rescued at sea will be taken to our naval base at Guantanamo, while we explore the possibility of other safe havens within the region. To enforce this policy, I have directed the Coast Guard to continue its expanded effort to stop any boat illegally attempting to bring Cubans to the United States. The United States will detain, investigate, and, if necessary, prosecute Americans who take to the sea to pick up Cubans." Id. For more information on Cuban immigration laws, see Berta Esperanza Hernandez-Truyol, Out in Left Field: Cuba's Post-Cold War Strikeout, 18 Fordham Int'l L. J. 15, 39-44, n.139 (1994).

n11 See Berta Esperanza Hernandez-Truyol, Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century, 23 Fordham Urb. L.J. 1075, 1094-97 (1996)[hereinafter Natives]. An example of local laws designed to exclude Latinas/os is California's Proposition 187, which denies health, education and welfare benefits to illegal entrants. Id. This xenophobic law is aimed at illegal immigrants from Mexico and blames them for California's economic problems. Id. Ironically, California proposes to resolve its economic problems by depriving this racial group of vital benefits. Id.

n12 See id. at 1083-86.

n13 See Building Bridges I, supra note 1, at 391.

n14 See id. See Portes, supra note 7, at 29. "For twenty years, the exile community had been the United States government's most resolute partner in the struggle against Castro communism and that dictator's attempts at expansion in Latin America. For Washington, the Miami exiles were not an 'ethnic' group, but an important ally in the fight for Cuba and Latin America." Id.

n15 "By 1979, on the eve of Mariel, close to 80 percent of Cubans in the United States were living in Miami, making it, in effect, Cuba's second-largest city and the refugees the most concentrated foreign-born minority in the country." See Portes, supra note 7, at 104 (quoting Sergio Diaz-
Briquets and Lisandro Perez, Cuba: The Demography of Revolution, 36 Population Bulletin 2-41 (April 1981)). See also Rieff, supra note 7, at 15 (describing the Cuban settlement in Union City, New Jersey, as "that other great center of the Cuban diaspora in the United States"); Weaver, supra note 7, at 41 (explaining Cuban-American demographics); Edna Acosta-Belen, From Settlers to Newcomers: the Hispanic Legacy in the United States, in The Hispanic Experience in the United States: Contemporary Issues and Perspectives 81, 95 (Belen et al. eds. 1988) (listing Puerto Rico as a significant settlement place for Cuban immigrants).

n16 See Portes, supra note 7, at 107. Cubans in Miami tried to recreate the atmosphere of Cuba and fostered Cuban values and a "moral community" within their enclave. See id.

n17 For more literature on the Cuban presence in the United States, see Portes, supra note 7, and Rieff, supra note 7.


n19 See Steven F. Arvizu, Latinos in Higher Education: Undereducation vs. Empowerment, in Handbook of Hispanic Cultures, supra note 7, at 282, 289 tbl. 6. In 1989, 21.9% of non-Hispanic Whites over age twenty-five had completed four years of college. Id. Out of all Hispanic groups polled, Cubans came closest to this number, with 19.8% of Cuban adults over age twenty-five having completed four years of college. Id.

n20 See Building Bridges I, supra note 1, at 392.

n21 See Rieff, supra note 7, at 17. For more history of Mariel refugees in Miami, see Portes, supra note 7, at 18-37.

n22 See Portes, supra note 7, at 137-40 (describing the Cuban enclave in Miami as a "moral community," characterized by its distinct political beliefs, militant loyalty, and strong moral values); Robert R. Alvarez, Jr., Changing Patterns of Family and Ideology among Latino Cultures in the United States, in Handbook of Hispanic Cultures, supra note 7, at 147, 159-60 (explaining the traditional family values that remain strong within the Cuban-American culture).

n23 See Portes, supra note 7, at 43-46. The Cuban community in Miami experienced a "rapid entrepreneurial advance," as compared with other Latina/o groups and AfricanAmericans. Id.

n24 See supra note 15, and accompanying text. See also Weaver, supra note 7, at 53 (explaining that CubanAmericans tend to maintain a culture separate from other Latina/o cultures).

n25 See Portes, supra note 7, at 207-10.

n26 See Building Bridges I, supra note 1, at 395 (explaining that, compared to all Latina/o groups, CubanAmericans came closest to the median family income of $ 32,274 for non-latinas/os, with a median family income of $ 27,294 in 1987) (citing Statistical Handbook on U.S. Hispanics 36, 197 (Frank L. Schick & Renee Schick eds., 2d ed. 1991)). For a comparison of educational levels, see supra note 19, and accompanying text.

n27 Elian was born in Cuba to Juan Miguel Gonzalez and Elizabeth Gonzalez. See Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000).

n28 When Elian was first rescued, the Miami relatives planned to return the boy. See id., at 1344. Juan Gonzalez did not realize until later that the Miami relatives planned on keeping Elian. See Nancy Gibbs, I Love My Child, Time, Apr. 17, 2000.

n29 See Gonzalez, 212 F.3d at 1344.

n30 See id.

n31 See id.

n32 See id.

n33 See id. n.2 (citing In re Lazaro Gonzalez, No. 0000479- FC-28, 2000 WL 492102 (Fla. Cir. Ct. 2000)).

n34 See id.

n35 See Gonzalez, 212 F.3d at 1344-45.
n36 See generally Rick Bragg and Lizette Alvarez, Miami Family Told to Turn Over Boy After Talks Fail, N.Y. Times, Apr. 13, 2000. "The boy's Miami relatives and much of the Cuban exile population in South Florida oppose sending him back to a communist dictatorship that his mother died to escape." Id.


n38 See id.; Gonzalez, 212 F.3d at 1345, n.3. See generally Gibbs, supra note 28.


n40 See Gonzalez, 212 F.3d at 1344-45.

n41 Id. at 1345.

n42 See id.

n43 See id.

n44 See id.

n45 See id.

n46 See Gonzalez, 212 F.3d at 1345, n.3. See generally Gibbs, supra note 28.

n47 See Gonzalez, 212 F.3d at 1345.


n49 See Gonzalez, 212 F.3d at 1345. Lazaro Gonzalez, Elian's great-uncle, told the INS, "During the time he's been here, everything he has, if he goes back, it's all changed. His activities here are different from those that he would have over there." Id.

n50 See Marika Lynch, Miami Relatives Suggest Elian Gonzalez’s Father is Unfit Parent, The Miami Herald, Apr. 3, 2000. "Three of the family's attorneys went on national television shows Sunday and suggested Juan Miguel Gonzalez was an unfit parent." Id. "Miami relatives . . . insist that Elian's father has been abusive and misleading in recent telephone conversations --at one time telling the boy his mother was alive and waiting for him in Cuba." Id.

n51 Gonzalez, 212 F.3d at 1344.

n52 See id. at 1345. The father also denied that the great uncle "was authorized to seek asylum for [Elian and] refused to consent to any lawyer representing Elian. Juan Miguel assured the INS official that his desire for [Elian's] return to Cuba was genuine and was not coerced by the Cuban government." Id.

n53 See id.

n54 Id.

n55 See id.

n56 Id. at 1346.

n57 Gonzalez, 212 F.3d at 1346.

n58 See id.

n59 See id. The bases of the claim, both of which were rejected by the district court, were a violation of 8 U.S.C. § 1158 and of the due process clause of the Fifth Amendment. See id.

n60 Author's translation: "Hey listen old lady/old man (mom/dad), what is it that you think about this Elian thing?"

n61 Author's translation: "Well my dear/daughter, I will tell you what I think. Both sides are behaving badly."

n62 Portes, supra note 7.

n63 Gonzalez, 86 F.Supp. 2d at 1171, n.4; Bragg & Alvarez, supra note 36.

n64 Portes, supra note 7.

n65 State law governs domestic relations. See generally, Florida's Domestic Relations Law, Fla. Stat. Ann. vol. 21A tit. XLIII § § 741-59 (West 1997 & Supp. 2001); Polovchak v. Meese, 774 F.2d 731, 734 (7th Cir. 1985) (explaining that "family disputes are usually handled at the state level").

n66 U.S. Const. art. I, § 8, cl. 4 (Congress is authorized "to establish a uniform Rule of Naturalization."); see also Chae Chan
Ping v. United States, 9 S. Ct. 623 (1889) (federal government alone can act on questions of immigration).

n67 Gabriel J. Chin, Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law, 14 Geo. Immigr. L.J. 257 (Winter 2000); Hiroshi Motomura, Federalism, International Human Rights, and Immigration Exceptionalism, 70 U. Colo. L. Rev. 1361, 1364 (Fall 1999) (stating that the plenary power doctrine "severely limits judicial review when a government decision regarding a noncitizen's entry or continued presence in the United States is challenged on constitutional grounds").

n68 It is a well-established principle that the president has plenary power over foreign affairs. See Barry E. Carter & Phillip R. Trimble, International Law 223 (3d ed. 1999). Article II of the United States Constitution grants the president the power to negotiate treaties and nominate and receive ambassadors. See U.S. Const. art. II, § 2,3. In U.S. v. Curtiss-Wright, the Supreme Court granted an implied presidential foreign affairs authority greater than the affirmative grants of power in the constitution, recognizing the president as the sole constitutional representative of the United States in the realm of foreign relations. See Carter & Trimble, supra at 224-27 (quoting Curtiss-Wright, 57 S. Ct. 216 (1936)). According to the groupings established by Justice Jackson in his concurrence in Youngstown Sheet & Tube Co. v. Sawyer, the president's authority is at a maximum when using the constitutional power over foreign affairs. See id. at 235 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 72 S. Ct. 863 (1952)). The president's plenary power over immigration was solidified in Garcia-Mir v. Meese when the Eleventh Circuit Court of Appeals deferred to the executive pronouncement (via the Attorney General) in an immigration affair. See id. at 268-270 (quoting Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986)).

n69 Gonzalez, 212 F.3d at 1349-51. The INS administrative decision or policy on unaccompanied young children was formed through pre-trial administrative procedures, not formal rulemaking, but the Eleventh Circuit found that it "is entitled to, at least, some deference . . . and that deference, when we take account of the implications of the policy for foreign affairs, becomes considerable." Id. at 1351.

n70 Id. According to the court, the INS policy of respecting the parents' wishes regarding a six-year-old child "comes within the range of reasonable choices." Id.

n71 See Parham v. J.R., 99 S. Ct. 2493, 2504-05 (1979) (upholding Georgia law permitting parents to commit their children to a mental hospital, thereby asserting that parents are the primary decision makers on behalf of their child. The Court stated, "Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."); see also Wisconsin v. Yoder, 92 S. Ct. 1526-42 (1972) (striking a Wisconsin state statute requiring high school attendance as unconstitutional when applied to Amish parents, thereby recognizing Amish parents' primary authority in decisions about their children's education); Prince v. Massachusetts, 64 S. Ct. 438, 441-42 (1944) (describing parental authority over children as a sacred, private interest, although limited by the state's power to act in the best interests of the child); Pierce v. Society of Sisters, 45 S. Ct. 571, 573 (1925) (invalidating Oregon mandatory school attendance law because it unreasonably interferes with the liberty of parents to raise their children, saying "the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); Meyer v. Nebraska, 43 S. Ct. 625, 626 (1923) (holding that Nebraska law regulating teaching of foreign languages infringes on parents' due process rights to "establish a home and bring up children . . . according to the dictates of their own consciences").

1087, 1093 n.22 (Mar. 1999) Codice civile [Italy C.c.] art. 320 (Italy); see also, s1626 Burgeliches Gesetzbuch BGB (F.R.G.) ("By virtue of the parental authority the father and the mother have . . . the right and the duty to take care of the person and property of the child . . . this includes the representation of the child."); Greek Civ. Code art. 1501 ("The father represents the child in any juridical act relating to [the child's] personal status or . . . patrimony."); accord art. 152 Allgemeines Burgeliches Gesetzbuch [Aus. ABGB] (Aus.); Codigo Civil [Spain C.C.] art. 154 (Spain) (Julio Romarach, Jr. trans., 1984); Codigo Civil [Arg. Cod. Civ.] art. 308 (Arg.); Code civil suisse [Switz. C.c.] art. 304 (Switz.); Minpo, art. 884 (Japan).


n75 United Nations: Convention on the Rights of the Child, 28 I.L.M. 1448, 1459-60 (1989) (Article 5 of the Convention on the Rights of the Child requires States Parties to "respect the responsibilities, rights and duties of parents," and article 9 ensures that "a child shall not be separated from his or her parents against their will."); see also, Hague Conference on Private International Law: Final Act, 19 I.L.M. 1501 (1980) (The entire goal of the Hague Convention is to facilitate the return of an abducted child to his or her biological parent.).

n76 28 I.L.M. 1448, 1459 (1989) (Article 9 of the Convention on the Rights of the Child explains that "competent authorities subject to judicial review may determine . . . that [separating the child from the parents] is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents.").

n77 The best interest of the child standard is almost impossible to define. See Wendy Anton Fitzgerald, Maturity, Difference, and Mystery: Children's Perspectives and the Law, 36 Ariz. L. Rev. 11 (Spring 1994). The standard is a "political construct" which was developed "in order to avoid disposing of children like any other marital asset." Id. at 53, 55. Determinations about a child's best interest are "inherently political," as the standard is "a vessel which judges and legislatures may fill with their own changing definitions." Id. at 56. According to Fitzgerald, the weightiest factor in making a best interest determination is the psychological health of the child. Id. Determinations are also affected by discrimination against women. Id. at 59. For an example of the "best interest" standard, contrast DeBoer v. DeBoer, 114 S. Ct. 1, 2 (1993) (refusing to overturn a decision by the Michigan Supreme Court to return an adopted child to her natural parents, implying that the advantages she experiences in her adopted home are not enough to overcome her "best interests"), with DeBoer, 114 S. Ct. at 11 (Blackmun, J. and O'Connor, J. dissenting) (lamenting the court's decision to return the child to her biological parents in violation of her "best interests"). The majority opinion in DeBoer stated, "Neither Iowa law, Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education." Id. at 2. See generally Palmore v. Sidoti, 104 S. Ct. 1879 (1984) (refusing to give effect to public racial
biases against child's biracial parents, even though acknowledging that the biases might impair the child's best interests); Santosky v. Kramer, 102 S. Ct. 1388, 1392 (1982) (summarizing the procedure for a judicial best interests determination in the state of New York).

n78 Jay Weaver, Elian Judges Challenge Legal Angles, The Miami Herald, May 12, 2000 at A1. During Eleventh Circuit panel's consideration of the case, Gregory Craig, an attorney for Juan Miguel, claimed "that within days of the boy being placed with his Miami relatives, they said that his mother died for him to live in freedom." Id.

n79 Id. Craig quoted one Miami relative as telling the Herald, "Heaven has brought him to freedom, we will not let him go back." Id.

n80 Id.

n81 Id.

n82 See Gonzalez, 212 F.3d at 1345, n.3.

n83 Id.

n84 See id. at 1345.

n85 Id. (Juan Miguel told the INS, "I'm very grateful that Elian received immediate medical assistance, but he should be returned to me and my family.")

n86 Id.

n87 Id.

n88 See Gonzalez, 212 F.3d at 1345, n.3.

n89 Id. at 1345, n.4. (To alleviate any coercion by the Cuban government, this meeting took place inside the house of a United Nations employee. To reduce the possibility of eavesdropping, Juan Miguel was also given the opportunity to write some of his responses.) Id.

n90 Id. at 1345.

n91 Id. at 1345-46.

n92 Id. at 1346.

n93 See id.

n94 See Gonzalez, 212 F.3d at 1346.

n95 See id.

n97 See id. at 1346-47.

n98 Id. at 1347.

n99 Gonzalez, 212 F.3d at 1348.

n100 See id. at 1348.

n101 Id.

n102 Id. at 1348-49.

n103 See id. at 1349.

n104 Id.


n106 See id.

n107 Id.

n108 See id. at 1349-50.

n109 See id. at 1350. "Our duty is to decide whether this policy might be a reasonable one in the light of the statutory scheme." Id.

n110 Id. at 1349-50.

n111 Gonzalez, 212 F.3d at 1350.

n112 Id. at 1351.

n113 See id. at 1352-53. The court remarked, "Considering the well-established principles of judicial deference to executive agencies, we cannot disturb the INS policy in this case just because it might be imperfect." Id. at 1353.

n114 See id. at 1351.

n115 See id. "Because six-year-old children must have some means of applying for asylum . . . and because the INS has decided that the children cannot apply personally, the next element of the INS policy--that a six-year-old child must be represented by some adult in applying for asylum--necessarily is reasonable." Id.

n116 See id. at 1352-53.

n117 See Gonzalez, 212 F.3d at 1351.

n118 Id. at 1352.

n119 See id.

n120 Id.

n121 Id. at 1353.
n122 See id.
n123 See Gonzalez, 212 F.3d at 1353.
n125 See id.
n126 See id. The court suggested that a "substantial conflict of interest" might arise when a child is ordered by his/her parent to leave the United States for a totalitarian state. Id.
n127 Id.
n128 See id.
n129 Gonzalez, 212 F.3d at 1353.
n130 Id. at 1353-54
n131 See id. at 1354.
n132 Id. This standard is set out in 5 U.S.C. § 706(2)(A) (2000).
n133 Id.
n134 See id. at 1353-54.
n135 See Gonzalez, 212 F.3d at 1353-54.
n136 See id. at 1353.
n137 See id.
n138 See Barry E. Carter & Phillip R. Trimble, International Law 472 (3d ed.1999). Under the Estrada Doctrine, states change the recognition status of other states only when a new state is formed and do not change recognition status when new governments assume power. See id. "The Estrada Doctrine embraces the principle of unfettered national sovereignty and rejects interference with the domestic affairs of one state by another through the granting or withholding of recognition." Id.
n139 See id. For example, "many states depart from the doctrine whenever they perceive a major political advantage in using the recognition instrument." Id.
n140 See id.
n141 See Lynch, supra note 50.
n142 See Gonzalez, 212 F.3d at 1344.
n144 See Gonzalez, 212 F.3d at 1353.
n145 See id. at 1353-54. The court would also defer to a decision that a parent living in a totalitarian state does not have "sufficient liberty to represent and to serve the true, best interests of his own child in the United States." Id.
n146 See id.
n147 Compare supra notes 18, and 22, with text accompanying supra notes 36, 63, and 64.
n148 See supra note 10 and accompanying text.
n149 See supra note 18.
n150 See supra note 8.
n151 The preamble to the Helms-Burton Act states that its purpose is "to seek international sanctions against the Castro government in Cuba, to plan for support of a transition government leading to a democratically elected government in Cuba, and for other purposes." Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996). Section 3(1) of the document lists several purposes of the Act, including "to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere." Id. at § 3(1).
n152 Some recent examples of UN opposition to the embargo include Press Release, United Nations GA/9654, As Assembly Reiterates Call for End to "Extraterritorial Measures," Cuba Announces $ 100 Billion Damage Suit Against United States (Nov. 19, 1999); Press Release, United Nations GA/9479, Assembly Urges States to Repeal or Invalidate Laws With Extraterritorial Effect on Sovereignty, Free Trade, Navigation of Other States (Oct. 14, 1998); Press Release, United Nations GA/9349, Assembly Again Seeks Repeal of Extraterritorial Measures Like United States Helms-Burton Act Against Cuba (Nov. 5, 1997); Press Release, United

n153 See Nick Anderson, Permanent Trade Status for China Clears Congress; Legislation: Senate Votes, 83 to 15, to Grant Normalized Relations with Beijing and End Lengthy Debate. The Measure Now Goes to Clinton, Who is Expected to Sign It, L.A. Times, Sept. 20, 2000, at A-1. This extension of permanent trade status may have been required by the fact of Chinese membership in the WTO. See Greg Mastel, Commentary: China's Trade Status is Not a Magic Bullet, L.A. Times, Oct. 2, 2000, at B-7.

n154 See Gonzalez, 212 F. 3d at 1344. In November 1999 Elian's mother left Cuba along with 12 other Cuban nationals. Id. Their small boat capsized and only Elian survived. Fishermen rescued him two days later. Id.

n155 See Borders (En)gendered, supra note 1, at 90405 (telling a story of the author's papi checking a form box indicating that he was "White" because he did not understand himself to be Latino); Indivisible Identities, supra note 3, at 20809 (telling a story of the author's Cuban-Chinese student who was shocked to discover some people considered her non-White).

n156 Andres Oppenheimer, Media Bias, Dismissive Labels Anger Cuban Exiles, Miami Herald, Apr. 6, 2000, at 6A; see also Rick Bragg, Cuban Boy Stays in U.S. for Now, a Court Decides, N.Y. Times, Apr. 20, 2000, at A1 (describing the backlash against the Cuban community after the Eleventh Circuit granted Elian a stay of deportation, including a plane which flew over Little Havana with a banner saying "Send Elian Home -The Taxpayers"); Rick Bragg, Judge Upholds Plan for Return of Boy to Cuba, N.Y. Times, Mar. 22, 2000, at A1 (explaining the anger at the Cuban community's activism which "many Miamians, including some Cuban-Americans, say damaged the sophisticated, cosmopolitan image to which Miami aspired").


n158 Cuban-Americans have been generally understood to be a "model minority." Building Bridges III, supra note 18. Many Latinas/os have not considered Cuban-Americans to be Latinas/os, perhaps because they are seen as more privileged. See Building Bridges I, supra note 1, at 411. Similarly, many Cuban-Americans do not consider themselves to be Hispanic. See Alice G. Abreu, Lessons From LatCrit: Insiders and Outsiders, All at the Same Time, 53 U. Miami L. Rev. 787, 797 (1999) (telling the author's understanding as a young woman that "being Cuban didn't count as being Hispanic --only Mexicans and Puerto Ricans count").

n159 See Rick Bragg, Court Upholds I.N.S.'s Rejection of Asylum Efforts for Cuban Boy, N.Y. Times, June 2, 2000, at A1. After the Eleventh Circuit panel ruled for the INS, David Abraham, a law professor at the University of Miami, said, "The case demonstrated that the overwhelming majority of Americans were not prepared to have distant relatives kidnap a child from his relatives as a way of continuing a 40-year-old struggle that means less and less to them everyday." Id. See also Nancy Gibbs, I Love My Child, Time, Apr. 17, 2000, at 24 (stating that the majority of Americans want to see Elian returned to his father in Cuba).

This was a matter of self-identification and included persons born in the United States.
The American news media dubbed 1999 as the year of the Latino based almost entirely on the runaway sales success and appeal of Latino singers to a mainstream pop music audience. While in 1998 the media spotlight, when directed at Latino/as, shone on a lone Chihuahua hawking tacos for corporate America, in 1999 Ricky Martin replaced a small dog as the media ambassador for Latino/as.

For years, White artists have dominated American pop music. With the notable exception of Black vocalists, non-White artists have rarely experienced sustained and substantial success in this market. Although Latino/a artists have made modest inroads into the pop music mainstream in the past, the current success of Latino/a singers is unprecedented for its sales figures, its domination of pop radio, the diversity of backgrounds of the Latino/a artists riding the same wave, and the degree of American media attention focused on this "phenomenon." In addition to the financial rewards enjoyed by artists (and their record companies) who succeed in the pop music market, the music industry, with its linkages to mass media and its public visibility, launches these artists into the mainstream of American culture and consciousness. For most Americans today, unlike just a few years ago, the dominant image of Latino/as is delivered and shaped by the pop music industry. For this reason, it is important to examine the current re/presentation of the Latino/a pop music (what I call LatPop) ambassadors. In what language do they speak to the American public? What images of Latino/a culture do they convey? What stereotypes do they further? Which do they dispel? In what ways are Latino/as, as a people, the beneficiaries of this unprecedented mainstream exposure? In what ways has Latino/a culture paid a price for this commercial success?

I. The Language of Commercial Success

With few exceptions, the only language for commercial success in American pop music has been English. Although songs recorded in languages other than English or those mixing English with another language (e.g., Spanish, known as Spanglish) are sometimes popular, the scarcity of these examples leads these songs to be viewed and characterized best as novelties.

Indeed, the current mainstream success of LatPop artists is achieved predominantly through English language recordings, as it generally has been for Latino/a artists in the past. For example, although Ricky Martin, Marc Anthony, and Enrique Iglesias had prior sales success with Spanish-language records marketed to Latino/a record buyers, their recent pop chart dominance resulted from single releases either entirely or predominantly in English, and from albums reflecting the same predilection toward the English language. Selena, who achieved posthumous pop success with English language recordings she had been preparing for release to American pop audiences, had enjoyed similar pre-crossover popularity among Latino/as for her Spanish language recordings. With no history of prior recordings in Spanish, Jennifer Lopez
and Christina Aguilera recorded their debut singles and albums predominantly in English. 

Santana, as a sui generis musical institution, stands alone for his history of success with both Latino/a and Anglo pop audiences for [*724] recordings in English, n20 Spanish, n21 and Spanglish n22 that have spanned several musical generations. The most successful mainstream artist recording solely in Spanish is the Buena Vista Social Club's musical project that is likely viewed by Anglo music buyers as a novelty. n23

This phenomenon of Latino/a singers achieving commercial success in English-Only reflects the unwillingness of the American public to accept Spanish as a legitimate language of mainstream communication. What is in some cases a fear of Spanish and in others an outright disdain for Spanish translates into the unmistakable message that American pop success requires the use of English. The termination of a Latino disc jockey from a popular Southern California radio station in the 1980s, later upheld by the Ninth Circuit, evidences these unwelcoming public attitudes toward the presence of Spanish in the mainstream. n24 Valentine Jurado claimed to have been fired because he refused to comply with the new station director's order to stop mixing Spanish into his radio broadcasts. n25 Although the station's former director had encouraged the use of some Spanish in order to attract Latino/a listeners, the station's policy changed when a consultant found that the bilingual format hurt ratings among its Anglo audience by "confusing" them about the station's programming. n26

Anglo audiences expressed more pointed objections when Linda Ronstadt toured in support of her Spanish language album Canciones de Mi Padre released in 1987. At a Massachusetts show, hecklers chanted [*725] "English, English." n27 At a New York concert attended by a Latino journalist, a disgruntled concertgoer "grumpily stomped down an aisle [toward the exit] and shouted to no one in particular, 'Remember the Alamo, Mex!"' n28 Perhaps because Linda Ronstadt began her career singing country, and then rock n' roll, and was not widely known to be a Latina, fans were surprised when she embraced her Mexican heritage and culture so prominently. Perhaps also, Ronstadt was viewed as swimming against the current of the mainstream ("crossing back" rather than over) toward Spanish as a form of reverse assimilation in what was and is today a swift assimilative current. n29

Clearly, then, the language of success (and acceptance) in the American pop music world is English. In the same vein, English is understood among Latino/as to be the language for financial success in America. n30 Indeed, as LatCrit scholars and others have said, the Spanish language poses no threat to the unofficial status of English as the dominant language in American discourse--fear of Spanish is not rational in theory or in fact. The popularity of LatPop artists lends strength to this argument. Not only have these artists learned English as a primary or as a second language, n31 they were successful in the mainstream only when [*726] they adopted English as their means of crossover communication. In this sense, the experience of the LatPop artists might help to dispel, or at least serve as ammunition against, the contention of the English-Only movement that Spanish-speakers have no incentive to learn English and are reluctant to do so unless forcefully silenced and coerced by government means. n32

In one respect, the popularity of LatPop artists who identify with the Spanish language either through their lyrics, their media interviews, their concerts, n33 their album liner notes, or otherwise, n34 may unleash a centrifugal (de-centralizing) force n35 in opposition to the centripetal forces of the English-Only movement. Increased public interest in Latino/a music and culture may lead to increasing interest in the acquisition of Spanish language fluency by Anglo native English speakers in the same manner that the LatPop music "explosion" has prompted interest among Anglos in salsa dancing and other slices of Latino/a culture. n36 Should this force emerge, the demonizing of Spanish by the centralizing forces of the English-Only movement could be offset and overcome. n37

II. The Culture and Acculturation of Crossover

A. Re/presenting Latino/a Identity

Rap artists often claim with a swagger in their recordings to "represent" geographic locations within the United States--as broad as East Coast or West Coast, and as narrow as cities (e.g., Compton) and boroughs (e.g., Brooklyn). Although not expressly purporting to "represent" [*727] anything of this sort in their recordings, n38 LatPop artists, through the media focus on their identity, surely represent the diversity of that identity. Latino/as, often linked by the Spanish language and by historical backgrounds of colonization and subordination, have diverse roots in Mexico, Cuba, Puerto Rico, and elsewhere. The primary artists of the LatPop explosion claim roots in Puerto Rico (Marc Anthony, Jennifer Lopez, and Ricky Martin), n39 Cuba (Buena Vista Social Club, along with Gloria Estefan and Jon Secada), Ecuador (Christina Aguilera), n40 Spain (Enrique Iglesias) and
Mexico (Carlos Santana). n41 With the exception of Ricky Martin and the Cuban members of the Buena Vista Social Club, they were born n42 or raised n43 in the mainland United States. Apart from Carlos Santana, n44 an artist whose introduction to the American music scene predates the birth of most of these LatPop artists, none were born or raised in Mexico or claim Mexican heritage. By contrast, Mexicans and Mexican Americans are by far the most populous of the groups that comprise Latino/as in the United States.

It is difficult to establish blame for this discrepancy on any particular animus the star-making music industry or the American public harbors toward Mexicans or Mexican Americans in relation to Latino/as from other backgrounds. The industry and public might respond that the numbers of those Latino/a artists who have managed to "cross-over" into the mainstream are too small to warrant such a conclusion. Yet, particularly in the entertainment industry, there may be something more "exotic" and sexy about a Caribbean-based commodification than one centered in Mexico or among Mexican Americans. Much of LatPop emanates from Miami (such as the Emilio Estefan produced acts of Ricky Martin and Colombian Shakira who emerged as a mainstream pop star in [*728] 2001). Miami is perhaps seen as a youthful and vibrant source of pop artists.

In addition to the possibility that Mexicans and Mexican Americans do not share this "exotic" mystique, their immigration history may position them as more of a national threat--one to be repelled rather than commodified. n45 The possibility of a hierarchy among Latino/as in the entertainment industry is also suggested by cinema's practice of casting Puerto Ricans in Mexican/Mexican American roles (such as Jennifer Lopez's portrayal of Selena and Benecio Del Toro's award-winning role as a Mexican police officer in Traffic). n46 Latino/as should be watchful for additional evidence of such a hierarchy in the recording industry and beyond.

Although there is little question that artists with roots in Puerto Rico, Cuba, or Mexico fall within the designation of Latino/Latina, the national origin of Enrique Iglesias in Spain n47 raises the issue of his identity association with Latino/as. Clearly, the media treats Enrique as a Latino for purposes of the LatPop explosion. What is the basis for his inclusion? Is it his Spanish language ability? His prior recordings in Spanish? The peppering of Spanglish in his English language recordings? His surname? The Latin "flavor" of his music? His association with the Miami Latino/a music scene? His sharing of some of the same stereotypes as other Latino/as, particularly the Latin lover image? His darker-than-Anglo skin? Reflecting the totality of these elements, is it an image of foreignness that compels his classification by the media as some type of Outsider? Was it the marketing design of his record company seeking to hitch Iglesias to the then rising star of Latino Ricky Martin? Looking at these potential grounds for racializing and identifying Enrique Iglesias as a Latino, one ground often identified by LatCrits as an identity linkage is missing--a shared history of colonialization and oppression. n48 Surely the media does not have this in mind when labeling [*729] Enrique as a Latino, thereby conjoining the colonizer and the colonized. n49 Assuming that the general public follows the media's lead in identifying those with pure Spanish roots as Latino/as, n50 is this contrary to the identity markers and politics of LatCrits? n51 At minimum, the LatCrit effort needs to reexamine identity in light of media presentation; moreover, while not surrendering ownership of identity, we must keep watch on the media's ongoing articulation of Latino/a identity in shaping our own understanding of Latino/a-ness. n52

B. Making Beautiful Music Together: Pan-Latino/a Identity

"If I see another article with a jalapeno pepper next to my name or a set of maracas or a sombrero or the words muy caliente . . . you know what I'm saying." n53

In publicizing the LatPop stars, the media and the record industry tend to lump and blur them together into one (pan)Latino/a identity. n54 From a LatCrit perspective, this approach has both advantages and downsides. The obvious downside is that this propensity of the media [*730] in commodifying and selling Latino/a (and other) culture(s) to the masses tends to ignore the subtleties and the not-so-subtleties of that culture. For example, Marc Anthony has complained that while he is often represented in the media as a "hot jalapeno," as a Puerto Rican he has never tasted one. n55 Ricky Martin is labeled a "hot tamale" although tamales are not part of the Puerto Rican cuisine. n56 Another concern is whether the push for a united marketing identity of LatPop stars will inhibit their cultural individuality in their recordings. For example, would it cause a record company to discourage a particular artist from highlighting her geographically-specific roots?

LatPop music holds the potential to help unite or to divide Latino/as. Consider the example set by rap/hip-hop music. As much as rap music has done to create Black visibility, it has nonetheless incited violence and dealt Blacks a setback by creating or mimicking Black identity-divides on geographic ("East" v. "West Coast"), gender/power ("Pimps" and "Hoes") and other
("Playas" and "Playa Haters") lines. Thus far, LatPop music has not resorted to identity-bashing. n57 Indeed, the media's tendency to blur cultural distinctions might help to establish new linkages and grounds for coalition among Latino/as—a shared pride and ownership of the LatPop stars and the Latino/a music stylings that weave through their music. n58 At minimum, these linkages might help to overcome the tired excuse of the entertainment industry for its contribution to the invisibility of Latino/as—the difficulty of marketing product to this diverse audience. For example, the industry points out that marketing to Cuban Americans in Miami is a different world from marketing to Mexican Americans in Los Angeles, n59 that among Latino/as there are varying degrees of fluency and comfort with the Spanish language, n60 and that the younger [*731] Latino/a generation may be more assimilated (thanks in part to this same industry) than older Latino/as. n61

C. Re/presenting Latino/a Culture

Anecdotally, I can report my sense of how the American public perceives the LatPop artists and their music. Generally, these artists are presented and received as bilingual, young, attractive ("eye candy"), light-skinned, middle to upper class, n62 and heterosexual. n63 Rather than [*732] focusing on their intellect, the music industry and the media emphasize their looks—the swivel of hips, the lure of cleavage, n64 the shaking of "bon-bons." n65

Listeners and the media will tend to describe LatPop music as exotic and foreign, as if it were an imported delicacy. Apart from an occasional punctuation of horns, and a passing reference to Spanish ("Bailemos" implores Enrique Iglesias), most critics would agree that the current iteration of Latin(o/a) "crossover" music is more American "pop" than Latin(o/a). n66 Moreover, the geographical imagery of LatPop generally is more local and American than "foreign." Consider Livin' La Vida Loca ("Woke up in New York City, In a funky cheap hotel") and Santana's description of the "Smooth" lady from "Spanish Harlem" or the lady ("Maria, Maria") who "fell in love in East L.A." n67 Presumably, then, the exotic and foreign "location" of LatPop music derives from the ethnicity of the artists or from their occasional use of Spanish. Record stores further the displacement of this music by stocking even English language recordings in international, Latin, or world music bins in the back of the [*733] store. n68 This foreignness is reinforced by media imagery proclaiming (warning?) that these LatPop artists have "crossed over" into the "mainstream," as if they were "illegal aliens" crossing a border (as mojados) into the United States. n69 This image of a physical border crossing is invoked when the press declares a Latin music "invasion," n70 using the same metaphor for war or enemies that is often used to describe undocumented immigration. n71 In fact, with the exception of the Cuban members of the Buena Vista Social Club, all the current mainstream LatPop artists are U.S. citizens. Regardless of their actual status, it will surprise no one in the LatCrit community that the public and media locate them geographically elsewhere. n72

At the same time, however, the LatPop artists convey images of assimilation. They sing mostly in English and they are bilingual. Ricky Martin, for example, speaks without an accent. Generally these artists are light-skinned and European in appearance. This is the dilemma well known to Latino/as, who often find themselves viewed and treated as foreigners despite their assimilation. n73 [*734]

Separate from the public perception of the LatPop artists, consider how these artists claim to represent themselves as Latino/as. Thus far, both lyrically n74 and visually, the Latino singers (or, more likely, their record companies) generally have exploited the stereotypical image of a Latin lover. Ricky Martin implores:

I wanna be your lover  
Your only Latin lover n75

Ricky manages to draw on the equally stereotypical view of Latinos as bandidos, n76 perhaps to add a hint of danger to his allure:

I'm a desperado  
Underneath your window n77

In his first two hit pop singles, Enrique Iglesias seduces his female victim with his infectious rhythm and voice, as well as his occasional use of Spanish to add something "exotic" to his pitch:

All I need is a Rhythm Divine  
Viva la musica, say you'll be mine n78

Bailamos, let the rhythm take you over  
Bailamos, te quiero, amor mio n80

Related to the Latin lover styling of most of the Latino artists, most Latina artists are marketed sexually through scantily clad images n81 and lyrics promoting sex:

When you put your hands on me  
I feel ready [*735]

And I lose my self-control n82
These sexually charged images conjure the stereotype of the fertility of Latinas. Indeed, media descriptions of the Latin pop music "explosion" n83 bring to mind the population "explosion" by which the media describes the Latino/a birthrate.

Latina artists generally paint a vividly subordinate role to men in suggesting that they live for their man. For example, Jennifer Lopez confesses:

I have spent all of my life
Waiting for tonight, oh
When you would be here in my arms n84

Christina Aguilera suggests that a woman needs a man to feel complete:

Hey there did ya happen to know
Wherever you go I'll follow . . .
You make me feel the way a woman is supposed to feel n85

Selena too conveyed her subordination to her man:
No doubt about it
I'll go where he goes n86 [*736]

Lyrics of the LatPop artists on occasion invoke the stereotype in which Latino/as spend their days and nights in fervent fiesta and frequent siesta. Ricky Martin in particular evokes this partying parody with his over the top celebration of the crazy life in Livin' La Vida Loca. n87 One of Selena's Spanish language hits manages to portray (her audience of) Mexicans and Mexican Americans as lazy, drunken, tortilla eaters:

If y'all come to dance . . . well, let's go enjoy ourselves
If y'all come to sleep, get out of here!
Because this song is not for any lazy one . . .
Look at Juan, he can't
Even move
Well his shoes weigh a lot
He must have mud on them
Look at Maria
She's moving from her chair
That's what always happens to you
If you eat a lot of tortillas
Look at Jose because he's only sitting
He drank a lot of beer and
Now he's walking sideways n88

[737] Despite the propagation of stereotypes in some LatPop, more subtle positive themes do emerge that are indeed reflective of Latino/a culture—the celebration of life and love, spiritual influences, and the importance of family. n89 Although sometimes at the expense of perpetuating the Latin lover stereotype, LatPop music by Latinos glorifies women and never suggests violence against them. n90 Moreover, in comparison to the reckless glorification of money (the "paper chase") and rampant misogyny ("Bitches ain't shit but hoes and tricks") n91 in much of rap music, the negative LatPop images are relatively mild.

D. Whose Vida is Loca?: LatPop Storytelling

"Indeed, the 'means of communication' have become as central to the structure of power/lessness in our postmodern, hyperlinked, globalized, mass media society as the 'means of production' were central to the class struggles of modernizing industrialism." n92

In discussing the representation of culture by LatPop artists, one overarching question must be asked: whose "stories" are being told? Are they the stories of the artists themselves? Latino/as in the United States? Mejicano/as? Puertorriqueno/as? Cubano/as? The American record buying public? The general public? The American music industry--its executives, writers, and producers? Thus far, the latter seems dominant. This is most evident in the recordings of Christina Aguilera, who did not write any of the songs on her debut album. None of her writers or producers appears to be Latino/a; few are female. n93 Indeed, the use of multiple writers outside the creative control of the LatPop artists sometimes [*738] leads to schizophrenic results. For example, on the topic of sexual self-restraint, Christina variously preaches self control ("My body's sayin' let's go, but my heart is sayin' no") n94 and abandon ("When you put your hands on me I feel ready And I lose my self-control"). n95 Before her murder, Selena had recorded five new English language songs for her "crossover" album, none of which she wrote, n96 although one was written by her Latino band member brother. Ricky Martin did not write any songs on his English debut, but many of his songwriters are Latino, including Jon Secada and Desmond Child of Cuban heritage, and many of his producers are Latino, including Gloria Estefan's husband Emilio. n97 Marc Anthony, Enrique Iglesias, Jennifer Lopez, n98 and Carlos Santana co-wrote most or several of their current songs. n99 Interestingly, the most authentic storytelling comes from the Buena Vista Social Club--these are not producer Ry Cooder's stories. n100
The orchestral role of the music industry also is apparent in the crush of hype that has become the LatPop explosion. It has been clearly documented that the music industry chose 1999 as the year of the Latino/a artist out of profit-minded motivations. n101 Not surprisingly, other American "integration events," such as the integration of Black athletes into professional baseball, were driven by similar corporate profit-seeking designs. n102 The "crossover" of Latino/a artists into the pop music mainstream is just the latest such event.

The LatPop explosion coincides with a time of relative economic prosperity in the United States, as well as a perceived labor shortage in some labor-driven industries such as agriculture. n103 Not surprisingly, the years 1999 and 2000 have seen a softening in anti-immigrant rhetoric as well as the uneasy embrace of Latino/as by Republican politicians in the 2000 Presidential campaign. The music industry's seizing of this inclusive moment is not unlike that of Hollywood during the "Good Neighbor" policy practiced in the 1940s and 50s. n104

The timing of LatPop success raises concerns for its longevity. Yet to be seen is whether Latino/a artists will remain vital or whether they will return to the American subculture should there be an extended economic downturn and should fingers again point at Latino/as, particularly immigrants, as responsible for our economic woes. In the wake of the terrorist attacks and recession in 2001, resurgent anti-Latino/a rhetoric challenges the recent gains. In order to avoid the cycle of what Dennis Greene described as a "periodic injection and presence" of Latino/as in the American cultural flow, n105 Latino/as must ensure continuity and visibility, as well as authenticity in their presentation, by acquiring ownership of the means of production/communication--the record companies and points of distribution.

III. What Does the LatPop Explosion Mean for Latino/as?

The dizzying commercial success of LatPop music in recent months can be intoxicating to those Latino/as in America starved for acceptance in their own country. Expressing this sentiment of being an Outsider for too long, one Latina in New Jersey proclaimed to a journalist "We're in! We're finally hot!" n106 This unbridled optimism reminds me of a segment from the cult comedy Animal House where the White fraternity brothers thought they had bonded with a fictional rhythm and blues band (known as Otis Day and the Knights) that played (think "Shout!") the wildest toga party on film. Walking into a Black roadhouse tavern with their reluctant dates in tow, one of the frat boys yells out to the band "Otis, My Man!," yet he is met with icy silence from Otis, the band, and the other patrons. n107 The benefits of supremacy are not readily relinquished nor are the wounds it causes easily forgotten.

Public attention directed at the LatPop music "conquest" belies the continuing struggle of Latino/a artists to "cross-over" to reach mainstream rock n' roll, n108 country, n109 and even soul radio and record buying n110 audiences. n110 Moreover, the current success of LatPop in reaching the mainstream exposes the relative absence of Latino/as (at least where portrayed positively) from the cultural mainstream of other media such as television, cinema, and literature. n111 Further, America at the start of the new millennium still is marked by the relative absence of Latino/as from most every important sector of American life from politics to business management to education. Realistically, does the LatPop explosion hold anything for overcoming these discrepancies and barriers? n112 In the same way, what has the media exposure of Black athletes, Black musicians, and Black film stars done for the average Black American? Are we any closer to a Black President just because a Black actor has portrayed one in the movies? n113 Will the doors that open for Ricky Martin close behind him? Will other Latino/as get through? Those with darker-skin? n114 Those who speak English with an accent? Those who speak only Spanish?

Surely there are long struggles left for Latino/as and for other facets of Latino/a culture in reaching the mainstream. n115 What awaits Latino/as in this mainstream--culturally, politically and otherwise? Is it worth striving for? Will it be financially fulfilling? Spiritually enriching? Will there be many other Latino/as there? What will they look like? Will any speak Spanish? Will there be tortillas and menudo to eat (or just "gorditas")? Will the Latino/a influences that reach the mainstream reshape and make the mainstream a different (better?) place to be? Are we there yet?

IV. LatPop Colonialization: The Ricky Martinization of Latin Music

"We are ascending culturally, but we are in a constant struggle against cultural erasure of the Ricky Martin form." n116

One of the emerging themes of this discussion of the LatPop music explosion is the sacrifice of culture in the pursuit of commercial success. n117 LatPop is assailed by many critics as watered down, homogenized, barely-recognizable-as-Latin-influenced music. n118 Indeed, some of n119 the recordings of
the current LatPop artists fall completely within other music genres such as dance/house and rhythm and blues. Almost all their singles are predominately in English. Often they depict a lifestyle ranging from middle to upper class despite the disproportionate poverty of Latino/as in the United States. Rather than serving as rebellious, confrontational, antisubordination praxis, as does some rap music, most LatPop songs are harmless odes to the opposite sex and a vibrant nightlife. Even the names of some of these LatPop stars (Enrique Martin Morales--Ricky Martin and Marco Antonio Muniz--Marc Anthony), as with their Latino/a artist predecessors, have been changed to de-emphasize their Latino/a heritage and apparently make them less threatening. This commodification of Latino/a culture by the recording industry works much like the process of assimilation. Thus, the journey to the mainstream of pop music success resembles the assimilative process by which the "American" culture is acquired and ethnicity pushed aside. This process, like the making of sausage and legislation, may best be left unwatched.

V. Accentuating the Positive: Cultural Resonance and the Unmaking of an Invisible People

"This is our Motown. Thirty years from now we will see Latinos having a long-lasting effect on the music and the country." In identifying positive attributes of the LatPop explosion, what stands out is the status of these Latino/as as role models, particularly for youth. Given the invisibility of Latino/as in America, these artists have also emerged as a source of cultural pride for Puerto Rican and other Latino/as. Ricky Martin, for example, is far removed from the negative West Side Story image of Puerto Ricans in his appearance and demeanor. When compared to the predominance of negative portrayals of Latino/as as criminals and domestics on television and film, the images of LatPop artists give some positive balance. Moreover, the English fluency of LatPop artists helps to dispel the impression that Latino/as are unwilling or unable to learn English.

What creates this positive link between LatPop artists and Latino/as as role models and otherwise? Is it the geographical roots of these artists in Puerto Rico, Mexico, Cuba, and elsewhere? More generally, is it the media's identification of these artists as Latino/as? Is it the Latin flavoring ("spicing") of their music? Is it their physical appearance and features? For me, it is their use of Spanish in their recordings. Indeed, I've wondered whether hearing Elton John sing in Spanish would resonate the same for me culturally as hearing Ricky Martin sing entirely in English.

VI. Accentuating the Positive: Moving Pop Music Beyond the Black-White Paradigm

"I had something to say to my Latinos that African American artists weren't. It's like James Brown sayin', 'I'm Black and I'm proud,' but I had to say it to my peoples: 'I'm Chicano and proud.'" The black-white paradigm, evident in race relations, is similarly apparent in American pop music. Anglo artists addressing the subject of race have tended to focus on the dichotomy of Black and White America. For example, the Stories' number one single from 1973, Brother Louie, tackled the subject of interracial dating as:

She was black as the night
Louie was whiter than white
There's a danger when you taste brown sugar
Louie fell in love overnight

Three Dog Night's number one single from 1972, Black and White, addressed racial unity and harmony as:

The world is black
The world is white
It turns by day and then by night
The child is black
The child is white
The whole world looks upon the sight
The beautiful sight

Covering the same territory is Paul McCartney's 1982 pairing with Stevie Wonder, Ebony and Ivory:

Ebony and Ivory
Live together in perfect harmony

When Anglo artists sought the publicity, novelty, and synergy of a musical pairing along racial lines (akin to "world music" artistry), they typically chose Black artists. Admittedly, given the isolated pop success of Latino/a artists, there have been few name worthy Latino/a artists available for such a venture. One of the delightful positive developments from the current LatPop success is the potential, already realized, for new pairings: Ricky Martin and Madonna, Gloria Estefan and 'N Sync, and Santana with everyone from Eric Clapton to Rob Thomas to Dave Matthews.
VII. Cultural Appropriation and Exotic Discoveries

"You'll have to excuse my cynicism. It's a result of having been discovered before and seeing little come of it." n143

From rock n' roll n144 to blue-eyed soul, n145 American pop music is well known for rewarding the appropriation of musical stylings. Through the years, Latino/a music has influenced many non-Latino/a artists. n146 Indeed, at least one artist has been so closely associated with Latino/a music beats and themes that the public might assume it to be Latino/a. n147 Not surprisingly, the current LatPop "explosion" has prompted many non-Latino/a artists to appropriate n148 the Latino/a music "feel" whether through use of Spanglish, n149 releasing English hits in Spanish language versions, n150 sampling of Latino/a music, n151 or reworkings of Latino/a music genres. n152 Of course, it may be equally valid to suggest that LatPop artists are appropriating American pop styles n153 when they record in English with American lyrical themes using the beats and instruments of American bubblegum pop, house, or mainstream R & B, n154 and on occasion combining in duets with American pop icons. n155 At the same time, since most of the LatPop stars are Americans who were raised here, what makes them any less entitled to record American pop music than Anglo artists? n156

The commercial success of the Buena Vista Social Club ("BVSC") project draws attention to one of the most controversial recipes in the debate over cultural appropriation--the "pairing" of an Anglo American artist with "foreign" musicians to produce "world music." n157 The BVSC represents an assemblage of Cuban musicians by Anglo guitarist and producer Ry Cooder who reprise the son and bolero music popular in Cuba's 1950s. Although the BVSC album caught fire among older (35 to 55) Anglo American record buyers, it is less known in the Latino/a community, where Latino/a pop, salsa, merengue, norteno, banda, Tejano, and other styles dominate sales. n158 Perhaps this is because the son style has been out of date in Cuba for decades. n159 Others suggest that the marketing approach for the BVSC project targets Anglos, and would backfire among Latino/as. That approach emphasizes the exotic and mysterious nature of the music, suggesting that producer Ry Cooder literally discovered a forgotten music from a strange faraway place. n160

There are other well known examples of world music pairings involving Anglos and Latino/as--notably the works of Paul Simon and David Byrne. n161 Paul Simon, however, is better known for his work with South African musicians and vocalists on the Grammywinning album Graceland that aptly frames the debate over cultural appropriation in these Anglo world music projects. The Graceland project was criticized for its representation of the power dominance of an Anglo artist over the subordinate Third World culture--despite paying the artists fees exceeding the industry standard, and in some cases sharing writing credit, n162 control and ownership of the Graceland project is clearly established as Simon's and as Anglo, American. n163 In addition to the dominant use of English in this and other Simon world music offerings, Graceland juxtaposes Third World rhythms with American lyrical images of New York and elsewhere: "I'm going to Graceland, Graceland, In Memphis Tennessee." n164 In contrast to Simon's Graceland, the BVSC album is recorded entirely in Spanish and is prompted lyrically by Cuban life and culture. Moreover, Ry Cooder as the producer did not use his name prominently on the project, instead adopting a Cuban-based title for the group. Finally, Cooder did not write the songs, although undoubtedly he had some influence in their selection.

The troubling appropriative aspect of the BVSC project is the apparent marketing strategy highlighting the discovery of exotic music, which reminds Latino/as of the centuries-old "discovery" by Columbus of America. Moreover, this theme is apparent in much of the media hoopla over LatPop. It is as if the record companies in their executive genius went out and discovered Latino/a music and, more broadly, the Latino/a culture. Surely, any Latino/a artist would tell them "I've been struggling to get you to listen to my music for years," and any Latino/a would tell them, "We've been here, invisible to you, all along."

Conclusion: "Hey! Macarena!"

The American media is famous for awarding its subjects their fifteen minutes of fame and moving on. Similarly, the American record buying public and the record industry have a well documented history of hype and then abandonment of artists (so-called one hit wonders) and genres. Latino/a artists have not been immune from the rollercoaster of the American media hoopla over LatPop. It is as if the record companies in their executive genius went out and discovered Latino/a music and, more broadly, the Latino/a culture. Surely, any Latino/a artist would tell them "I've been struggling to get you to listen to my music for years," and any Latino/a would tell them, "We've been here, invisible to you, all along."

Will the demographics of the expanding Latino/a population ensure LatPop's survival in the cultural mainstream? Does LatPop's acceptance signal success for music with more substantial Latino/a influences, and for other aspects of Latino/a culture? What will emerge from the mainstream's orgiastic feast
on the Latino/a culture--will the mainstream become a little more Latino/a from the experience? Will Latino/as preserve their sense of self, familial, and community worth and culture? When intoxicating rhythms fill the night air, feet take the dance floor, hips begin to sway, trumpets punctuate like rapid heartbeats, and Ricky Martin pays homage to La Vida Loca with lyrics laced with a touch of Spanish, these questions momentarily may lose their significance.

FOOTNOTE-1:

n1 Employing the same narrow reference as the mass media, this article refers to the United States as America and the term America does not encompass Central or South America.


This gender-specific reference to Latinos is intentional here, as with few exceptions the media when referring to both Latino and Latina pop singers uses the reference Latino or Hispanic. Elsewhere, I generally use the reference Latino/a.


n4 At the 42nd annual Grammy Award ceremony in 2000, Latino/as won in the major mainstream categories of Album of the Year (Santana's Supernatural), Record of the Year (Santana's Smooth), and New Artist (Christina Aguilera). In the Super Bowl held January 2000, Christina Aguilera and Enrique Iglesias performed together in the halftime festivities. See Superbowl news at http://www.infoplease.com/ipa/Ao872658.html (last visited Feb. 28, 2001); see also Christina Aguilera's home page http://www.Christina-a.com/awards.html. In the 2000 Republican National Convention, Ricky Martin's La Copa de Vida (The Cup of Life), was employed as the theme song, supposedly to proclaim racial inclusiveness. Later Ricky Martin performed the song at George Bush's inauguration.

n5 By "pop" music, I am referring to pop(ular) music, which is best defined by reference to commercial success than by critical appreciation. Deanna Campbell Robinson et al., Music at the Margins: Popular Music and Global Cultural Diversity 10 (1991) (defining popular music).

n6 In addition to the major success of Christina Aguilera, Marc Anthony, Enrique Iglesias, Jennifer Lopez, Ricky Martin, and Santana, those Latino/a artists charting minor pop singles or albums in 1999 and 2000 include Elvis Crespo (Puerto Rican), Cuban Link, Gloria Estefan, Julio Iglesias Jr., Los Kumbia Kings and A.B. Quintanilla III, Mana, Nu Flavor, the Chris Perez Band, Jon Secada, Son by Four, and Angela Via. In late 2001, Shakira (Colombian mother, Lebanese father) scored a platinum album with her English language recording Laundry Service. Puerto Rican rapper Fat Joe also enjoyed mainstream success in late 2001, as did the Latino Christian rock group P.O.D.

n7 Billboard's listing of the top pop singles artists (based on sales and airplay) from 1955 to 1995 includes seven Black artists in the top 20 (Stevie Wonder, Michael Jackson, Aretha Franklin, the Supremes,
Marvin Gaye, the Temptations, and Prince) and eleven Black artists in the top 30 (adding James Brown, Janet Jackson, Fats Domino, and Whitney Houston). Joel Whitburn, The Billboard Book of Top 40 Hits 805 (6th ed. 1996). There are no Latino/a, Native American, or Asian American artists in this top 30. Id.

n8 As reflected in Billboard's statistics, of the Top 100 best-selling pop singles artists from 1955 to 1995, the only Latino/as are Mariah Carey (#31, she is of Irish and Black/Venezuelan parentage and is not identified by the media as Latina); Linda Ronstadt (#66), Gloria Estefan/Miami Sound Machine (#83), and Herb Alpert/Tijuana Brass (#93). Id. at 805806. Few Asian or Native American artists have successfully reached the American pop charts. Asian artists include Yoko Ono (who charted with her husband John Lennon), the disco duo Pink Lady, and Kyu Sakamoto (only charting song went to number one, Sukiyaki). Id.; see also Peter Kafka, Hot CoCo, Forbes, Mar. 20, 2000, at 206 (describing efforts of Sony Music to break Asian pop vocalist CoCo Lee into the American market). In early 2000, Don Ho's daughter Hoku found crossover chart success. Redbone was a Native American "swamp rock" group popular in the early 1970s. But see George Lipsitz, Dangerous Crossroads: Popular Music, Postmodernism and the Poetics of Place, 65-66 (1994) (documenting how the core of this band, two Mexican Americans, came to represent Native Americans). Other charting Native American artists include such little known acts as Link Wray and R.B. Greaves.

n9 In the early 1900s, Latin musicians sparked a tango craze, led by Spaniard Xavier Cugat. Later came the rumba and mambo styles, the latter popularized among Anglo audiences most successfully by Perez Prado and the former best represented again by Cugat. See generally John Storm Roberts, The Latin Tinge: The Impact of Latin American Music on the United States (2d ed. 1999) (detailing this rich musical history with great detail and precision, enabling me to focus my attention on more recent crossover artists). Latino artists reaching the top 40 pop singles chart during the rock music era (1955 forward) with instrumental hits include Herb Alpert & The Tijuana Brass, Ray Barretto, Deodato (Brazilian), Stan Getz and Astrud Gilberto, Los Indios Tabajaras (Brazilian Indians), Chuck Mangione, Perez Prado (Cuban band leader), and Mongo Santamaria (Cuban born). Chicano rock artists of the 1960s and 70s charting on Billboard's top 40 pop singles chart include Cannibal and the Headhunters, El Chicano, Malo, ? (Question Mark) and the Mysterians (featuring a Mexican American lead singer and charting with 96 Tears), Santana, and Tierra (charting 1980). Latino/a dance/house artists charting in the 1980s and early 1990s include Paula Abdul (Brazilian and French Canadian), Corina, Gloria Estefan and the Miami Sound Machine, Expose, Jellybean (John Benitez), Linear, Lisa Lisa and Cult Jam, Denise Lopez, Sa-Fire, and Sheila E. Latino disco artists in the 1970s reaching the Billboard top 40 pop singles chart include Disco Tex and the Sex-o-lettes (lead vocalist was a Mexican American); Foxy (four of five members were Cuban); Patrick Hernandez (father from Spain), Santa Esmeralda (Spanish disco group), and Silvetti (from Argentina). Latino rap artists charting on Billboard's top 40 pop singles chart in the 1990s include AZ (Anthony Cruz), Big Pun (from Puerto Rico), Cypress Hill (featuring a Mexican/Cuban and Afro-Cuban rappers), Gerardo ("Rico Suave" fame) from Ecuador, Lighter Shade of Brown (Mexican American rappers), Mellow Man Ace (from Cuba), Noreaga (Victor Santiago), and N2Deep (featuring a Mexican American rapper). Billboard Music's home page at http://www.billboard.com (includes chart reviews for the previous 10 years) Other Latino/a artists charting Top 40 singles in the rock music era include Morris Albert (Brazilian), Angelica, Joan Baez, the Blackout Allstars (including Tito Puente, Sheila E., and Ray Barretto), Vikki Carr (Florence Martinez Cardona), Cheech & Chong, Desmond Child (Cuban mother), Dawn (featuring Tony Orlando), Jose Feliciano, Freddy Fender (Baldemar Huerta), Eydie Gorme, Julio Iglesias, Trini
Lopez, Los Bravos (Spain), Los Del Rio (of Macarena fame), Los Lobos, Martika (Cuban born), Sergio Mendes & Brasil '66, Mocedades (Spain), Chris Montez, Michael Morales, the Premiers, Rene & Rene (Mexican American duo), Linda Ronstadt, Sam the Sham and the Pharaohs, Santo & Johnny, Seal (Nigerian and Brazilian), Jon Secada (Cuban born as Juan Secada), Selena, Sunny & The Sunglows, the Triplets, Usher (Panamanian), and Ritchie Valens. Popular vocal groups with one or more Latino/a members include the Backstreet Boys (Puerto Rican/Irish member), Color Me Badd, the Cover Girls, 4 P.M. (For Positive Music), the 1950s vocal group Frankie Lymon and the Teenagers (two Puerto Rican vocalists), and O-Town. The late Jerry Garcia, of Spanish heritage, was the most prominent member of the Grateful Dead. Latino artists charting on Billboard's top 40 album chart during the rock music era and not listed above include Laurindo Almeida (Brazilian), Eddie Cano, Billy Cobham (Panama born), Placido Domingo (Spain), Mandrill, and Edmundo Ros (Venezuelan born bandleader). My uncle, David Troncoso, played bass with Eddie Cano from 1965 to 1968, as well as other prominent Anglo and Latino artists such as Donovon, Willie Bobo, and Peter Nero (1970-1973). Another uncle, Fernando Troncoso, also played bass with several notables such as Martin Denny; the late Tito Puente once sat in with my uncle's band at the club Panchitos.

Many of the above Latino/a artists were so-called one-hit wonders and few are recognizable to the average Anglo American. Yet, overall, these artists and others not achieving such mainstream chart success have made a substantial impact on American pop music. See generally Juan Gonzalez, History of Empire: A Harvest of Latinos in America 220 (2000) (“It is hard to overstate the immense influence Latin American music has had--from the mid-nineteenth century to the present--on the various forms of popular music in the United States, whether among whites or among blacks.”).

n10 See text infra accompanying notes 39-51.

n11 See generally Cobo, supra note 3, at 1M (suggesting that while the Latin pop music "craze" hardly matches the intensity of the so-called British Invasion of the 1960s, it is nonetheless extraordinary considering the prior invisibility of Latino/a artists on the charts).

n12 Pedro A. Malavet, Literature and the Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production: The Confessions of an Accidental Crit, 33 U.C. Davis L. Rev. 1293, 1303 (2000) (opining that music has a much wider impact than literature in popular culture because of its accessibility); Elizabeth Llorente, Suddenly, It Seems, Latino Culture is Everywhere, N. N. J. Rec., Oct. 31, 1999, at A1 (“Food and music are the best breakthrough channels through which Latinos can connect with the mainstream. They're nonthreatening approaches to making contact with the general community and finding acceptance,” remarks of director of Hispanic Information Center in New Jersey).


n14 Deborah Pacini Hernandez, A Tale of Two Cities: A Comparative Analysis of Los Angeles Chicano and Nuyorican Engagement with Rock and Roll, 11 J. Center for P.R. Studies 71, 72 (2000) (observing that popular music, while diverse in origin, content, and style, has always been English-only). Because it often employs Black English lyrics that are not recognizable to many Anglos, rap music might be viewed as one exception. Nevertheless, rap music has grown to a billion-dollar industry. Ironically, although performing in the King's English, many rock music artists obfuscate their lyrics through screams, screeches, and wails. Timothy Finn, Rock en Espanol Rolls Right Along, Austin High-Tech News, Feb. 23, 1999 (reporting Latin music
Another exception of sorts is instrumental music that speaks to listeners in an international language understood universally. In the early 1900s through the 1950s, tango, rumba, and mambo band leaders were wildly popular in part because of the absence of language barriers with this largely instrumental music. Roberts, supra note 9. In the 1960s, artists such as Herb Alpert & The Tijuana Brass scored several Latin-influenced instrumental hits, and many Latino/a artists have found popularity in the jazz genre with instrumental performances. E.g., Gato Barbieri, Chick Corea, Chuck Mangione, and Cal Tjader. Id. at 169, 176, 183.

n15 Those few non-English singles to reach number one on the Billboard pop singles chart during the rock era include La Bamba (Los Lobos), Eres Tu (Touch the Wind) (Mocedades), Nel Blu Dipinto Di Blu (Volare) (Domenico Modugno), Sukiyaki (Kyu Sakamoto), and Dominique (Singing Nun). Non-English language chart hits tend to fall into two categories: (1) so-called one hit wonders that include Eres Tu (Touch the Wind) by Mocedades (from Spain) and (2) charting hits by artists whose other hits were recorded in English, such as Ritchie Valens's La Bamba and Santana that charted with the Spanish language song Oye Como Va. Similarly, songs that prominently mix English with Spanish or other languages often end up as the only charting hit for the artist: such as Mellow Man Ace's certified gold Spanglish rap single Mentirosa in 1990, Malo's 1972 hit Suavecito, and Los Del Rio's Spanglish version of Macarena. See generally Whitburn, supra note 7.

n16 Paula Span, Switch to English and Hold the Salsa, Portland Oregonian, Oct. 9, 1999, at C7 (reporting remarks of Billboard's Latin Notas column writer, John Lannert, that "This is not a country that's ever going to embrace hit singles that aren't in English. . . . The music can have Latin elements, but all these artists [e.g., Martin] are making their mark with English-language recordings.").

n17 A good example is the 1960s Bossa Nova group Sergio Mendes and Brasil '66. All of their top 40 pop hits were English recordings (The Look of Love, The Fool on the Hill, and Scarborough Fair) although much of their album material was recorded in Portuguese. Scoring a string of Latin-tinged instrumental successes with his Tijuana Brass, Herb Alpert reached number one with his only vocal recording, the English language This Guy's in Love With You. Linda Ronstadt's twenty charting solo hits were all in English (e.g., Blue Bayou, When Will I Be Loved). Another prominent example is Gloria Estefan/Miami Sound Machine—although she has made several recordings in Spanish, all her top 40 hit singles are in English, launched by the Latin-flavored Conga. Whitburn, supra note 7, at 805.

n18 Ricky Martin spices his English hits with a pinch of Spanish—"She's livin' la vida loca" (Livin' La Vida Loca) and "Hola amiga" (Shake Your Bon-Bon). Ricky Martin, Livin' La Vida Loca, on Ricky Martin (Sony/Columbia 1999); Ricky Martin, Shake Your Bon Bon, on Ricky Martin (Sony/Columbia 1999). Enrique Iglesias follows the same formula—"Bailamos, let the rhythm take you over" (Bailamos) and "Viva la musica, say you'll be mine" (Rhythm Divine). See Enrique Iglesias's home page at http://www.enriqueiglesias.com/English/enriqueB.html (last visited April 10, 2001).


n20 Santana's charting singles in English have included Evil Ways and Black Magic Woman. Whitburn, supra note 7; Santana's home page at http://www.santana.com/music/search.asp; Santana, Evil Ways, on Best of Santana
(Columbia/Legacy 1998); Santana, Black Magic Woman, on Best of Santana (Columbia/Legacy 1998).

n21 Oye Como Va, written by the late Tito Puente. Whitburn, supra note 7; Santana, Oye Como Va, on Best of Santana (Columbia/Legacy 1998).

n22 No One to Depend On ("I ain't got nobody that I can depend on . . . no tengo nadie"). Santana, No One to Depend On, on Best of Santana (Columbia/Legacy 1998).


n24 Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987).

n25 Jurado, 813 F.2d at 1408.

n26 Id. at 1408, 1411 (upholding summary judgment against radio DJ who failed to produce sufficient evidence that English-Only policy was racially motivated or that he was discharged on the basis of discriminatory employment criteria). See generally Bill Piatt, Linguistic Diversity on the Airwaves: Spanish-Language Broadcasting and the FCC, 1 La Raza L.J. 101 (1984) (decrying the lack of federal guidelines as to what extent the Latino/a community has a right to Spanish-language broadcast stations); see also Steven W. Bender, Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience, 2 Harv. Latino L. Rev. 145, 155 (1997) (detailing efforts of the EnglishOnly movement to limit the number of Spanish-language radio stations in Texas). French language law extends to mass media and requires use of French language on all radio and television programs. See Leila S. Wexler, Official English, Nationalism and Linguistic Terror: A French Lesson, 71 Wash. L. Rev. 285, 374 (1996).


n28 Id. (stating that many Americans are uncomfortable hearing Spanish in mainstream settings such as the Ronstadt concert). See also Chris Macias, The Beat Goes On: The Year's Hottest Sound is Latin, But There's A History Behind the Craze, Sacramento Bee, Aug. 15, 1999, at EN18 (discussing how a Latino rock band touring with the Anglo alternative rock group Offspring was booed and pelted with trash by audiences that didn't appreciate cumbia rhythms and Spanish lyrics). Anglo rocker Ted Nugent sparked Latino/a protests in 2000 when he attacked Mexican immigrants during his concerts in Texas by declaring on stage that "If you're not gonna speak English, get the fuck out of America." Mark Davis, Nugent Makes Noise, and LULAC Makes More, Fort Worth Star-Telegram, Apr. 19, 2000, at 13.


Over the years, Latino/a artists have frequently been the object of ridicule in the media and elsewhere. For example, shortly after Selena's murder, Howard Stern declared on his radio show that "Alvin and the Chipmunks have more soul . . . Spanish [note that Selena and most of her fans were Mexican American] people have the worst taste in music. They have no depth." Shock Jock Apologizes: Stern Says He Meant No Harm In Making Fun of Slain Singer, Grand Forks Herald, Apr. 7, 1995, at C4. Ricky Martin has been parodied on Saturday Night Live and several Internet websites ridicule Christina Aguilera.

n30 Steven W. Bender, Our Laws Should Encourage, Not Bar, Multilingualism, The Register-Guard, Apr. 4, 1996, at 13A.

n31 Even Christina Aguilera, the former Mouseketeer whose portrayal in the media often belies her Latina heritage, grew up in a household where her parents spoke Spanish. Alisa Valdes-Rodriguez,
Diminutive Girl With a Great Big Voice, Beacon Journal, Aug. 18, 1999, at B12. Christina's second album released in September 2000 was recorded entirely in Spanish; Christina received lessons to improve her Spanish fluency while recording the album. Selena also learned English as her primary language; the motion picture Selena details similar Spanish language coaching of Selena by her father.

n32 See generally Bender, supra note 26, at 159-161 (discussing rationales of the English language movement).

n33 Professor Pedro Malavet has pointed out to me that Marc Anthony's HBO cable concert special was authentically Puerto Rican in character, with many songs in Spanish.

n34 For example, the names of artists such as Enrique Iglesias are Spanish surnames. See discussion infra note 123 of the forces in the music and entertainment industries that compel Latino/a artists to Anglo-cize their Spanish names for mainstream acceptance.


n36 See generally Nancy Ehrenreich, Confessions of a White Salsa Dancer: Issues of Appropriation, Appreciation, and Identity in the "Latin Music Craze," 78 U. Denv. L. Rev. 795 (2001). Some participants at the LatCrit conference suggested that Anglos are inclined to liven their generally bland mix of culture by exposure to (what they perceive as) exotic, "spicy" influences, such as salsa dancing, the Spanish language, and Mexican and other Latino/a food.

n37 Cf. Angel R. Oquendo, Re-Imagining the Latino/a Race, 12 Harv. Blackletter L.J. 93, 126 (1995) (suggesting that the spilling over of Spanish into non-Latino/a communities in the United States might make U.S. society less hegemonic and more tolerant).

n38 An exception was the late rapper Big Pun (Christopher Rios) who is credited with repopularizing the term of reference to a Puerto Rican as a boricua. Big Pun Dead at 28, Hispanic, Apr. 2000, at 12. Ironically, Latino/as may have more substantial geographical bases for division than African Americans, given the dominant Latino/a population on the West Coast as Mexican American and the East Coast as Puerto Rican and Cuban American.

n39 The late Puerto Rican rapper Big Pun was one of the top-selling American rap artists. ABC News at abcnews.go.com/sections/us/dailynews/big_pun000208.html (record sold platinum). His mentor, Puerto Rican rapper Fat Joe, found commercial success in late 2001.


n41 Carlos Santana was born in the remote Mexican town of Autlan de Navarro. See Chris Heath, Carlos Santana, Rolling Stone, Mar. 16, 2000, at 38.

n42 Aguilera, Anthony, and Lopez were born in the mainland United States. See generally, www.rollingstone.com/artists/bio (website contains biographies of most artists).

n43 Estefan, Iglesias, and Secada came to Miami as children; Santana as a teen to California. Id.

n44 The late Selena was also of Mexican heritage; her brother and bandmate A.B Quintanilla had a minor pop chart hit in 2000 with his new group the Kumbia Kings. Kumbia King's website at http://www.kumbiakings.com.

n45 By contrast to the preferences of mainstream record buyers, regional Mexican music (e.g., Tejano, norteno) comprises 51 percent of the American Latin music market. James Sullivan, Myriad Sounds of Latin Music, S.F. Chron. Sept. 16, 2001, at datebook 59.
n46 Selena (Warner Studios 1997); Traffic (Usa Films 2001).

n47 Enrique was born in Spain; his famous father Julio is himself the son of a wealthy Madrid family. Enrique's mother is Filipina. Elina & Leah Furman, Enrique Iglesias (2000) p. 2-3, 16. Enrique came to Miami to live with his father at age nine. Id. at 35.

n48 See generally Oquendo, supra note 37, at 93-94 (suggesting that what really unites Latino/as is their shared history of oppression and common language). When in high school, I fell victim to the tendency among some Latino/as to emphasize their Spanish roots. In contrast to my grandmother's more indigenous history in Mexico, my grandfather's roots extend beyond Mexico to the Dominican Republic and to Spain. As a young student schooled in the romanticism of Spanish conquest and sailing the high seas, being from Spain sounded noble and adventurous. Based on my perception of Spain as ranking higher than Mexico in the pecking order of identity so seemingly important at that age, I would respond proudly when asked about origins that "I'm from Spain." Being half German and Irish, on my father's side, I might have responded that I was German, which coincides with my surname. Most of my peers, however, knew my widowed mother's last name (then Irene Acevedo) and her brother's name (Jose Troncoso) and his occupation as a Spanish instructor, and would not have bought this story. See generally Francisco Valdes, Race, Ethnicity, and Hispanismo In a Triangular Perspective: The "Essential Latina/o" and LatCrit Theory, 48 UCLA L. Rev. 305, 322-23 (2000) (suggesting an identity hierarchy that prompts some Latino/as to position themselves as European and White by links to Spain).

n49 Are the numbers of Spaniards in the United States too small to warrant serious discussion of this issue, as one LatCrit suggested to me? Does size matter for purposes of constructing identity? It might not. For example, if we fail to include Spaniards within our concept of Latino/a-ism, that may carry the significant conclusion that we are identifying Latino/as primarily on the basis of some shared history that does not encompass Spaniards.

n50 As noted previously, however, although Enrique's father is Spanish, his mother is Filipina. See Furman, supra note 47, at 16. One of the biggest selling new artists of 2001, Nelly Furtado (Portuguese-Canadian), raises similar issues in constructing Latino/a identity.

n51 LatCrits have looked to shared histories and even to politics in constructing the Latino/a race, and less to physical appearance and language. Identity constructions of Latino/as based on physical appearance or language are problematic given the variety of indigenous languages spoken by some Latino/as, and the monolingual English status of many later-generation Latino/as in the United States. Moreover, LatPop artists such as Christina Aguilera, with her blonde hair, blue eyes and light skin, point out the difficulties in constructing a Latino/a identity based on appearance.

n52 I am somewhat hesitant to spend too much time discussing identity-inclusion, having viewed that as somewhat like rearranging deck chairs on a Titanic of race relations. Cf. Berta Esperanza Hernandez-Truyol, Building Bridges--Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement, 25 Colum. Hum. Rts. L. Rev. 369, 411 (1994) ("Significantly, the majority does not care one bit if you are Cuban, first wave or not, or Mexican or Puerto Rican or anything else. The funny name, the accent, the different culture, and the brown skin are enough--you are an "outsider.").


n54 The subject of pan-Latino/a ethnicity was addressed at LatCrit I. See 2 Harv. Latino L. Rev. 175 (1997).


n56 See Alisa Valdes-Rodriguez, Crossover into Ignorance, Balt. Sun, June
n57 For example, Santana's Maria Maria fuses West and East Coast identities by its references to a bi-coastal Latina who grew up in "Spanish Harlem" but "fell in love in East L.A." Carlos Santana, Maria Maria, on Supernatural (Arista 1999).

n58 In order to retain the Latino/a following of LatPop artists such as Ricky Martin and Marc Anthony, their English language debuts included Spanish translations of some of the songs slated for release as singles. See Larry Flick, Latino Singer Finds Market for English, Ariz. Rep., Apr. 21, 1999, at D1 (reporting that in order to retain his Latino/a following Martin planned to reaffirm his ties to that community in promoting his album). So as not to alarm Anglo recordbuyers, these Spanish translations tend to be placed at the end of the disc, locating Spanish at the back of the bus in Anglo culture.


n60 See Howard LaFranchi, Will Bilingual Trend Make Us 'Habla Espanol,'? Christian Sci. Monitor, June 30, 1999, at 1 (discussing that about half of Latino/as in the U.S. are bilingual, one quarter are monolingual in Spanish, and one quarter are monolingual in English).

n61 Cf. Kevin R. Johnson, Immigration and Latino Identity, 19 Chicano-Latino L. Rev. 197, 203 (1998) (noting the language and cultural differences among young Mexican immigrants and young non-immigrant Mexican Americans in the same city); see also Deborah Pacini Hernandez, Ricky Martin and the Perils of Pop Authenticity, Newsday, Sept. 12, 1999, at B6 (suggesting that Ricky Martin and LatPop speak to millions of young, urban Latino/as who move freely and comfortably between two cultural idioms and that previously the media assumed this group thronged only to Spanish-language media and culture).

n62 Images of the "good life" are relatively common in LatPop lyrics. Enrique Iglesias evokes the theme of a Visa commercial (present everywhere one wants to be) in his emphatic travelogue imagery:

From the coast of Ipanema
To the island of Capri
All the way to Kuala Lumpur
I will follow you wherever you may be

Enrique Iglesias, Rhythm Divine, on Enrique (Interscope Records 1999).

Ricky Martin expresses his infatuation in living the crazy and no doubt expensive life with a lady who "makes you order French champagne." Ricky Martin, Livin' La Vida Loca, on Ricky Martin (Sony/Columbia 1999). Indeed, the only images of poverty in LatPop are those that grace the lyrics of Selena and Santana. Santana's lyrical imagery of world politics reminds one:

See as the rich is getting richer
The poor are getting poorer

Carlos Santana, Maria Maria, on Supernatural (Arista 1999).

Money will make people deal like they don't have to feel
But now, it ain't real, it ain't real

Carlos Santana, Do You Like the Way, on Supernatural (Arista 1999).

Selena sang:

Although I'm poor
All of this that I give to you
Is worth more than money

Because it is truly love (English translation from liner notes)

Selena, Amor Prohibido, on Amor Prohibido (EMI Latin 1994).

Rap music by Black artists often paradoxically glorifies the lifestyle of "champagne wishes and caviar dreams." E.g., Warren G, I Want it All, on I Want it All (Restless 1999) ("I want it all, money,
fast cars, diamond rings, gold chains and champagne, shit, every damn thing.

n63 Both Latino and Latina artists depict and reinforce their heterosexuality in their music. Although Ricky Martin is dogged by the media about his sexuality, his (songwriters') lyrics are heterosexual in orientation:

She's my lover, she's my friend . . .
She's all, she's all I ever had
Ricky Martin, She's All I Ever Had, on Ricky Martin (Sony/Columbia Records 1999).

Marc Anthony admits:

Girl I'm exactly where I want to be
The only thing's I need you here with me
Marc Anthony, I Need To Know, on Marc Anthony (Columbia 1999).

Enrique Iglesias suggests:

You're the kinda girl I dream about
Electric eyes and a big mouth
Enrique Iglesias, Oyeme, on Enrique (Interscope Records 1999).

Christina Aguilera declares that:

A girl needs somebody sensitive but tough
Somebody there when the goin' gets rough
Every night he'll be giving his love
To just one girl
Christina Aguilera, What a Girl Wants, on Christina Aguilera (RCA Records 1999).

Jennifer Lopez sings:

I wanna be where he wants me to be . . .
When he wants me

Although many Anglo entertainers have come "out" and not suffered significant declines in their commercial success, homophobia in the Latino/a community would make it particularly difficult and risky for a LatPop artist to do so.

n64 Jennifer Lopez's now famous Versace dress worn at the 2000 Grammy Awards ceremony is known as The Dress. See Transparency Abounds, Hispanic, Apr. 2000, at 20.

n65 Ricky Martin's Shake Your Bon-Bon was his third top 40 pop single. See Valdes-Rodriguez, supra note 56, at 1E (noticing the similarity of media focus on LatPop artist bodies to the attitude of European settlers toward indigenous people seen as wild, sexual and in need of taming).

n66 See discussion infra Part IV.

n67 See Chris Hawley, Latin Stars Draw Criticism at Home, Phila. Inquirer, July 19, 1999, at E5 (revealing that the title of Jennifer Lopez's album On the 6 refers to the train that she used to ride from the Bronx to Manhattan to take singing and dancing lessons).

n68 Thigpen, supra note 2, at 80 (previewing the English language debut of Marc Anthony and reporting Anthony's lament that when he asks for his Spanish language albums in Times Square record stores, they direct him to the international section in the back of the store: "I recorded it on 47th Street! How can you get more local than that?"); see also Hernandez, supra note 61, at B6 (disclosing that the music industry promotes Spanish language recordings through their international divisions even where the music is by, for, and about those in the United States). This displacement carries over to Latino/a nonfiction in American bookstores. See Juan F. Perea, Los Olvidados: On the Making of Invisible People, 70 N.Y.U. L. Rev. 965, 970-971 (1995) (describing the scattered location in bookstores of Latino/a nonfiction; often placed in the Latin American Studies section which symbolically displaces Latino/as outside U.S. boundaries).

n69 Shuster & Strauss, supra note 53, at L3 (quoting Marc Anthony as saying, "I don't know what we're crossing over from or to. We've been here all along"). Some have explained the label of crossover as referring to those artists who previously recorded in Spanish and appealed only to Spanish-speaking fans. J.D. Considine, Latin Pop is Spicing Up American Charts, St. Petersburg Times, Oct. 22, 1999, at 24. However, this does not explain media's use
of the crossover tag for artists such as Jennifer Lopez and Christina Aguilera who do not have such history.


n71 E.g., Timothy Christenfeld, Wretched Refuse Is Just the Start, N.Y. Times, Mar. 10, 1996, § 4, at 4. (detailing metaphors for immigration including those of water and military references). The media's reference to the LatPop stars as conquering American radio and recordbuyers bolsters this image of foreignness, and ironically seems to portray conquest in a favorable light. E.g., Cobo, supra note 3, at E1. Cf. Furman, supra note 47, at 129 (describing the theme for Enrique's 1999 concert tour as "Coming to America" although he had lived in Miami since age nine).

n72 See Valdes-Rodriguez, supra note 56, at 1E (suggesting that story in USA Today calling Ricky Martin's music south-of-the-border was displacing this otherwise U.S. citizen).

n73 See Valdes-Rodriguez & Boucher, supra note 3, at D5 (reporting that an MTV vee jay had marveled at Martin's ability to speak "perfect English"). Cf. Stephanie M. Wildman, Reflections on Whiteness and Latina/o Critical Theory, 2 Harv. Latino L. Rev. 307, 313 (1997) (adding a Latino/a dimension to a commentator's conditions for White privilege, suggesting that one of the societal conditions that an Anglo can count on is that "People who see me [the Anglo] and hear my name will assume that my children and I speak fluent English. People will not be surprised if I speak English well.").

n74 As discussed infra at text accompanying notes 92100, many of these artists do not write their own lyrics.

n75 Ricky Martin, Shake Your Bon Bon, on Ricky Martin (Sony/Columbia 1999).

n76 See generally Delgado & Stefancic, supra note 13 at 1273-1275 (describing the stock visual images of Mexican Americans in American cinema history to include the conniving, treacherous bando).

n77 Ricky Martin, Shake Your Bon Bon, on Ricky Martin (Sony/Columbia 1999). See generally Novas, supra note 29, at 93-95 (describing origins and examples of the use of "desperados").

n78 See supra note 63 for discussion of heterosexual images in LatPop.

n79 Enrique Iglesias, Rhythm Divine, on Enrique (Interscope Records 1999).

n80 Enrique Iglesias, Bailamos, on Enrique (Interscope Records 1999).

n81 The motion picture Selena depicts her strict father's reaction to the late Selena's revealing stage wardrobe. Selena (Warner Bros. 1997).

n82 Christina Aguilera, When You Put Your Hands on Me, on Christina Aguilera (RCA Records 1999). Consider other songs performed by Aguilera:

But then it feels so good, I knew it would
You know the way to make me crazy
I want to give it to you

Christina Aguilera, So Emotional, on Christina Aguilera (RCA Records 1999).

Now when mum and dad has gone . . .
We will party 'til the dawn . . .
Come over here baby . . .
You better cross the line
I'm gonna love you right

Christina Aguilera, Come on Over (All I Want is You), on Christina Aguilera (RCA Records 1999).

n83 E.g., Kenn Rodriguez, Explosion Tag Has Singer Hot, Albuquerque Journal, June 16, 2000, at E15 (conveying dissatisfaction of singer Marc Anthony with the media's proclamation of a "Latin music explosion" to describe what Anthony views as American pop music).

n84 Jennifer Lopez, Waiting for Tonight, on On the 6 (Epic 1999). Talk About Us embodies a similar theme:

You see all my life I've waited
Waited all my life
Just to be with someone like you
Jennifer Lopez, Talk About Us, on On the 6 (Epic 1999).

n85 Christina Aguilera, Love For All Seasons, on Christina Aguilera (RCA Records 1999).

n86 Selena, Captive Heart, on Dreaming of You (EMI Latin 1995) (song title translation).

n87 Ricky Martin, Shake Your Bon Bon, on Ricky Martin (Sony/Columbia Records 1999). Of course, one should view the lyrical content of LatPop in part against the backdrop of American pop music's dominant themes that include partying and sexual bravado. In other words, is a Latino/a who lives La Vida Loca much different from an Anglo who wants to "Rock and Roll All Night, and Party Every Day?" Kiss, Rock and Roll All Nite, on Dressed to Kill (Mercury 1975) (a defining hit for the Anglo rock band Kiss in 1975).

n88 Selena, Techno Cumbia, on Amor Prohibido (EMI Latin 1994) (English translation from liner notes). A 1962 top ten novelty smash by Anglo crooner Pat Boone, Speedy Gonzales, was even more direct in exploiting the stereotypical image of Mexicans as boozing and indolent:

Stop alla your a-drinkin'
With that floozie named Flo
Come on home to your adobe
And slap some mud on the wall
The roof is leakin' like a strainer
There's loads of roaches in the hall . . .
No enchiladas in the icebox
And the television's broke . . .
Hey, Rosita, come queek-down at
The cantina they givin' green stamps
With tequila!!
Pat Boone, Speedy Gonzales, on April Love: The Best of Pat Boone (Laserlight 1974).

Earlier, Peggy Lee and Dave Barbour covered similar ground with their hit Manana (Is Soon Enough For Me):
The faucet she is dripping and The fence she's falling down . . .
My brother isn't working and My sister doesn't care . . .
My mother think's I'm lazy and maybe she is right
I'll go to work manana but I gotta sleep tonight
Manana is soon enough for me
Peggy Lee, Manana (Is Soon Enough For Me), on Miss Peggy Lee (EMI-Capitol Entertainment 1998). See generally George Archuleta, Racial Slurs in Music Didn't Start with Gansta' Rap, Denver Post, Dec. 18, 1997, at B7 (supplying most of the above lyrics) (explaining that music heard in America "blatantly relegates people of color to inferior status")

n89 E.g., A.B. Quintanilla y Los Kumbia Kings, Amor, Familia y Respeto (EMI Latin 1999).

n90 In his crossover smash Still Not a Player, however, deceased rapper Big Pun (aka Big Punisher) boasts that he "got ya [his lover] screaming punish me," although his sexual masochism did not rise to the level of some non-Latino rappers. Big Punisher, Still Not a Player, on Capital Punishment (Loud Records 1998). In one of the biggest selling records of 2001, Black rapper Ja Rule declared in his duet with Jennifer Lopez:

Bring pain to pussy
Niggaz and pussy
Holes they one in the same
Jennifer Lopez, I'm Real (Murder Remix featuring Ja Rule), on J.Lo (Epic 2001).


n92 Elizabeth M. Iglesias, Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and

n93 See Christina Aguilera, Christina Aguilera (RCA Records 1999).


n96 Selena co-wrote Bidi Bidi Bom Bom, one of her biggest Spanish language hits. Selena, Bidi Bidi Bom Bom, on Amor Prohibido (EMI Latin 1994).

n97 Ricky Martin, Ricky Martin (Sony/Columbia 1999).

n98 One of the co-writers on Jennifer Lopez's debut album is Gloria Estefan (Let's Get Loud). Jennifer Lopez, Let's Get Loud, on On the 6 (Epic 1999).

n99 But the lyrics of the song Smooth that propelled Santana's album Supernatural to mainstream success were written solely by Rob Thomas, an Anglo artist fronting the alternative band Matchbox 20. Carlos Santana, Smooth, on Supernatural (Arista Records 1999).

n100 See discussion infra part VII.

n101 See, e.g., Diana A. Terry-Azios, Can the Explosion Last?, Hispanic, Mar. 2000, at 22, 26 (describing the industry force put behind Latino/a artists once Ricky Martin's now famous performance of La Copa de Vida at the 1999 Grammy Awards convinced executives that LatPop could be the "Next Big Thing").


n103 Moreover, the LatPop explosion has occurred at a time when Latino/a groups, particularly Cuban Americans in Miami and Puerto Ricans and Cuban Americans in New York, have begun to wield influence in circles from politics to product purchasing and advertising.

n104 See Gonzalez, supra note 9, at 216 (describing the pressure under this national policy for Hollywood to portray Latino/as more sympathetically than in past roles).

n105 Remarks of Dennis Greene at the plenary Multi/Cultural Artistic Re/Presentations in Mass Media: Capitalism, Power, Privilege and Cultural Production at LatCrit V (May 2000).

n106 Llorente, supra note 12, at A1 (quoting Miriam Gonzalez, a city hall employee).

n107 Animal House (Universal Studios 1978).


n109 A few Latino/a artists have had success on county radio, such as Linda Ronstadt, Johnny Rodriguez, Freddy Fender, and in 1995, Rick Trevino.
There are no Latino/a artists represented in the Top 200 artists on the Billboard rhythm and blues chart from 1942-1988. Joel Whitburn's Top R & B Singles 1942-1988, 580-581 (1988). In the last few years, however, Latino rap artists have made inroads on the R & B charts, with the late Puerto Rican rapper Big Pun scoring a number one single in 1998 with "Still Not a Player" and receiving a Grammy nomination for Best Rap Album. Big Pun was referred to in the Black hip-hop community as a "big nigga," which suggests inclusion, at least of African Latino/as and darker-skinned Latino/as, within a Black American identity. Riggs Morales and Kim Osorio, Larger Than Life, The Source, May 2000, at 180, 183. The n-word is common in the recordings of both Big Pun and his mentor, Puerto Rican rapper Fat Joe. But Jennifer Lopez sparked a controversy in the Black community in 2001 when she referred to "niggaz" in her smash rap/pop single I'm Real. I'm Real (Murder Remix featuring Ja Rule), on J.Lo (Epic 2001) ("Now people screamin' 'what's the deal with you and so and so.' I tell 'em niggaz mind their biz but they don't hear me though"). J-Lo's NWord, Wash. Times, July 23, 2001, at A2.

In 1999 and 2000, several Black R & B artists incorporated Spanish (Spanglish) into their lyrics. E.g., Sisqo, Thong Song, on Unleash the Dragon (Def Jam 1999) ("She was livin' the vida loca"); Montell Jordan, Once Upon a Time, on Get it on Tonite (Def Soul 1999). Moreover, several Latino rappers, such as Cuban Link, had successful singles on the rap charts.

See Waxman, supra note 59, at C1 (suggesting that the latest craze establishing Latino/a pop idols hardly makes up for the overall absence of Latino/as in the entertainment universe). See also Marco Portales, Crowding Out Latinos: Mexican Americans in the Public Consciousness 12-13 (2000) (predicting that most Americans would be hard-pressed to name a single Chicano author). In April 2000 I conducted an informal visual study of a chain grocery store's modest book department looking for Latino/a titles, themes, and authors in both fiction and non-fiction. I found one offering--an account of the alleged Texas railroad serial killer with a picture of the Mexican suspect on the cover.

Ana Veciana-Suarez, Hispanics Gain Popularity Again, Las Vegas Review-Journal, Aug. 9, 1999, at 1E (pointing out that problems in the Latino/a community such as dismal student drop-out rates will hold back Latino/as despite Ricky Martin's cover-boy status); Llorente, supra note 14, at A1 (suggesting too that serious problems of drop-out rates, discrimination, alcoholism and poverty are hardly eased by the LatPop artist exposure).

For example, Morgan Freeman in Deep Impact. Deep Impact (Paramount Pictures 1998). Cf. 2Pac, Changes, on Greatest Hits (Interscope Records 1998) a posthumous release from rapper 2-Pac ("We ain't ready to see a Black President.").


This holds true even for food. Despite the mainstream popularity of the Taco Bell restaurant chain, many young Americans know of menudo only as the Latino vocal group that helped launch Ricky Martin to stardom.

n117 See Robinson et al., supra note 5, at 52 (detailing the music industry's classic strategy to produce "new" sounding music that is innovative enough to be different but still similar enough to what the recordbuying public purchased the month before).

n118 Consider these comments: Judy Cantor, La Raza Rocks On, Miami New Times, July 29, 1999 ("[Ricky Martin and Jennifer Lopez] are Latin America 'lite,' like presenting a pasteurized version of a culture," remarks of Mexican rock group member); Glenn Gamboa, Shak'In His Bon-Bon, Hispanic Heartthrob Knows How to Deal with Success, Beacon Journal, Dec. 2, 1999, at E14 ("Martin--along with Jennifer Lopez and Marc Anthony--is providing a diluted, Americanized version of Latin music for the pop mainstream. The bulk of Ricky Martin'[s album] . . . is essentially a pop album with a few Latin touches--like flamenco guitars and short horn parts."); Kevin C. Johnson, Latin Musicians Are En Fuego (That's 'On Fire,' Amigo), St. Louis Post-Dispatch, Aug. 22, 1999, at C3 ("It's not hard to accuse these LatPop artists of whitewashing their Latin roots, bleaching them into something more acceptable to mainstream audiences."). Compare Deepti Hajela, Salsa Sensation, Grand Rapids Press, Feb. 15, 2000, at C8 (interviewing Marc Anthony who declares that he is not part of any Latin music explosion; rather, his music and that of the other LatPop stars is American pop--"Why can't a Latino put out a pop album, especially if they were born and raised in the U.S. and they understand the culture?").

Nonetheless, there are indications that the music industry has made progress in its view toward (mild) Latin influences in mainstream music. Cf. Steve Morse, Ricky Martin's Livin' La Vida Loca in Latin Resurgence, Times Union, June 1, 1999, at D5 (describing the efforts of Emilio Estefan to record the Miami Sound Machine's 1985 hit Conga as "I was almost thrown out of Sony Records. They said, Take the congas out and the trumpets out of the song."). I realize, however, that this was not due to any cultural epiphany in the music industry; obviously it was the result of emerging demographics and marketplace studies. The general recordbuying public, at least, was ready for a mild case of La Vida Loca.

n119 Particularly the debut recordings of Christina Aguilera and Jennifer Lopez.

n120 See discussion supra part I. Note the stereotypical Latin lover image in the following Time magazine letter to the editor:

Ricky Martin is right to say he "didn't have to go English to make it." The new English-language album seriously lacks the intense flavor and zest of his four previous Spanish releases. The watered-down American pop doesn't show half of what he is capable of doing. Hey, Ricky, those of us who see you in our dreams want you whispering those sweet nothings in Spanish.


n121 See supra note 62.

n122 On the antisubordination potential of music, 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, 1016 (1999) (acknowledging the subversive capacity of mass cultural forms such as rock music to undermine and evade state mechanisms of political control over thought, language, and the imagination); see also Nicholas A. Gunia, Half the Story Has Never Been Told: Popular Jamaican Music as Antisubordination Praxis, 33 U.C. Davis L. Rev. 1333 (2000); Malavet, supra note 12, at 1303-04. Query how well LatPop represents and expresses the sentiments of Latino/as to the mainstream American
audience. One 55 year-old Chicano activist explained his confrontational attitude as:

I grew up in a time when signs in restaurants read 'No dogs or Mexicans allowed.' It's hard for me and people of my generation to forget that. I'm still an angry Chicano. Before I can tone it down, we need to have our say in the mainstream media.

Christine Granados, Born Again Latinos, Hispanic, May 1, 2000, at 34, 36 (remarks of El Paso columnist Joe Olvera). Surely, the frothy music of Ricky Martin and Christina Aguilera does little to satiate these wounded feelings.

n123 In contrast to most LatPop, Santana's album Supernatural does tackle broader subjects of injustice and global poverty. Carlos Santana, Supernatural (Arista 1999). Lesser known Latino/a artists also have made rebellious music, such as Los Mocosos' 1999 college-radio hit Brown and Proud. See generally Juan Flores, From Bomba to Hip-Hop: Puerto Rican Culture and Latino Identity 136-37 (2000) (discussing how Puerto Rican artists are using rap as a vehicle for cultural affirmation).

n124 Other Latino/as who recorded under Anglo-cized names include Baldemar Huerta (Freddy Fender) and Florencia Martinez Cardona (Vikki Carr). Jon Secada legally changed his first name from Juan to Jon in 1990. History of rock artists at http://www.rockonthenet.com/artists-sjonsecadamain.htm. Jennifer Lopez loses the surname accent in her debut album and promotions. The movie La Bamba portrays the transformation of Richard Valenzuela to Ritchie Valens as orchestrated by his manager to appeal to Anglo recordbuyers. La Bamba (Columbia Pictures Corp. 1987). Selling the name change to a reluctant Valenzuela, his manager explains Richard's apparent lack of choice: "Look, it could have been worse, you could have been Ricky Zuela." The movie industry has a similar history of prompting name changes to gain mainstream acceptance; for example, Ramon Estevez (Martin Sheen); as does television--Desiderio Alberto Armaz y de Acha (Desi Arnaz).

n125 The burgeoning work on the subject of commodification includes Stewart Ewen, all Consuming Images: The politics of Style in Contemporary Culture (1988); Robert Kutiner, Everything for Sale: The Virtue and Limits of Markets (1996); Margaret Jane Radin, Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things (1996); Joan Williams, Adrienne Davis and Martha Ertman, Commodifications Futures (Forthcoming 2002).

n126 Cf. Bob Wing, "Educate to Liberate!": Multiculturalism and the Struggle for Ethnic Studies, Colorlines, Summer 1999, noting the potential for this media and cultural homogenization to creep into university Ethnic Studies programs through corporate affiliations:

"The corporations began to seize upon elements of African-American and Latino popular culture, stripping them of their most militant and creative elements and repackaging them for a mass consumer market." [remarks of Columbia's Manning Marable] At its worst, Ethnic Studies is the intellectual reflection of corporate multiculturalism in the university setting.

Most of the LatPop stars have aligned themselves with major corporate sponsors to promote their concert tours, or for product endorsements. For example, Ricky Martin endorses for Pepsico, and Ford Motors sponsored Martin's fall 1999 tour. See generally Cynthia Corzo, Livin' La Vida, An Easy Sell: As Latin Culture Goes Pop, Advertisers Catch on Quickly, Miami Herald, Sept. 25, 1999, at 1C.

n127 Hawley, supra note 67, at E5 ("In the mainstream, the more 'race-less' you can be, the better. Martin is almost being disengaged from the Latino image. I'm not sure how much of a cultural ambassador he is," remarks of a professor of Puerto Rican Studies).

n128 Terry-Azios, supra note 101, at 26 (remarks of Latino/a music magazine co-publisher).

n129 But see Hawley, supra note 67, at D3 ("We're proud of them [Ricky et al.], but it's not like they're bringing our music to the world. They're not representing it,"
remarks of musician in Puerto Rico); supra note 122 (questioning how well LatPop music and artists represent a Chicano/a activist viewpoint). My research assistant Steve Tamayo suggested that the attitudes of some Latino/as, particularly some activist Chicano/as, would be, bluntly, "fuck the mainstream."

n130 Chris Hawley, Puerto Rico Proud of New Heroes, Dayton Daily News, Nov. 14, 1999, at A21 ("In a few months, they [Martin et al.] have done much to undo the decades of damage done by West Side Story [which portrayed Puerto Ricans as street gangsters]," remarks of Puerto Rican politician); Miriam Longino, Viva Ricky! Latin Hearthrob Raises Libidos, Atlanta Constitution, Oct. 25, 1999, at D1 ("He lets people know we are not a stereotype. We're not all poor, living in the Bronx on welfare. We are intelligent . . . He represents that," remarks of mainland Puerto Rican).

n131 See supra notes 30-32 and accompanying text.

n132 As discussed previously, supra note 51 and 114, the LatPop artists generally are light-skinned. Christina Aguilera, for example, is blonde, blue-eyed and fair-skinned. Ironically, this is the same image favored by Spanish language television programming in the United States. Fletcher, supra note 113, at A1.

n133 Professor Nancy Ehrenreich asks the question whether it is appropriate for a Latino/a who does not dance and is not fluent in Spanish to feel possessive about Latin dance or the Spanish language. See Ehrenreich, supra note 36, at 809 (answering both questions affirmatively). As someone who is less than fluent in the Spanish language, I agree with Nancy's conclusion. I do not, however, feel possessive about Anglo artists' use of the Spanish language in their recordings. Rather, I view that use, even if coached, as an expression of authentic regard for the Latino/a culture. Further, I believe that someone choosing to speak in Spanish would be less likely to view other aspects of Latino/a culture and Latino/as as subordinate and subhuman. On the other hand, I view Anglos playing Latino/a characters in Hollywood cinema in different terms. That role appropriation tells me the industry did not believe any Latino/a actor was competent to play the role, or that it feels the public would be uncomfortable watching or unable to relate to a Latino/a actor. Finally, I'm not sure whether I have the same regard for politicians who adopt the Spanish language to deliver messages of inclusion.


n136 A demeaning reference to African American women popularized in 1971 in the Rolling Stone's number one single Brown Sugar. Rolling Stones, Brown Sugar, on Sticky Fingers (MCA 1971); The Stories, Brother Louie, on About Us (Kama Sutra 1973).

n137 The Stories, Brother Louie, on About Us (Kama Sutra 1973).

n138 Three Dog Night, Black and White, on Seven Separate Fools (ABC-Dunhill/MCA Records 1972).

n139 Paul McCartney, Ebony and Ivory (With Stevie Wonder), on Tug Of War (Capitol/EMI Records 1982); Michael Jackson scored a major chart hit in 1991 with a similar theme in Black or White. Michael Jackson, Black or White, on Dangerous (Epic 1991).

n140 Those Anglo/Black artist duos charting number one singles include Aretha Franklin and George Michael; Michael Jackson and Paul McCartney; R. Kelly and Celine Dion; Patti LaBelle and Michael McDonald; Donna Summer and Barbara Streisand; and Dionne Warwick, Gladys Knight, Stevie Wonder, and Elton John. See Aretha Franklin with George Michael, I Knew You Were Waiting for Me, on Aretha (BMG/Arista 1980); Michael Jackson with Paul McCartney, The Girl is Mine, on Thriller (Sony/Columbia 1982); R. Kelly with
Celine Dion, I'm Your Angel, on R. (BMG/Jive 1998); Patti LaBelle, On My Own, on Best of Patti Labelle (Uni/MCA 1999); Donna Summer with Barbara Streisand, No More Tears, on Donna Summer--On The Radio Greatest Hits Volume 1& 2 (Casablanca/Polygram 1979).

n141 Two of the few charting Anglo/Latino/a pairings were the 1984 duet of Julio Iglesias and Wille Nelson, To All The Girls I've Loved Before, Julio Iglesias, To All The Girls I've Loved Before (with Willie Nelson) on 1100 Bel Air Place (Columbia Records 1984); and the 1960s charting duo of Steve (Lawrence) and Eydie (Gorme). See Steve & Edyie, Steve & Eydie Sing the Golden HIts (MCA 1960).

n142 In 2001, Christina Aguilera joined Black artists Lil'Kim and Mya, and White artist Pink on the remake of Lady Marmalade. Lady Marmalade (Interscope 2001).

n143 Veciana-Suarez, supra note 112, at 1E (reacting to the media hype over the trendiness of LatPop music and the Latino/a culture).

n144 Often called the first rock n' roll hit song, Bill Haley and His Comet's Shake, Rattle & Roll had previously been a number one charting rhythm and blues song for Joe Turner in 1952. See Rock Hall of Fame at http://www.rockhall.com/hof/inductee.asp?id=201 (last visited Nov. 28, 2001).

n145 Examples of these Anglo soul-pop artists include Daryl Hall & John Oates, George Michael, the Rascals, and the Righteous Brothers.

n146 Examples of Anglo hit pop songs with Latino/a lyrical or thematic influences include Eso Beso (That Kiss!) Paul Anka, Eso Beso, on Remember Diana (RCA Records 1975); Twist, Twist Senora, Gary U.S. Bonds, Twist, Twist Senora, on Quarter To Three/Twist Up Calypso (Ace); Speedy Gonzales, Pat Boone, Speedy Gonzales, on Love Letters (Dominion); Margaritaville, Jimmy Buffett, Margaritaville, on Boats, Beaches, Bars, and Ballads (Margaritaville Records 1992); Tequila The Champs, Tequila, on Tequila (Ace); The Astronaut (Jose Jimenez, comic character created by Bill Dana); Corazon, Carole King, Corazon, on Really Rosie/Her Greatest Hits (Legacy Records 1971); La Isla Bonita, Madonna, La Isla Bonita, on True Blue (Sire Records 1986); Copacabana (At the Copa), Barry Manilow, Copacabana (at the Copa), on Even Now (Arista Records 1978); Bossa Nova Baby, Elvis Presley, Bossa Nova Baby, on It Happened At The World's Fair/Fun In Acapulco (RCA Records 1963); The Cha-Cha-Cha, Bobby Rydell, The Cha Cha Cha (Come 1962); Little Latin Lupe Lu, Mitch Ryder and the Detroit Wheels, Little Latin Lupe Lu, on All Hits (1967); Guantanamera, The Sandpipers, Guantanamera, on Best of Sandpipers (A&M Records 1998); Cecilia, Simon & Garfunkel, Cecilia, on Bridge Over Troubled Water (Columbia Records 1970); and El Condor Pasa, Simon & Garfunkel, El Condor Pasa, on Bridge Over Troubled Water (Columbia Records 1970). Examples of Black artists with hit pop songs influenced by Latin music include Come Closer to Me (Acerate Mas), Nat "King" Cole; Spanish Harlem, Aretha Franklin, Spanish Harlem, on Aretha's Greatest Hits (Rhino Records 1971); I Like It Like That, Chris Kenner, I Like It Like That; and The Wah Watusi, Orlons, The Wah Watusi. Some of these songs invoke stereotypical images of Latino/as as lazy and dirty (e.g., Speedy Gonzales, see supra note 88), as outlaws and desperados (e.g., War's Cisco Kid), as passionate and violent (e.g., Copacabana), and as awash in booze (e.g., Margaritaville).

n147 Although comprised of African Americans and Anglos, the band War scored several pop hits with Latino/a themes (e.g., War, Low Rider, on Why Can't We Be Friends (RHI 1975); War, The Cisco Kid, on World Is A Ghetto (RHI 1972) and one with Spanish lyrics (War, Ballero, on War Live (RHI 1973).

n148 Employing the model of appropriation versus appreciation may not be the best way to describe the influence of Latino/a music on mainstream culture. See Ehrenreich, supra note 36, at 797 (cautioning that viewing Anglo interest in Latino/a culture as appropriative constructs the mainstream culture as entirely Anglo
and diminishes the contributions and crossfertilization of Latino/a and other non-dominant cultures in shaping today's popular culture).

n149 Consider the alternative band Offspring's 1999 hit Pretty Fly for a White Guy (with lyrics "uno dos tres cuatro cinco cinco seis"), Will Smith's Miami (with lyrics "Welcome to Miami, Beinvenido a Miami"), and the former Spice Girl Geri Halliwell's inclusion on her 1999 debut album of a song titled Mi Chico Latino. Offspring, Pretty Fly (for a white guy), on Americana (Sony/Columbia 1998); Will Smith, Miami, on Big Willie Style (Sony/Columbia 1997); Geri Halliwell, Mi Chico Latino, on Schizophonic (Emo/Capital 1999).


n151 E.g., Vitamin C, a female singer, sampled Santana's 1972 hit No One To Depend On in her solo single "Me, Myself & I." Vitamin C, Me Myself And I, on Buy Me (1999).

n152 One of the most recent examples of genre "appropriation" was the smash Mambo No. 5, an updated take on Perez Prado's mambo hit, by Lou Bega, whose father is Ugandan and mother Sicilian. Mambo No. 5, Mambo No. 5 (Khaeon 2001).

n153 Another level of appropriation is the African influence in Latino/a music and LatPop. Carlos Santana has candidly acknowledged the African influences in his "Latin" rock music. Chuy Varela, Santana: In the Open, Hispanic, May 2000, at 82; Macias, supra note 28, at EN18 (conveying remarks of Carlos Santana that what is known as Latin music--salsa, cumbia, merengue, and so forth, is rhythms and textures that originated in African music); Considine, supra note 69, at 24 (tracing the roots of African influence in tropical Latin music).

n154 Thigpen, supra note 2, at 80 (reporting Jennifer Lopez's assessment of the stylings of her debut album as "It's a mix of urban and Latin influences, stuff that makes me dance."). Conversely, some Latino/a artists have set Anglo pop hit lyrics to Latino/a-influenced beats for commercial success. For example, the three Top 40 charting singles of Sergio Mendes & Brasil '66 were Bossa Nova remixes of songs by the Beatles, Dusty Springfield, and Simon & Garfunkel. Sergio Mendes & Brasil, Greatest Hits of Brasil '66 (Uni/A&M 1987).

n155 The following combinations have emerged: Ricky Martin and Madonna on Be Careful (Cuidado Con Mi Corazon); Enrique Iglesias and Whitney Houston (Could I Have This Kiss Forever); Selena and David Byrne (God's Child (Baila Conmigo)); and Santana with Eric Clapton, Dave Matthews, Rob Thomas and others. Ricky Martin, Cuidado Con Mi Corazón (with Madonna), on Ricky Martin (Sony/Columbia 1999); Enrique Iglesias, Could I Have This Kiss Forever, on Enrique (Uni/Interscope 1999); Selena, God's Child, on Dreaming of You (Emd/Emi Latin 1995); Santana, Supernatural (Arista 1999). Santana's recent associations raise the appropriation question most directly--was his crossover to young recordbuyers and pop radio accomplished only by his association with one of the most popular young Anglo artists on the radio, Rob Thomas of the band Matchbox 20?

n156 Hajela, supra note 118, at 112 (interviewing Marc Anthony who states that he is not part of any Latin music explosion; rather, his music and that of the other LatPop stars is American pop--"Why can't a Latino put out a pop album, especially if they were born and raised in the U.S. and they understand the culture?").


n158 See generally Alisa Valdes-Rodriguez, Who's Buying Cuban Phenom?, It's Not Latinos Responsible for Buena Vista Social Club's New Rise, L.A. Times, Aug. 14, 1999, at F1. In this sense, the BVSC album harkens back to the appeal of tango music in the 1920s and
1930s to what Professor Malavet labels "sophisticated" Americans and Europeans. Malavet, supra note 12. By contrast, the Anglo audience for other LatPop is predominately young, but extends to all ages and to all classes.

n159 Valdes-Rodriguez, supra note 158, at F1.

n160 Id. (reporting a Latino/a record label executive's suggestion that the American media may have lost credibility with Latino/as by suggesting that Cooder had rediscovered a forgotten music from an exotic land); Wim and Donata Wenders, Buena Vista Social Club, The Companion Book to the Film 117 (2000) (interviewing Ry Cooder with questions such as "How do you deal with strange, nearly forgotten musical cultures that you want to document on records?").

n161 Paul Simon and former Talking Heads leader David Byrne issued the Brazilian influenced albums The Rhythm of the Saints (1990) and Rei Momo (1989) respectively. Paul Simon, Rhythm of the Saints (Wea/Warner Bros. 1990); David Byrne, Rei Momo (Wea/Warner Bros. 1989). In 1997, Paul Simon released the album Songs From the Capeman, his short-lived Broadway production (featuring Marc Anthony and Ruben Blades) dramatizing the life of a Puerto Rican gang member convicted of double-murder in New York City in 1959. Among other criticisms, the Capeman musical propagated the negative stereotypes of West Side Story in its portrayal of Puerto Rican gang members. Paul Simon, Songs from the Capeman, on 1997 Concept Cast Album (Wea/Warner Bros. 1997).

n162 The Latino roots rock band Los Lobos collaborated with Simon on the music and vocals of one of the songs on Graceland, All Around the World or the Myth of Fingerprints, but was denied songwriting credit by Simon. Paul Simon, All Around the World or the Myth of Fingerprints, on Graceland (Wea/Warner Bros. 1997); see Steven Feld, Notes on Word Beat, Public Culture Bulletin, vol. 1, no. 1, Fall 1988, at 34-35.

n163 E.g., Deanne Campbell Robinson et al., supra note 5, at 273; Lipsitz, supra note 8, at 56-63:

Simon's supervision of the project, copyright for the finished work, and superimposition of lyrics about cosmopolitan postmodern angst over songs previously situated within the lives and struggles of aggrieved Black communities revealed the superior power he brought to the project and the disproportionate capital he exercised over it as a white American artist with ample access to capital, technology, and marketing resources.

Id. at 57.

n164 Paul Simon, Graceland, on Graceland (Warner Bros. 1997). One can imagine Simon's response to such criticism as asking what harm is done by borrowing and fusing Third World influences to tell American stories? The same question can be asked with regard to Simon's Broadway Capeman production--what is wrong with an Anglo telling a legitimate and factual slice of Puerto Rican life in New York City? The answer perhaps derives from the insignificance and illegitimacy of Latino/a stories in the culture of American mass media. Anglo borrowing of Latino/a influences and Anglo telling of Latino/a stories would be more tolerable and even welcome if only it occurred against a backdrop of Latino/a relevance and positive visibility. Against such a backdrop, West Side Story would not be the only media representation of Puerto Ricans, and thus their portrayal as a murderous, but perhaps misunderstood, thug in Capeman could be viewed more properly as one man's misdirected life than as a cultural blueprint for Puerto Ricans and other Latino/as. Cf. Leti Volpp, Blaming Culture for Bad Behavior, 12 Yale J. of Law & the Humanities 89 (2000) (suggesting that undesirable behavior when undertaken by a White person is viewed as an individual bad act but, when engaged in by a person of color, is reflective of a racialized culture).

n165 Spending 14 weeks at number one on the Billboard pop single charts in 1996 and ending up as one of the biggest-selling singles in pop music history, the most successful version of Macarena was a
I. Introduction

My continuing LatCritical travels take me once again to the cultural borderlands. On this occasion, I look at the competing narratives of Latinas/os in the United States. Music, particularly popular music, has always been a marker for culture. Even in exile, mi musica popular (my popular music) keeps me intellectually and emotionally connected to Puerto Rican culture while I am not living within it. But, at the same time, exile becomes the new looking glass through which I re/view mi cultura puertorriquena (my Puerto Rican culture).

The current "Latin Music Craze" in the United States mass media demands critical analysis from the LatCrit community. LatCrit scholars have engaged in the serious discussion of cultural production - of culture generally and popular culture in particular. LatCrit theory has analyzed cultural production mostly by "Others," n6 that is, cultural production internal to outsider communities. n7 LatCrit scholars also have studied how United States mass media portrays Latinas/os, African-Americans and Filipinas/os. n8 This article will examine the competing narratives of Puerto Rican cultures in Puerto Rico and in the United States that are illuminated by the current Latin Music Craze. It will then explore how LatCritical praxis can counter the problems of discrimination against and internalized oppressions within the colonized Puerto Rican peoples. n10

While the construction of cultural identities can be profoundly positive and empowering, as explored below, cultural constructs can also constitute discrimination. By negatively portraying a particular group, the normative society can perpetuate attitudes that subordinate the targeted culture. Additionally, individual groups might even adopt some of the discriminatory tropes, thus internalizing, and in that manner accepting and perpetuating, that discrimination within their culture.

Cultural studies require an unflinchingly honest approach that identifies both positive and negative aspects of any culture. But this is especially challenging in the context of the United StatesPuerto Rico colonial relationship because of the dangers inherent in the construction of multiple cultural identities within a single sovereign nation. On the one hand, the development of the concept of cultural nationhood or citizenship might be used to differentiate the colonized peoples from their colonial oppressors. It can additionally be used as a source of empowerment, consciousness and pride. n14 But, on the other hand, cultural exploration might produce legitimate concerns over the dangers of nationalism and cultural imperialism. Accordingly, LatCrit theory must illuminate the proper balance between identifying cultural faultlines that require reform and imposing cultural imperialism that seeks a homogenized normativity that only perpetuates the hegemony of the colonial power.

The remaining sections of this article will illustrate that Puerto Rican culture, particularly its popular culture, is a strong counterhegemonic affirmation of a non-sovereign form of nationhood. Puerto Rican cultural nationhood, however, competes with the
negative dominant narrative imposed by the United States through its mass media culture, despite the more positive re/tellings found in the current Latin Music Craze.

Initially, Part II includes a narrative about the author's exile, and the perspective that this status brings to this study. Part III constructs a broad and complex concept of culture, centered specifically on popular culture. Popular culture can be production by and of the people, or it can be the commercial mass media product that is consumed by a large number of purchasers. This work will discuss both forms of popular culture and will contrast them with "high culture" n18 because looking down on pop culture is more often elitist than counter-hegemonic. Additionally, when popular culture represents the crossing of physical and/or cultural borderlands, hegemony and counter-hegemony depend on which side of the border you occupy. n19

In Part IV, postmodern LatCritCritical theory will be used to interrogate how the current Latin Music Craze might affect the competing and often conflicting narratives about the Puerto Ricans. It will also explore how faultlines exist in, and are perpetuated by, Puerto Rican culture internally, and even by the now more positive but still essentialized n20 [*758] re/telling of the Puerto Rican story in the normative United States mass media. The article concludes with a call for continuing critical analysis of popular culture that challenges power hegemonies internal and external to our communities.

II. Exile, Cultures, and Becoming the "Other"

As a result of the ongoing colonial experience, there are two Puerto Rican cultures initially: one for the island and another for the culture of the Puerto Ricans who reside outside Puerto Rico. The two are in fact linked into a broader, diverse Puerto Rican cultural experience. Additionally, there is the narrative telling of Puerto Rico by the normative United States mass media popular culture. Because the author is an exile from the island, this section analyzes his struggles along these cultural borderlands.

Many Puerto Ricans might resent an "outsider" imposing his vision on their culture. In other words, even if I am accepted as a native-born Puerto Rican, I might be accused of imposing an imperialistic, "American" n21 vision of society on our cultural nation. In the process, these critics might argue that I would be destroying the culture that I claim to be trying to defend (not to mention belong to). Because of the inherent paradoxes of exile, I want to share a personal narrative about being a boricua in exile, which, of course, is a foundation of and for my analysis.

A. Ponceno (Person from Ponce) Goes to the United States: Othering Part I

In thinking about culture and nation, and the experience of Puerto Rico, I was struck by how my life's travels are effectively a metaphor for [*759] nation and colony, n22 freedom and serfdom, sovereignty and dependency. The shifting sets can be conceived as the simple boarding of a plane on one side of the Caribbean or the other--for neither of which do I need to switch passports, although I change nationalities.

I was born and raised in Puerto Rico, la Isla del Encanto--the Enchanted Island, or as others might translate it, the Island of Enchantment. It was not until I was seventeen (17), and a junior in High School, that family circumstances converged and resulted in my migration to these United States. That journey, while crossing both cultural and citizenship fronteras (borders), fortunately did not require a passport, or any obvious change in legal status n23--although when I came of age, from this side of the border, I would be able to vote for President. n24

Having finished my secondary education, both academic and cultural, in DeKalb County, Georgia, I chose to attend Emory University in Atlanta and thereafter migrated only slightly North to attend law school at Georgetown University Law Center in Washington, D.C. In the middle of the Summer of 1993, while I again was living in Puerto Rico, as I discuss below, I received a call from the Admissions Director at Georgetown, indicating that she had gathered from my admission essay that I was, and wanted to continue to be, a law teacher. She informed me that the Law Center had a Fellowship for Future Law Teachers n25 and that the selection Committee had voted to offer me that position, even though I had not applied for it. This meant that I could accelerate my plans to start my post-J.D. degree by a year because the Fellowship included a tuition waiver and a small stipend. [*760]

During the course of the Fellowship, I was introduced to the American Legal Academy by two faculty mentors. n26 They, and other members of the Georgetown faculty who also were dedicated to the fellowship, encouraged me to remain in the states as a law school teacher. n27 I was surprised to learn that there were only a handful of Latina/o and Puerto Rican law teachers in the United States. n28 Therefore, I started to take their recommendation seriously.

My journey to the legal academy is relevant to set the stage and as a metaphor for the convergence between
the reality and the theory of power that makes me, as a United States citizen, both normative and "Other"--the latter of course because of my puertorriquenismo (state of being Puerto Rican). Being Puerto Rican turns me into an inferior "colored person," an "Other" in this society. n29

Describing this Othering metaphorically, my feet, which are "clean" in Puerto Rico, become "soiled" here: I become a "patisucio," which literally means to have dirty feet. It is a reference to being poor in Puerto Rico because you could not afford to buy shoes, and your bare feet were thus always dirty. My father often describes himself as a patisucio because he got his first pair of shoes in the public school--to which he walked on unpaved streets--in his barrio Bucana in Ponce. (Ironically, he used to shine shoes as a shoeless child in order to make a bit of extra money for his household.) Patisucio is also his acknowledgement of being a class outsider within Puerto Rican society. But my father acquired the honorary class privilege that accompanies education and wealth, and as a result, his children were not patiscuos in Puerto Rican society. Nevertheless, when I traveled to the United States borderlands, I became a metaphorical patisucio [*761] from Puerto Rico and the dirt on my feet became code for my social construction as "colored."

In that sense, it is ironic that I have chosen not to live in my country while it suffers from colonial status. I eschew the concept of a citizenship that is legally second-class, and lacks a passport. Hence, I live in the "states" where I can better seek the benefits of my statutory American citizenship, but partly because of that statutory citizenship, I am Othered and rendered socially second-class here. Nevertheless, personal, professional and emotional links to Puerto Rico cause me to cross the cultural borderlands on different occasions and under diverse circumstances, but now with different perspectives illuminated by exile.

B. You Can't Go Home Again: Othering Part II

The pull to my Enchanted Island had me head South after earning my first law school degree to live my own version of the biblical tale known as the prodigal son. n30 Initially, a tragic, accidental journey took me to work in the U.S. Federal Court n31 within the Puerto Rican borderlands n32--making the stark reality of my two citizenships, both with a U.S. passport, come to life. n33 The U.S. District Court for the District of Puerto Rico n34 belongs to the First Circuit, n35 together with Maine, Massachusetts, New Hampshire, and Rhode Island. n36 But these state boundaries are not [*762] my fronteras (borders), the Atlantic represents the physical, political, and psychological barriers that I travel. This particular lesson in border crossings continued when I became a member of the Bar in Puerto Rico and after my two-year federal clerkship, joined Bufete Malavet & Ayoroa (the law firm of Malavet and Ayorora), my dad's established law practice in my home town of Ponce. I then learned about his extensive record as a subversivo, n37 which was imposed on him simply because the police thought that he believed that we ought to travel with a Puerto Rican passport. n38

A short time after I joined papi's (dad's) practice, I also started teaching Federal Courts and Puerto Rico Appellate Procedure at the Pontifical Catholic University of Puerto Rico School of Law. This exposure to the intellectual side of law n39 inspired me to pursue an academic life, a goal that led me, again, to the estadounidense (United States) borderlands. Initially, I thought this was a two-way trip, but as discussed above, fate intervened, and I chose to stay in the American borderlands, returning to Puerto Rico now only as a temporary visitor.

Going into exile while owning the passport with which to return home is a difficult choice, even though it can have some benefits, perhaps the most important of which for this discussion is the critical frame [*763] of reference that exile illuminates. However, when this critical eye is turned inward towards my own culture, I am suddenly transformed into an outsider in my own Puerto Rican borderlands.

I had always been aware of political and class faultlines in Puerto Rican society, because my family had often been both the objects and the honorary beneficiaries of those forms of elitism. n40 Although now I recognize and acknowledge the victims of racism and the unfair nature of the privilege that this discrimination creates, even racial faultlines work in my favor back on the island where I am mapped as white. But other forms of discrimination--such as xenophobia, anti-Semitism, sexism, and homophobia--were clearly illustrated for the first time by the looking glass of exile.

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 fellow Puerto Ricans in Puerto Rico difficult to take. n41 I am also much more sensitive to issues of race and to the societal privilege that Puerto Rican culture gives me because of whiteness. Finally, as an exile, I am also more attuned to the paradoxical animosity between island and mainland Puerto Rican cultures. n42
For me, "home" is Ponce, Puerto Rico. No matter how far away from it I may go, my personal, professional, and emotional travels always lead me back to Ponce. But to the extent that I now re/view La Perla del Sur (the Pearl of the South) n43 through the looking glass of exile, at least intellectually, I can never really go home again. For me, the curse of exile is that I am socially constructed by the normative United States culture as an inferior, "colored" "Other" and that I can no longer look at my own culture with the critical but uninformed vision of my youth. The next parts of this article represent a deployment of these perspectives to deconstruct the competing narratives of Puerto Rican cultures.

III. Culturas Puertorriquenas (Puerto Rican Cultures)

This discussion of culture is particularly timely because of the Latina/o musical moment that seems to have overtaken the United States 

English-speaking market. n44 Ricky Martin, Marc Anthony, n45 Jennifer Lopez, Enrique Iglesias, and even former Mouseketeer Christina Aguilera n46--who has re-discovered that her father speaks Spanish--and that other Latino youngster, Carlos Santana n47 are among the most popular artists in the United States today. n48 Especially pertinent for this article is the fact that Anthony, Lopez, and Martin are Puerto Rican.

Accordingly, after laying the necessary theoretical foundation, this part of the article develops a LatCritical reaction to the Latin Music Craze in the United States which can be subdivided into two parts: (1) public portrayals of Latinas/os in general, and of Puerto Ricans in particular, as men without guns or knives, and women who are not prostitutes, and not a drug addict in sight, represent progress in the Puerto Rican/American paradigm; and (2) with all due respect to the label "Latin," this is not mi musica latina (my Latin Music). The discussion will be framed in the context of the competing narratives of Puerto Rican cultures across the American borderlands, including those of Puerto Ricans in Puerto Rico, Puerto Ricans in the "United States proper" n49 and that of the normative American society.

A. The LatCritical Study of Culture

Defining "culture" can be a difficult process for the critical scholar. For example, "while claiming that they had no wish to add a 165th formal definition of culture to the 164 they had examined, [two important cultural studies scholars] did finally sum up the way in which 'this central idea is now formulated by most social scientists': 'Culture consists of patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols.' And 'the essential core of culture consists of traditional . . . ideas and especially their attached values.'" n50

This article analyzes popular culture as a definition of group identity, that is, the culture by and of a peoples. Accordingly, it adopts a philosophically communitarian Cultural Studies view of the term, meaning that culture is a whole way of life (ideas, attitudes, languages, practices, institutions, structures of power) and a whole range of cultural practices: artistic forms, texts, canons, architecture, mass-produced commodities, and so on. Culture means the actual grounded terrain of practices, representations, languages, and customs of any specific historical society. Culture, in other words, means not only 'high culture,' what we usually call art and literature, but also the everyday practices, representations, and cultural productions of people and of postindustrial societies. n52

However, this work also studies mass media popular culture. "Mass media" might be defined as "those media that have been derogatorily designated as 'mass culture' or the 'culture industry' by left-and right-wing intellectuals alike." n53 In distinguishing popular culture and mass media culture, Carla Freccero warns that while mass media culture can have substantial hegemonic effects, it can also be used counter-hegemonically. n54 Ultimately, she speaks of "popular culture that more closely resembles the definition of the popular as that which belongs to the people." n55

"Certainly there are significant differences between popular culture and mass media." n56 But "popular" does not necessarily mean massmedia-imposed, and the art of popular culture is art. n57 and the art of popular culture is art. n58 In identifying and distinguishing popular culture from mass-media-imposed culture, this article deploys the competing narratives of popular cultures both to identify hegemony and to counter it. n59

Finally, critical theory warns that one must be careful not to essentialize in this process of constructing and analyzing culture. In linking Puerto Rican ethnicity and citizenship, n60 it is imperative to avoid the evils of ethnic strife and balkanization that a hegemonic culture might impose. This article demonstrates that it is possible to celebrate a particular culture and avoid deploying it as a justification to attack fellow human beings because of their culture by identifying both positive and negative forces in the competing narrative tellings of the Puerto Ricans.

In discussing the competing narratives of and by the Puerto Ricans, one must change frames of reference often. Although principally concerned with Puerto Rican culture in Puerto Rico, this article discusses
coexisting and sometimes conflicting spaces within the culture that brings all three popular cultures into American popular culture, n64 and the mass media. The United States seeks to "Other" the Puerto Ricans as second-class citizens, addition to legally constructing Puerto Ricans as political prisoners n70 and over the protests of the public discourses over the release of Puerto Rican political prisoners n70 and over the protests of the public discourses over the release of Puerto Rican political prisoners. In turn, the Puerto Ricans have culturally embraced their distinction from the gringos. Accordingly, the United States attempts to "Americanize" the Puerto Ricans that were rejected. n75

In addition to island puertorriqueños/as distinguishing themselves from "gringos," they also distinguish themselves from the niyoricans. The Puerto Rican experience in the United States outside of the island is, in general, much more bilingual and multi-cultural than that of the islenos, which is discussed below. n76

One interesting example of the conflict between social constructions of culture can be found in competing definitions of the very word gringo. There are several stories about the derivation of the term. One argues that it comes from "green coats," thus, a reference to the uniforms worn by U.S. soldiers during the Mexican War. n77 Another story argues that the term originated in a bastardization of the song "Green Grows the Grass" allegedly sung by U.S. soldiers invading Mexico in 1847. n78 Whether the term's use in the Americas originates thusly is open to question, but it is clear that the word itself predates Mexican-US conflicts. As early as the eighteenth century, the word was reportedly used in Spain as a bastardization of the word "griego" (Greek) and was used to refer to anyone speaking a foreign tongue or with a foreign accent. n79 The usage is thus analogous to the American phrase "it's Greek to me." n80

More interestingly, Spanish dictionaries describe gringo as a simple adjective. n81 In contemporary usage in Spain, it is used to refer to a foreigner, especially one who speaks English. In Argentina, it is used to refer to white, blonde Europeans. In the Americas, it is used to refer to citizens of the United States. n82 But English dictionaries uniformly define it as a word used "disparagingly" or as a "contemptuous" reference to English-speakers generally and U.S. citizens in particular. n83 To most Spanish-speaking Latinos/os the term gringo is simply a term used to refer to U.S. citizens. It is made necessary by the fact that the United States of America is one of very few nations in the world that lacks a country name. n84 However, English speakers are uniformly told that they are being insulted, rather than properly identified. n85 Just as their empowering [771] native language is negatively presented to English speakers, Puerto Ricans construct themselves positively, and in turn are negatively constructed by the United States.

The dominant narrative about Puerto Ricans by the United States carefully cultivates the view that the people of Puerto Rico, despite their U.S. citizenship, are too brown, too Latina/o and too "foreign"--too unassimilable--to be incorporated into the United States. n69 More recently, Puerto Ricans have been portrayed as "unpatriotic" and "ungrateful" in the public discourses over the release of Puerto Rican political prisoners n70 and over the protests of the Navy's use of Vieques as a bombing range. n71 In addition to legally constructing Puerto Ricans as second-class citizens, [769] the United States reinforces this devaluation of Puerto Rican dignity n72 by stereotyping Puerto Rican difference and Otherness. n73

The United States seeks to "Other" the Puerto Ricans as U.S. citizens who are not cultural "Americans." n74 In turn, the Puerto Ricans have culturally embraced their distinction from the gringos. Accordingly, the United States attempts to "Americanize" the Puerto Ricans that were rejected. n75

Puerto Rico is a group of islands bordered by the Atlantic Ocean and Caribbean seas, n65 which has been a United States territory since 1898. n66 Puerto Ricans are statutory United States citizens. n67 This citizenship has produced substantial relocation by Puerto Ricans in the United States. n68 Thus, there are at least two substantial Puerto Rican communities that interact with and are distinguished from estadounidenses (citizens of the United States): Puerto Ricans in Puerto Rico and Puerto Ricans in the United States.

The current Latin pop music craze reflects these borderlands: Ricky Martin was born and raised in Puerto Rico, and Marc Anthony and Jennifer Lopez were born and raised in New York City. In the Latin Music Craze, all three artists play mostly for an Angla/o estadounidense audience. In Puerto Rico, the terms that are used to distinguish the three groups of American citizens described above are gringo (used to refer to a non-Latina/o citizen of the United States who is not Puerto Rican), niyoricano (although it specifically refers to New York City, it is used to refer to persons of Puerto Rican descent born anywhere in the United States), and isleno (used to refer to Puerto Ricans from the island).

The dominant narrative about Puerto Ricans by the United States carefully cultivates the view that the people of Puerto Rico, despite their U.S. citizenship, are too brown, too Latina/o and too "foreign"--too unassimilable--to be incorporated into the United States. n69 More recently, Puerto Ricans have been portrayed as "unpatriotic" and "ungrateful" in the public discourses over the release of Puerto Rican political prisoners n70 and over the protests of the Navy's use of Vieques as a bombing range. n71 In addition to legally constructing Puerto Ricans as second-class citizens, [769] the United States reinforces this devaluation of Puerto Rican dignity n72 by stereotyping Puerto Rican difference and Otherness. n73

The United States seeks to "Other" the Puerto Ricans as U.S. citizens who are not cultural "Americans." n74 In turn, the Puerto Ricans have culturally embraced their distinction from the gringos. Accordingly, the United States attempts to "Americanize" the Puerto Ricans that were rejected. n75

In addition to island puertorriqueños/as distinguishing themselves from "gringos," they also distinguish themselves from the niyoricans. The Puerto Rican experience in the United States outside of the island is, in general, much more bilingual and multi-cultural than that of the islenos, which is discussed below. n76

One interesting example of the conflict between social constructions of culture can be found in competing definitions of the very word gringo. There are several stories about the derivation of the term. One argues that it comes from "green coats," thus, a reference to the uniforms worn by U.S. soldiers during the Mexican War. n77 Another story argues that the term originated in a bastardization of the song "Green Grows the Grass" allegedly sung by U.S. soldiers invading Mexico in 1847. n78 Whether the term's use in the Americas originates thusly is open to question, but it is clear that the word itself predates Mexican-US conflicts. As early as the eighteenth century, the word was reportedly used in Spain as a bastardization of the word "griego" (Greek) and was used to refer to anyone speaking a foreign tongue or with a foreign accent. n79 The usage is thus analogous to the American phrase "it's Greek to me." n80

More interestingly, Spanish dictionaries describe gringo as a simple adjective. n81 In contemporary usage in Spain, it is used to refer to a foreigner, especially one who speaks English. In Argentina, it is used to refer to white, blonde Europeans. In the Americas, it is used to refer to citizens of the United States. n82 But English dictionaries uniformly define it as a word used "disparagingly" or as a "contemptuous" reference to English-speakers generally and U.S. citizens in particular. n83 To most Spanish-speaking Latinos/os the term gringo is simply a term used to refer to U.S. citizens. It is made necessary by the fact that the United States of America is one of very few nations in the world that lacks a country name. n84 However, English speakers are uniformly told that they are being insulted, rather than properly identified. n85 Just as their empowering [771] native language is negatively presented to English speakers, Puerto Ricans construct themselves positively, and in turn are negatively constructed by the United States.

The dominant narrative about Puerto Ricans by the United States carefully cultivates the view that the people of Puerto Rico, despite their U.S. citizenship, are too brown, too Latina/o and too "foreign"--too unassimilable--to be incorporated into the United States. n69 More recently, Puerto Ricans have been portrayed as "unpatriotic" and "ungrateful" in the public discourses over the release of Puerto Rican political prisoners n70 and over the protests of the Navy's use of Vieques as a bombing range. n71 In addition to legally constructing Puerto Ricans as second-class citizens, [769] the United States reinforces this devaluation of Puerto Rican dignity n72 by stereotyping Puerto Rican difference and Otherness. n73

The United States seeks to "Other" the Puerto Ricans as U.S. citizens who are not cultural "Americans." n74 In turn, the Puerto Ricans have culturally embraced their distinction from the gringos. Accordingly, the United States attempts to "Americanize" the Puerto Ricans that were rejected. n75
As hurricane Debby approached Puerto Rico, and it started to become clear that the storm would not make a direct hit on the island, El Nuevo Dia, a daily newspaper, put the following headline on its web site: "Esperando a Debby Alcapurria en Mano." The headline can be translated as "Waiting for Debby, with Alcapurria in Hand." An alcapurria is a mixture of mashed green banana and yautia (tannier), stuffed with beef or pork, and then deep fried. Waiting for a hurricane--after boarding up the house, getting supplies, and picking up any items that might become missiles in a wind storm--with a cold drink and an alcapurria, while listening to the radio, is an apt symbol of Puerto Rican culture.

More generally, while reflecting a social consciousness distinct from that of its two colonial rulers, Puerto Rican popular culture is both the product and the prisoner of 500 years of history under Spanish and United States colonial rule. Puerto Rican culture is not ideal; it has racialized, ethnicized, and gendered faultlines that will be engaged in this article, but it is different from the United States' culture. However, to put it simply, culturally, Puerto Rico was a Latin-American country when the first United States troops came ashore in Guanica in 1898. Today, it is still a culturally LatinAmerican country, populated by Latinas and Latinos.

The law and its institutions, starting with those imposed by the Spaniards, are an important part of Puerto Rican culture. Both reflect a mixture of our two colonial rulers. In the area of constitutional, criminal, administrative and procedural law, Puerto Rico has a system that has been forged by United States' influence. In private law, especially those areas covered by the Civil Code, Puerto Rico bears an unmistakable Spanish influence. Despite the clash of the two different legal cultures, Spanish civil law on the one hand, and Anglo-American common law on the other, both have managed to co-exist, producing a uniquely Puerto Rican legal system.

But while the rules of law might reflect a multi-colonial mixture, the language used in the law is Spanish, which is incontrovertibly the dominant language on the island, and is the language of local administration and public education. Significantly for this work, Spanish is also the language of the popular arts, and Puerto Rico is no exception. Although there are Puerto Rican Jews and Moslems, the strict dietary rules of those religions do not apply to the Puerto Rican staple diet. Accordingly, pork is a major part of the diet, especially on celebratory occasions, and shellfish and all other forms of seafood are traditional foods as one would expect in a tropical island.

Shared celebrations, such as fiestas patronales (patron saint festivals) and important holidays, also mostly of a religious origin, such as Christmas and Holy Week, mark Puerto Rican culture. The Patron Saint festivals are celebrated in every municipality in Puerto Rico, and the matter is even regulated by Puerto Rico's laws. The celebration always includes food, drink, and music of all kinds, but dance music, especially salsa, attracts the most people. Traditionally, one day of the patronales will be dedicated to honoring and remembering the ausentes (absent persons), usually persons who have migrated away from the town. In fact, many Puerto Ricans living in the United States choose this date to return to their home towns.

In an example of some United States influence, but adapted to the Puerto Rican way, Thanksgiving is now celebrated, but mostly it marks the start of the Christmas holiday. The content of the Christmas celebration, and its length, however, are much different from the United States traditional celebration; they are definitely Puerto Rican. Parrandas, very common during Christmas, are basically large moving parties in which a musical serenade is brought to a friend or family member's home. In exchange for good music and the company of friends, the home owner welcomes the group into the house and gives them food and drink. The traditional Christmas foods are lechon asado (roast pig), arroz con gandules (rice with pigeon peas), pasteles (a mixture of tannier and green plantain, stuffed with beef, pork or chicken, wrapped in banana leaves), for dessert, coquito (Puerto Rican coconut eggnog) and arroz con dulce (rice flavored with coconut milk and sweetened with brown sugar). The Christmas holidays include the Epiphany, January 6, the date when children usually get toys.

The overall celebration lasts beyond the Epiphany into the so-called octavas and octavitas—a full eight days of further partying or...
Turning specifically to musical heritage as a vehicle of a singular culture, this piece will now present the history and development of musica popular Puertorriqueña (Puerto Rican popular music).

Popular music in particular represents the Puerto Rican identity. Notwithstanding the current Latin Music Craze, prominently displaying a homogenized product by Puerto Ricans Marc Anthony, Jennifer Lopez, and Ricky Martin, there is general agreement on many diverse forms of Puerto Rican popular music. However, there is a strong debate over whether there is a single specific Puerto Rican "national music," driven by the overall debate between defenders of "high culture" versus "popular culture," which is often reduced to questions of class and race. [*776]

The traditional view is that the Danza, a waltz-like salon dance music usually composed by classically trained musicians, is the Puerto Rican national music. Danza is most definitely Puerto Rican, but it is the music adopted by and associated with the upper class and cannot fairly be considered the "National" music in the context of cultura popular (popular culture). The alternative candidates for the title of national music are salsa, especially favored by those who defend the African influence in Puerto Rican culture, and the seis, a music produced by the Puerto Rican jibaro, the agricultural peasant of the mountains. Jose Luis Gonzalez, in his critical essay El Pais de Cuatro Pisos, bemoans both the classist and racist use of Danza, with its inherent denial of the African experience, as well as the cult of the jibaro, which he likewise associates with an enforced preference for whiteness. [*777]

However, the jibaro seis has a powerful and legitimate claim to being a Puerto Rican national popular music that is neither classist nor racist. It was the music of the true jibaro, the poor peasant farmer of Puerto Rico. This music has other prominent characteristics: (1) it was born in Puerto Rico in the nineteenth century; (2) it has had a strong and long-standing influence in Puerto Rican music generally; (3) it is easily identified by most Puerto Ricans as "Puerto Rican music;" and (4) it is still popular music today. Additionally, the seis uses the most important native musical instrument, the cuatro. Long before salsa or its historical antecedents like the plena had appeared, the seis was the music of poor, that is, most puertorriqueñas/os.

This article is not concerned with awarding the title of Puerto Rican national musical form, but ultimately, the debate over Puerto Rican national music serves clearly to underscore two things: one, the richness and diversity within Puerto Rican culture; two, the debate also discloses the problematics of race and class that can be found in the racially-mixed cultura india, espanola y africana (Indian, Spanish, and African culture) of Puerto Rico.

Music and dance create a link between the three major influences within the Puerto Rican peoples. The Taino natives engaged in dances, often designed to tell important tribal stories, called Areytos. The Puerto Rican criolla/o was often accused of being much too interested in dancing. Even the now-much-too respectable Danza was considered "scandalous" by some conservative criollas/os, who criticized the closeness of the dancers and their movements. Today, salsa and merengue keep the puertorriqueñas/os moving together fast, and boleros (slow ballads), a bit more slowly.

Music is naturally an essential element of daily life as well as of special occasions. Music can be designed for dancing, listening, or both. The result is the constant presence in Puerto Rico of big bands that play dance music, and smaller groups that play music to be listened to and/or to be danced. The best example of the latter are the Trios (three person groups) that specialize in boleros. The big bands were initially the precursors of salsa and are now the main practitioners of it, with the Sonora Poncena and El Gran Combo de Puerto Rico celebrating fifty years in show business this year. Today, salsa is undoubtedly the most popular form of Puerto Rican music.

Popular music is a part of the cultural fabric of the Puerto Ricans not simply because of its capacity to entertain and to make people move, but also because it often presents an unflinching look at the realities and hardships of daily life. For example, the baquine is a party to celebrate that a baby who died during or shortly after birth has gone to heaven without suffering the hardships of life on earth. Specifically as to Christmas tradition, the book Navidad que Vuelve (Christmas Returns) examined the song Los Reyes No Llegaron, (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 story of a young orphan who thinks that the wise men have forgotten him, because they did not bring him a present. Another poignant example of a song carrying a message of economic hardship is Lamento Borincano (Puerto Rican Lament), 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.
Music can also be a teaching tool that allows the singer to bypass society's problems, such as illiteracy, and still educate. \footnote{Music can overcome many challenges, sometimes plainly containing political subtexts.} Puerto Rican popular music, with its oral tradition, represents an important form of resistance in a repressive colonial society. \[*780*

In the colonial context, cultural expression takes on the added dimension of political self-awareness and assertiveness. \footnote{Songs also recognized Puerto Rico's wish for independence \footnote{and accompanying self-awareness as peoples during the Spanish colonial period.} Lola Rodriguez de Tio provided a call to arms in the revolutionary version of La Boriniquena, \footnote{the Puerto Rican national anthem (now with different lyrics).} Puerto Rican popular music has also engaged in the use of song as a vehicle for resistance with the second colonial rulers. \footnote{For example, Andres Jimenez's "El Jibaro," demands that Puerto Ricans stand up to the American tyranny, by exclaiming "¡Cono, despierta boricua!," which is loosely translated into "damn wake up people of Puerto Rico."} \footnote{n147}

As just prominently shown with the example of its music, Puerto Rican culture is a rich and diverse tapestry that does indeed mix Native, Spanish and African heritage. \footnote{It is a strong culture that is rightly proud, if perhaps unaware, of its cultural faultlines, although there is serious ongoing debate about the matter.} Nevertheless, it is a culture based on shared social experiences, consistent with its tropical origin. The shared symbolism of the Spanish-speaking, pastel-eating, coquito-drinking experience, among many other complex relationships, produces the Puerto Rican culture. \footnote{n149 The remaining sections of this article will explore the relationship between the Puerto Rican culture described above and the narratives of the current Latin Music Craze, contextualized in postmodern LatCritical theory.}

IV. Postmodern Travels through Fronteras Culturales (Cultural Borderlands)

In the current deconstructionist postmodern age, the idea of liberal universalism is rejected as being "merely a cover for an imperialistic particularism." \footnote{Postmodernism also points out the theoretical shortcomings of current philosophical movements and warns against the mistakes of extremism, at any end of the philosophical spectrum.} This is especially true when one in engages in Cultural Studies.

The articles in this symposium which focus on culture study and on the many re/presentations of Latinas/os interrogate which culture owns which aspects of those re/presentations. My perspective is a bit different. I see mi cultura latina as something that I embrace and which represents me, while crossing the many borderlands produced by colonialism and exile. In other words, I see my cultural realities and contexts, from a postmodern perspective. This construct is made possible by a theoretical distinction between popular or people's culture and political culture, that is, between cultural and political citizenships.

I have argued in other works that the Puerto Ricans must be able to develop "shared identities" \footnote{within their own community as political} and cultural citizens of the Republic of Puerto Rico, or within the United States community, as political citizens of the United States who have their culture respected by the normative society. \footnote{To construct the Puerto Ricans as cultural "citizens of the world," or even of the United States, would constitute an imposed homogeneity. Conversely, however, this construct might imply an imposition of a homogenized United States Anglo culture, which would be equally essentialized.}

I reject the notion that being Puerto Rican (or American, or Irish) first and a citizen of the World second is morally questionable or irrelevant. \footnote{This argument implies that nationalism may be deployed as a positive force, as long as it is limited by a pluralistic communitarian consciousness.} In this context, Puerto Ricans should be able to choose to be Puerto Rican patriots, \footnote{and more generally, peoples of the world should be able to choose a national affiliation.}

But nationalism, either Puerto Rican or American, cannot become dogma. \footnote{Just as Puerto Ricans should be respected as a minority culture within the United States, they should respect disenfranchised communities within the Puerto Rican peoples, either under American or Puerto Rican sovereignty. Puerto Ricans would be making a choice between legal and national affiliation.} This requires Puerto Rico and the United States to live up to the ideal described by Jurgen Habermas of a diverse "political culture" that exercises "constitutional patriotism." \footnote{The perspective of the many Puerto Rican borderlands will now become our changing frame of reference, viewed through a postmodern lens. The current Latin Music Craze both challenges and reinforces faultlines imposed on Puerto Rican culture by the normative United States society, and those internally imposed by the essentializing forces within Puerto Rican society. The next sections of the article will focus specifically on faultlines and how they are...}
challenged by or reflected in the work of the new Latina/o artists.

A. Faultlines in and about Puerto Rican Cultures

The Spanish Colony of 1493 to 1898 created, for worse and for better, the Puerto Rican culture described above. But this society is not the culture of the Taíno natives who greeted Columbus in the Caribbean; n164 it is not the culture of the Africans, free and enslaved, who came or were brought to the Island; and it is not the culture of the conquistadores (conquerors), Spanish or estadounidense. Rather, it is a separate and distinct hybrid. n165 The Spaniards effectively designed the blueprint for the gender, cultural, religious, ethnic, and racial mix in the island by conquering and destroying the natives, raping the native women, bringing in settlers, allowing immigration, and importing African slaves. The Spanish then proceeded legally to define and organize their practically constructed local society. n166

Within this complex context, the Puerto Ricans started to construct a Puerto Rican selfhood—a separate and distinct history. n167 As a result of that process, the prevailing society in Puerto Rico is today Spanish-speaking, largely Catholic, and racially diverse. Unfortunately, like many other societies, Puerto Rican culture is also heteropatriarchal, n168 sexist, n169 racist, n170 homophobic, n171 and elitist. n172

An empirical study of Puerto Rican "intolerance" found that the test subjects were openly willing to admit a strong dislike for homosexuals—who were the identified group that was most likely to suffer from discrimination. n173 The same study also identified xenophobia n174 and class discrimination n175 among Puerto Ricans. Xenophobia and so-called class discrimination, however, are often codes for racism in Puerto Rican society. n176 Nevertheless, despite its internal faultlines, fundamentally, Puerto Rican culture is different; it is "Other"—used here in its positive sense—than the normative narrative about the Anglo United States culture and the Puerto Ricans within it.

West Side Story (WSS) is probably the dominant narrative telling of the Puerto Rican story for estadounidenses. An untitled essay attributed to Mort Goode accompanies the compact disc with the original songs of this musical. It describes the scene accompanied by the song "America" as a "playful argument... between Anita ([played by] Chita Rivera) and two homesick Puerto Rican girls [played by unidentified actresses] over [786] the relative merits of life back home and in Manhattan." n177 Although the lyrics might be described as "interesting," the manner in which this song was performed is offensive, with affected language that mirrors only the worst of stereotypes about Puerto Ricans. Moreover, WSS presents Puerto Rican men only as poor, uneducated gang members. Puerto Rican women are likewise poor and violent, but they are also the objects of racialized desire.

The current Latin Music Craze has changed the dominant narrative of WSS, on balance for the better, although WSS had set a very low threshold to overcome. Below, the article will discuss the good, bad, and troubling aspects of the new narrative telling of the Puerto Ricans represented by the success of Ricky Martin, Jennifer Lopez, and Marc Anthony. n178

B. Commodification in the Current Latin Music Craze

Initially, this part must distinguish between identifying cultural faultlines and deploying culture to justify bad behavior. n179 Specifically, the commodification n180 ofLatinas/os in the current Latin Music Craze [*787] illustrates faultlines that must be corrected rather than forgiven. Even the consumption of the products of these newly popular artists within Latina/o culture represents an internal form of commodification. And Puerto Rican culture includes other forms of commodification. n181 On the other hand, there are positive aspects to the current narrative telling of the Puerto Rican story in America. By way of introduction however, I will point out that I am not seeking to blame the artists for the shortcomings of the society to which they sell their product.

The narrative record of the current Latin Music Craze is mixed, as professors Bender and Ehrenreich discuss. In his contribution to this symposium, Professor Bender deftly analyzes the current crop of Latina/o pop artists that have become popular among the larger American audience. He specifically focuses on language as a possible source of both positive re/construction of the Latina/o narrative and the danger of cultural homogenization. In her contribution to the symposium, Professor Nancy Ehrenreich writes about rejecting interpretations of Anglo/a interest in Latin productions as either good or bad. n182

Perhaps I am essentializing or just missing something, but I do not see Marc Anthony as the "Hot Latin Lover." However, the American mass media clearly disagrees and presents the salsa singer in often racialized sexual constructs. n183 Nevertheless, Ricky Martin and Jennifer Lopez are very clearly and consistently commodified as racialized, hypersexual bodies. n184 [*788]

As Professor Bender tells us, Ricky Martin is the hot Puerto Rican tamale. n185 His videos shown on MTV
are carefully choreographed to show a "Latin" hypersexuality. The portrayal represents some progress simply because Martin is not a knifewielding member of a criminal gang, as Puerto Rican men were depicted in WSS. However, the construct of Martin as an object of desire is a patent form of commodification of his racialized body. He is "teenage eye candy," the essentialized "Hot Latin Lover." n186

Jennifer Lopez also presents a mixed picture. She is depicted as beautiful in a "different" way, and she is not the desperately poor, uneducated woman of WSS, which represents progress. But the construct of her image is equally commodified. She is a hypersexual racialized body, who is in fact essentialized into one "magnificent" body part: her ass. n187 Never have so many references to one ass been heard in United States media. n188 Then there was "the Jennifer Lopez dress" at the Fourty-Second Grammy Awards Ceremony. n189 The construct of Latinas as beautiful, self-assured women is progress, their racialized commodification leaves room for critical praxis. n190

C. The Myth of Latina/o Homogeneity

In addition to their sexualized commodification, the three Puerto Rican artists and the other performers in the current Latin Music Craze are often the objects of the Myth of Latina/o Homogeneity. This essentialized vision posits that all Latinas/os constitute one "foreign nationality," relative to the U.S., and a single mixed race. n191 Hence, Ricky Martin becomes a "hot tamale" and Marc Anthony a "hot jalapeno." n192 Racially, Latinas/os are essentialized, and often essentialize themselves, n193 as una raza (one race), india, espanola y africana (Indian--meaning Native American--Spanish and African). n194

As applied to the Puerto Ricans, the notion of homogeneity imposes on them a collective colonial vision. Puerto Ricans are constructed by the United States as being altogether brownskinned. n195 The Puerto Ricans are also the Latina/o "Other" and, therefore--despite their U.S. citizenship--"foreign" relative to the United States. n196 As a result of these constructs, the Puerto Ricans become too "Other" to be "real Americans." Consequently, although the United States had the legal right to acquire Puerto Rican soil through conquest, n197 the cultural unassimilability of the Puerto Ricans means that they are unqualified for full legal and political incorporation into the United States. n198

Professor Bender criticizes the homogenization of the Latina/o experience through the attempt to create a (pan)latino identity in the current Latina/o musical moment. Even the changes in names--Ricky Martin's given name is Enrique Martin-Morales, and Marc Anthony's is Marco Antonio Muniz--are cited as examples of the need to appear non-threatening by being sufficiently assimilated, that is, homogenized. n199 Professor Ehrenreich worries about the appropriation of aspects of Latina/o culture by the normative American society. But she is also concerned about the construct of cultures as static and thus essentialized, imposed structures. n200

The work of the three Puerto Rican artists that has become commercially popular in the United States reflects an essentialized vision of a static Latina/o homogeneity. For example, the most successful songs are those performed in English, which is negative in the context of promoting the acceptance of Spanish as an "American" language, but positive if we focus on the acknowledgement of Latina/o bilingualism. However, [*791] the consumption of this homogenized product provides the artists with a limited opportunity for subversion of English normativity.

Marc Anthony, for example, has developed the most linguistically and musically complex repertoire among the three Puerto Rican artists. He includes many songs in Spanish in his albums and has albums that are sung exclusively in Spanish. n201 His HBO special had an outstanding repertoire of music, from Preciosa, the beautiful ballad by Rafael Hernandez, to Anthony's own ballads and salsa tunes. Nevertheless, his albums in Spanish are placed in the back of the music store, whereas his English language product, recorded by the same artist in the same place (the U.S.A.), is put in the front of the musical bus. n202 In other words, despite his best efforts, Marc Anthony is either an English-speaking U.S. Latino artist or a Spanish-speaking "foreigner." n203 He clarifies that he is a bilingual Puerto Rican-American. n204

The current homogenized product for the American mass market has a "Latin" beat and perhaps a "Latin" flavor that packages the aspects of Latina/o culture that Americans find alluring. For example, the Latin beat and hypersexualized dancing in the video of "Livin' la vida loca" uses Spanish merely as a spice rather than as the primary language of communication n205 and Latina/o racialized bodies as quite literal sex/appeal.

Nevertheless, the visibility of these Latina/o artists constitutes a more positive re-telling of the Puerto Rican story in the United States, especially because three of the most famous performers (Martin, Lopez, and Anthony) are Puerto Ricans and they publicly self-map as Puerto Rican. n206 These artists sing in Spanish, even though that is not their most [*792] popular product. They also present a successful picture of Puerto Ricans in America.
V. Conclusion

I will not condemn or dismiss the current Latin Music Craze just because it is not mi cultura puertorriquena. Despite its limitations, I find many aspects of the present popularity of Latina/o artists quite empowering. To put it simply, the invisibility of Latinas/os from the cultural mainstream in the United States has, at least for the moment, abated. More interestingly, the previous negative images of Latinas/os are being replaced by a positive albeit homogenized commodity. However, the artists themselves, when given the opportunity, tell their personal narratives of being Puerto Rican Latinas/os in the United States and of being bilingual, multicultural, multi-dimensional persons. Moreover, the current rapid and overwhelming success of Latina/o performers gives to the LatCrit community an opportunity for education and scholarship.

LatCritical scholarship, for example, can properly explain that the Puerto Ricans are a colonized peoples and that it is the paradox of colonial peoples that they are often both the products and the continuing victims of colonialism. Colonized societies are often multicultural; yet, oppression becomes internalized to such an extent that wealth, power, and privilege are reserved for the chosen few, at the expense of other members of the community, in a process that replicates rather than rejects the power structures of the colonizer. Generally speaking, women, persons with darker skin hues, “foreigners,” and other outsiders are marginalized in this society, even after the colonial power is gone. Moreover, oppression is so internalized that many victims do not wish to see discrimination and often do not see themselves as the outsiders.

On the other hand, submitting to the homogenization of the American mass media, without subverting it, is likewise to allow ourselves to be culturally colonized. It is also a missed opportunity to replace the dominant essentialized narrative about the Puerto Ricans and replace it with a positive re/telling of our story. LatCrit scholarship is uniquely positioned to perform and inform this process of resistance of homogenization and re/construction of a multicultural narrative.

The current Latina/o musical moment in American mass media certainly represents progress in the narrative telling of the Latina/o experience in this country by the normative American society. We have gone from the hoods, prostitutes, drug dealers, gang members, and generally inferior people associated with West Side Story and other mass media fare to a slick, high-income, homogenized product that encapsulates the image of the “hot Latin Lover.” While the essentialized vision that is represented by this homogenization is certainly partly objectionable, it ought not lead us to reject the relative improvements represented by the newly popular artists, or necessarily to blame them for their commodification (although the artists themselves must bear some responsibility for allowing themselves to be packaged in that manner).

The Latin Music Craze requires critical scholars to do two things. First, we must recognize the historical progression in the re/presentation of Latinas/os, with the necessary acknowledgement of progress in the normative Angla/o society's re/telling of our story. Second, we must continue to apply a critical eye to the current narrative to identify its prevailing shortcomings, thus ensuring continued education and progress.

This critical and educational process must be performed at all levels of our cultural borderlands. As United States citizens and scholars, we must ensure that our "American" culture counts within the normative narrative of the United States. In other words, we must refuse to accept a static, normative version of American Anglo/a culture and show instead the richness of American multiculturalism.

As Latinas/os, we also must work to identify and to tear down existing power hegemonies within our individual cultures, as well as within the larger U.S. society. In this struggle, the proper artistic and scholarly deployment of Latina/o popular cultures that survive, and even thrive within the American mass media culture, can serve as a form of political praxis that subverts existing internal and external power hegemonies affecting LatCrit communities. The current Latin Music Craze can thus serve as an important asset for LatCritical praxis.

FOOTNOTE-1:


n2 See Lewis Carroll, Through the Looking Glass & What Alice Found There (1946); see also Phyllis Craig-Taylor, Through a Colored Looking Glass: A View of Judicial Partition, Family Land and Rule Setting, 78 Wash. L. Quarterly 737, 738 n.1 (2000) ("Sometimes the law works very much like Alice's 'looking glass' - making things which are real appear fiction and things that are fiction appear real.").
n3 Noel Estrada, En Mi Viejo San Juan. Author's translation: One afternoon I departed towards a strange/foreign nation/ because destiny so wanted,/ but my heart remained in front of the sea/ in my Old San Juan. Asociacion Puertorriquena de Coleccionistas de Musica Popular (ACOMPO), Cancionero, 2 La Cancion Popular 69 (1987). Having been born and raised in Puerto Rico, speaking and singing in Spanish, I identify with the description of the United States as a foreign nation, despite my statutory U.S. citizenship.

n4 The term "Latin Music Craze" is used here to refer to the current popularity of Latina/o artists in the United States, as exemplified by the success of musicians and performers like Carlos Santana, Ricky Martin, Enrique Iglesias, Christina Aguilera, Marc Anthony, and Jennifer Lopez.


n6 In general, as used here, "Other" and being "othered" mean to be socially constructed as "not normative." See, e.g., Cathy J. Cohen, Straight Gay Politics: The Limits of an Ethnic Model of Inclusion, in Ethnicity And Group Rights 580 (Will Kymlicka & Ian Shapiro eds., 1997) ("Much of the material exclusion experienced by marginal groups is based on, or justified by, ideological processes that define these groups as 'other.' Thus, marginalization occurs, in part, when some observable characteristic or distinguishing behavior shared by a group of individuals is systematically used within the larger society to signal the inferior and subordinate status of the group."). However, I will also use the term "Other" as a relative term. See infra note 14 and accompanying text.


n8 See Fifth Annual LatCrit Conference, Substantive Program Outline, Plenary Panel Three: Multi/Cultural Artistic Re/presentation in Mass Media: Capitalism, Power, Privilege and Cultural Production, available at http://nersp.nerdc.ufl.edu/malavet/latcrit/lcivdocs/substantiveprogram.htm (last visited Aug. 23, 2000) [hereinafter LatCrit V Substantive Program Outline]. The panel had four presenters, one commentator and one moderator. The presenters were Ruby Andrew, J.S.D. candidate at Stanford Law School and an analyst for the Congressional Research Service, Steven W. Bender, Associate Professor of Law at the University of Oregon School of Law, Juan Velasco, Postdoctoral Fellow at the Chicano Studies Research Center at UCLA, and Dennis Greene, Associate Professor of Law at the University of Oregon School of Law. The commentator was Nancy Ehrenreich, Associate Professor of Law at Denver University College of Law. The author moderated.

n9 LatCritical means the LatCrit approach to legal theory. 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.


n10 The internalization of oppression occurs when a group that is oppressed by the normative society replicates some forms of oppression to marginalize members of its own community along lines of discrimination that parallel those of the normative group. For example, women might be subordinated by the men within the group, and among African Americans, lighter skin hues are considered more desirable. Oliva Espin explains the paradox of a group that is the object of discrimination marginalizing members of its own community:

The prejudices and racism of the dominant society make the retrenchment into tradition appear justifiable. Conversely, the rigidities of tradition appear to justify the racist or prejudicial treatment of the dominant society. These "two mountains" reinforce and encourage each other. Moreover, the effects of racism and sexism are not only felt as pressure from the outside; like all forms of oppression, they become internalized. . . .


n11 See generally Pedro A. Malavet, Puerto Rico: Cultural Nation, American Colony, 6 Mich. J. Race & Law 1 (2001) [hereinafter Malavet, Cultural Nation]. This article describes the legal status of Puerto Rico as a United States colony, and of Puerto Ricans as statutory United States citizens. It also discusses the reality of a cultural nationhood on the territory of Puerto Rico which clashes with the Puerto Ricans' lack of sovereignty and with dominant narrative constructed by the U.S., thus making the Puerto Ricans a colonized peoples.

n12 Carla Freccero explains that the term "cultural studies" covers a range of theoretical and political positions that use a variety of methodologies, drawing on ethnography, anthropology, sociology, literature, feminism, Marxism, history, film criticism, psychoanalysis, and semiotics. Cultural studies is anthropological, but unlike anthropology, it begins with the study of postindustrial rather than preindustrial societies. It is like humanism, but unlike traditional humanism it rejects the distinction between so-called low culture and high culture and argues that all forms of culture need to be studied in relation to a given social formation. It is thus interdisciplinary in its approaches. Cultural studies "has grown out of efforts to understand what has shaped post World War II societies and cultures: industrialization, modernization, urbanization, mass communication, commodification, imperialism, a global economy."


n13 See, e.g., Malavet, Cultural Nation, supra note 11 (explaining that the Puerto Ricans are culturally distinct from the normative U.S. society).

n14 Hence, "Othering" can be used as a subversive force that empowers marginalized colonial peoples. See Adeno Addis, On Human Diversity And The Limits Of Toleration, in Ethnicity And Group Rights 127 (Will Kymlicka & Ian Shapiro eds., 1997) ("By 'shared identity' I mean to refer to an identity that bonds together, partially and contingently,
minorities and majorities, such that different cultural and ethnic groups are seen, and see themselves, as networks of communication where each group comes to understand its distinctiveness as well as the fact that distinctiveness is to a large degree defined in terms of its relationship with the Other.

n15 In speaking of the dangers of nationalism, Ronald Beiner ponders: "Either fascism is a uniquely evil expression of an otherwise benign human need for belonging; or there is a kind of latent fascism implicit in any impulse towards group belonging." Ronald Beiner, Introduction, in Theorizing Citizenship 19 (Ronald Beiner ed., 1995) [hereinafter Theorizing Citizenship].

n16 Freccero explains that imperialism can occur on different levels and usually involves territorial annexation, economic and political annexation, juridical (legal) annexation, and ultimately ideological and cultural annexation; these latter are often referred to as cultural imperialism . . . cultural or mental decolonization is a "literature/criticism that is participatory in the historical processes of hegemony and resistance to domination rather than (only) formal and analytic." Collective and concerted resistance to programmatic cultural imperialism thus comes to be called 'cultural' or "mental" decolonization.

Freccero, supra note 12, at 68 (citations omitted).

n17 Normative means the dominant societal paradigm, that is, what is considered "normal" in a given sociological context. See Berta Esperanza Hernandez- Truyol, Borders (En)gendered: Normativities, Latinas and a LatCrit Paradigm, 72 N.Y.U. L. Rev. 882, 891 (1997) ("knowledge is socially constructed;" therefore, the "normative paradigm's dominance" defines "normal").

n18 "High Culture" maintains that 'culture is the gift of educated taste that marks off a lady or a gentleman from the upstart. For those in the Marxist tradition, culture has its place in the larger class war. High culture cloaks the extortions of the rich. Ersatz mass culture confounds the poor. Only popular cultural traditions can counter the corruption of the mass media." Adam Kuper, Culture: The Anthropologists' Account 4-5 (1999).


n20 Essentialism, as used herein, means 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.


n21 Hernandez-Truyol explains the irony of using the term "American" to refer to citizens of the United States of America:

I will use the designation U.S. for the United States of America. Many, if not most or all of the other authors use the terms U.S. and America interchangeably. I decided not to alter the authors' choice of language in that regard. I do find it necessary to comment thereon, however, mostly because I find it ironic that in a book on imperialism the imperialistic practice of denominating the U.S. as
"America" remains normative. Indeed, America is much larger than the U.S. alone; there is also Canada [and Mexico] in North America, and all of Latin America and the Caribbean, some locations commonly referred to as Central America, some as South America.


n22 "Colony" is used in this article to refer to a polity with a definable territory that lacks legal/political sovereignty because that authority is being exercised by peoples that are distinguishable from the inhabitants of the colony. See generally Malavet, Cultural Nation, supra note 11.

n23 The phrase "obvious change" is used here because Puerto Rican statutory U.S. citizenship does in fact undergo a legal change whenever a Puerto Rican moves from the Island to one of the fifty states. See generally Malavet, Cultural Nation, supra note 11, at Part III.B.3, Part III.C (explaining legal construction of second-class citizenship for Puerto Ricans who choose to remain on the island territory); see also infra note 49 and accompanying text.

n24  De La Rosa v. United States, 842 F. Supp. 607, 609 (D.C.P.R. 1994) ("granting U.S. citizens residing in Puerto Rico the right to vote in presidential elections would require either that Puerto Rico become a state, or [the adoption of] a constitutional amendment"); cf. Gregorio Igartua de la Rosa v. United States, Civil No. 00-1421(JP), July 19, 2000, 1 (D.C.P.R.) (The Court stated: "The present political status of Puerto Rico has enslaved the United States citizens residing in Puerto Rico by preventing them from voting in Presidential and Congressional elections and therefore is abhorrent to the most sacred of the basic safeguards contained in the Bill of Rights of the Constitution of the United States - freedom." According to the court, "what I had not learned until recently, is that when a white American looks at me, he or she sees a persona de color [colored person] - and it sure is not a statement in favor of making the diaspora normative.").

n25 The "Graduate Fellowship Program for Future Law Professors" is designed "to attract candidates who can bring under-represented perspectives to the development of legal scholarship and increase the diversity of the law teaching profession." http://www.law.georgetown.edu/graduate/fellowships.html#3 (last visited August 31, 2000).

n26 Each fellow works with at least one faculty mentor to develop a scholarly agenda and to co-teach in their courses. Professor James V. Feinerman and Professor John R. Schmertz were my mentors.

n27 There were many, but Professor and Associate Dean Elizabeth Patterson and Professor Emma Coleman Jordan were especially invested in this program. Professors Susan Low Bloch, Michael Gottesman, William Vukovich, Charles Abernathy, and Charles Gustafson were also encouraging. Additionally, my immediate predecessor in the program, Nancy Ota, now a professor at Albany, was especially helpful.

n28 At last count, I was one of nineteen Puerto Ricans, and 142 Latinas/os in the U.S. legal academy. Michael A. Olivas, comp. Latino/a Law Professors, 2000-01, personal correspondence via E-Mail from Michael Olivas, Sept. 2, 2000 (on file with the author). This represents an increase in the overall number of Latina/o law professors, as well as an increase of two in the number of Puerto Ricans in the past six years. See also Michael A. Olivas, The Education of Latino Lawyers: An Essay on Crop Cultivation, 14 Chicano-Latino L. Rev. 117, 129 (1994) (when this article was published, there were seventeen Puerto Rican and 140 Latina/o law professors in the U.S.). Naturally, these numbers do not include those teaching in the four law schools in Puerto Rico.

n29 See Malavet, Accidental Crit I, supra note 1, at 1327. ("What I had not learned until recently, is that when a white American looks at me, he or she sees a persona de color [colored person] - and it sure is not a statement in favor of making the diaspora normative."). In this discussion, I explained that my dad had
pelo malo (bad hair) - a reference to curly or kinky hair, which reflects an essentialist preference for white features. However, after reading that draft, my father has hastened to point out that he has medium-bad hair, which is better than pelo malo, but worse than pelo lacio (straight hair).

n30 Luke 15:11-32 (King James) ("It was meet that we should make merry, and be glad: for this thy brother was dead, and is alive again; and was lost and is found.").

n31 On December 31, 1986, ninety-six persons died as a result of an intentionally-set fire at the San Juan Dupont Plaza Hotel. The first of hundreds of suits was filed just a few days into the New Year of 1987. I watched the fire on television from my father's home in Ponce where I was staying during the Winter break from Georgetown Law School. I was again home in Ponce, getting ready to take the Puerto Rico Bar exam during the Summer of 1987, when I heard that the Honorable Raymond L. Acosta was looking for a law clerk to fill an emergency position that had opened up to assist him in his work on the DuPont litigation, which by then had been assigned the number MDL-721 by the Multidistrict litigation panel. For some background on the DuPont Litigation, see generally In Re Recticel Foam Corporation, 859 F.2d 1000 (1st Cir. 1988); In Re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d 1007 (1st Cir. 1988); In Re: Two Appeals Arising Out Of The San Juan Dupont Plaza Hotel Fire Litigation, 994 F.2d 956 (1st Cir. 1993); In Re: Thirteen Appeals Arising Out Of The San Juan Dupont Plaza Hotel Fire Litigation, 56 F.3d 295 (1st Cir. 1995).

n32 The United States District Court for the District of Puerto Rico was created by § 34 of the Organic Act of 1900. This court was "the successor to the United States Provisional Court established by General Order, Numbered Eighty-Eight, promulgated by Brigadier-General Davis, United States Volunteers ...." Id.

n33 Judge Acosta, a person with a broad-based life experience, had jumped into the waters of Normandy on D-Day plus one, on June 7, 1944. He is a former FBI Agent, who was appointed U.S. Attorney for the District of Puerto Rico by President Carter, and U.S. District Court Judge by President Reagan. I very much enjoyed working for Judge Acosta, but working for the most important agency of the U.S. governance of Puerto Rico was paradoxical. On the effect of the court on Puerto Rico law, see generally Jose Trias Monge, El Choque de Dos Culturas Juridicas en Puerto Rico (1991).

n34 28 U.S.C. § 119 (1999) ("Puerto Rico constitutes one judicial district. Court shall be held at Mayaguez, Ponce, and San Juan.").


n37 Persons were deemed to be "subversivos" (subversives) because they favored the independence of Puerto Rico. See Noriega-Rodriguez v. Hernandez-Colon, 122 P.R. Dec. 650 (1988) (the practice of opening police files for people because of political activity violates the Puerto Rico Constitution); see also Noriega-Rodriguez v. Hernandez-Colon, 92 JTS 85 (1992) (the files could not be edited to remove or delete the names of undercover agents or other informants before being returned to their subjects). Compare the Puerto Rico cases with the following U.S. Supreme Court decisions: Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956) (Smith Act activities against the communist party not held unconstitutional); Laird v. Tatum, 408 U.S. 1 (1972) (existence of "data gathering system" in which the Pentagon created files on persons it deemed dangerous, did not unduly chill the files' objects first amendment rights). See generally Ivonne Acosta, La Mordaza: Puerto Rico, 1948-1957 124-125 (1987) (an excellent scholarly analysis of the effects of the Puerto Rican version of the Smith Act); Manuel Suarez, Requiem on Cerro Maravilla: The Police Murders in Puerto Rico and the U.S. Government Coverup (1987) (a detailed account of the murder of two pro-independence supporters by Puerto Rico police, and their coverup); Las Carpetas: Persecucion Politica y Derechos
Civiles en Puerto Rico (Ramon Bosque Perez & Jose Javier Colon Morera eds., 1997) [hereinafter Las Carpetas] (an excellent collection of the legal documents related to the landmark "subversive" files decision by the Puerto Rico Supreme Court).

n38 I always thought he wanted a Puerto Rican passport. However, he tells me today, in reaction to an earlier draft of this narrative, that he would be happy with an Associated Republic and an American Passport. But the police thought otherwise. My father's carpeta de subversivo (subversive file) was file number 31336, it 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 proindependence movement, but that "no" he was not dangerous. Carpeta No. 31336, at 55 (copy on file with the author).

n39 This is also in keeping with family tradition, because in addition to his work as a law teacher, my father has written extensively about the law. See, e.g., Pedro MalavetVega, Evolucion del Derecho Constitucional en Puerto Rico (1998) [Malavet-Vega, Evolucion]; Pedro MalavetVega, Manual de Derecho Notarial Puertorriqueno (1988); Pedro Malavet-Vega, Manual de Derecho Penal Puertorriqueno (1997).

n40 See generally Malavet, Accidental Crit I, supra note 1, Part IV.

n41 This is probably the best example of a form of discrimination that is in fact worn as a badge of honor by many men, as is further explored below at note 181 and accompanying text.

n42 This is paradoxical given the strong link between the two cultures, a two-way cultural bridge that is well over 100 years old. This is discussed further in Part IV infra.

n43 La Perla del Sur, the Pearl of the South, is a reference to Ponce, which is on the Southern coast of Puerto Rico.

n44 In commenting on the current huge commercial success of Latina/o artists, we should not ignore that Latinas and Latinos have been in the American cultural scene for a long time. Tango, for example, became hugely popular in the United States starting sometime around 1913. John Storm Roberts, The Latin Tinge: The Impact of Latin American Music on the United States 44 (1999). However, in terms of commercial success and mass media exposure, the new crop of artists who are clearly identified as being Latinas and Latinos is something new. Bender, supra note 19 (discussing other artists of Latina/o heritage who have been popular in the U.S. market, but who have not generally been viewed as Latinas/os, for example, Linda Ronstadt and Mariah Carey; Prof. Bender also carefully documents the commercial success of the current group).

n45 Not to be confused with the famous Mexican balladist Marco Antonio Muniz. Marc Anthony won the Grammy for Best Tropical Latin Performance at the Forty-First Annual Grammy Awards.


n47 Santana's album Supernatural dominated the Forty-Second Annual Grammy Awards, winning in the following categories: Record of the Year (for Smooth), Album of the Year, Song of the Year (again for Smooth), Best Pop Performance by a Duo or Group with a Vocal (for Maria Maria), Best Pop Collaboration with Vocals, Best Pop Instrumental Performance, Best Rock Performance by a Duo or Group with a Vocal, Best Rock Instrumental Performance, and Best Rock Album. http://grammy.com/awards/newwinners.html (visited August 28, 2000).

n48 See generally Bender, supra note 19, at 729.

n49 See Balzac v. Porto Rico, 258 U.S. 298 (1922). The Supreme Court expressly indicates that as long as they choose to remain on the Island, Puerto Ricans, who are United States citizens, will not enjoy the full rights of American citizenship. It thus distinguishes between Puerto Ricans as individual United States citizens, and as
collective inhabitants of Puerto Rico. As individuals, they are free "to enjoy all political and other rights" granted U.S. citizens, if they "move into the United States proper." Id. at 311. But as long as they remain on the Island, they cannot fully enjoy the rights of United States citizenship.

n50 Kuper, supra note 18, at 58 (citations omitted).

n51 The communitarian concept of citizenship views the "citizen as a member of a community." Herman Van Gunsteren, Four Conceptions of Citizenship, in The Condition of Citizenship 41 (Bart van Steenbergen ed., 1994). "This conception strongly emphasizes that being a citizen means belonging to a historically developed community. Individuality is derived from it and determined in terms of it." Id. Moreover, "identity and stability of character cannot be realized without the support of a community of friends and like-minded kindred." Id.

n52 Freccero, supra note 12, at 13.

n53 Id. at 9. In the LatCrit context, the description of the Media Panel put it this way:

[1] How does law participate in the process of reducing into arts into an "entertainment industry"; [2] How does the structure of that industry restrict the production and dissemination of authentically transformative cultural forms and events? Conversely, how does it promote the production of homogenized MacCulture or of hegemonic cultural stereotypes?; [and 3] How should LatCrit theory engage these issues?

LatCrit V Substantive Program Outline, supra note 8.

n54 "Popular culture is a currency, however, that circulates between the academy and public culture, and as such it can at least constitute a common terrain of contestation." Freccero, supra note 12, at 9.

n55 Id. at 9.

n56 Id. at 135 n.1.

n57 "However, 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." LatCrit V Substantive Program Outline, supra note 8.

n58 Freccero explains that: "Graeme Turner attributes to Stuart Hall and Paddy Whannel the 'influential distinction between popular art (which derives from folk cultures) and mass art (which does not): 'The typical 'art' of the mass media today is not a continuity from, but a corruption of, popular art,' they say." Freccero, supra note 12, at 135 n.1 (citations omitted).

n59 As counterhegemony, "popular culture becomes the currency of political polemic and debate." Freccero, supra note 12, at 8. It is deployed against the hegemonic "dominant culture." Id. This is a process that is essential for legal scholars, as explained again in the Media Panel description:

Whether in culture or politics, the language of law is a crucial field for mediating questions of either symbolic or literal representation. Responding to critics of post modern theory, who complain that cultural politics has replaced real politics with "the representation of politics," we shall explore the "politics of representation" and reveal the various ways in which mass-media constitute a form of exclusionary and patriarchal political activation through the misuse of power. Analysis of mass-media narratives allows us to engage in an interdisciplinary, scholarly and critical study of certain cultural representations that is consistent with the previously articulated commitments of LatCrit theory to the construction of community and the transformation of material realities.

LatCrit V Substantive Program Outline, supra note 8.

n60 To the extent that this article is based on the concept of Puerto Rican cultural nationhood, it is certainly at least partially using ethnicity as a marker for a particular form of citizenship. In the context of the citizenship debates in political and legal philosophy, this is an attempt to define what Ronald Beiner calls the "elusive synthesis of liberal cosmopolitanism and
illiberal particularism, to the extent that it is attainable, is what I want to call 'citizenship.'" Beiner, supra note 15, at 12-13. In trying to come up with this definition, he struggles with what he describes as the "universalism/particularism conundrum," which he defines as: "To opt wholeheartedly for universalism implies deracination--rootlessness. To opt wholeheartedly for particularism implies parochialism, exclusivity, and narrowminded closure of horizons." Id.

n61 Adeno Addis, in arguing against secession, identifies the need for co-existence: "Whether the multiplicity is the 'unintended' consequence of colonialism or the organizing principle, the defining feature, of the particular nation-state, the uncontroverted fact is that most nations are indeed multiethnic and multicultural." Addis, supra note 14, at 113.

n62 The popular culture of Puerto Ricans living in the islands of Puerto Rico.

n63 The popular culture of Puerto Ricans in the "United States proper" as that term is defined in Balzac v. Porto Rico, 258 U.S. 298 (1922). Essentially, although Puerto Rico is United States territory and Puerto Ricans are United States citizens, the United States proper is used here to refer to the 50 states of the Union.

n64 This is not to suggest an acceptance of a single American homogenized culture, since that would be the result of an essentialist process that imposes a homogenized normativity. However, there is at least an attempt at a normative Angla/o American culture that does not include the Latinas/os within the U.S. borderlands.

n65 Unless otherwise expressly indicated, references to the isla or island should be read as synonymous with all the Puerto Rican islands. Puerto Rico is composed of several islands. However, it is generally referred to as the "Isla del Encanto" (The Enchanted Island or the Isle of Enchantment), or simply as the "island." The Islands of Puerto Rico are the main island known as Puerto Rico and a series of smaller islands, including, but not limited to, Vieques, Culebra, Mona, and Monito. See 48 U.S.C. § 731 (1999) ("The provisions of this Act shall apply to the island of Puerto Rico and to the adjacent islands belonging to the United States, and waters of those islands; and the name Puerto Rico as used in this Act shall be held to include not only the island of that name but all the adjacent islands as aforesaid.").


On Puerto Rico's continued territorial status, see generally Malavet, Cultural Nation, supra note 11. See also Ediberto Roman, Empire Forgotten: The United States's Colonization Of Puerto Rico, 42 Vill. L. Rev. 1119, 1151 & n.146 (1997).

n67 See Treaty of Paris, Dec. 10, 1898, U.S.-Spain, art. IX, T.S. No. 343, in Race and Races, supra note 66, at 327 (citing 11 Treaties and Other International Agreements of the United States of America 1776-1949 615-19 (Charles I. Bevans ed. 1974) ("The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."). See also Jones Act of 1917, ch. 145, 39 Stat. 951, 953 (1917) (conferring U.S. citizenship on all "citizens of Porto Rico sic;" it adopted the definition of Puerto Rican citizenship included in the...
Foraker Act); Foraker Act, ch. 191, 31 Stat. 79 (1900) ("That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in Puerto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Puerto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain . . . ."). See generally Malavet, Cultural Nation, supra note 11.


n69 Hence, Puerto Rico remains an organized but unincorporated territory of the United States. See generally Malavet, Cultural Nation, supra note 11. The essentialized homogeneity reflected in each of these labels is discussed and deconstructed in Part IV below.

n70 An article in the New York Times reflects this latter attitude. On Sunday, September 13, 1999, the paper ran an article headlined "Hundreds Gather to Welcome Pardoned Militants in Puerto Rico." Hundreds Gather to Welcome Pardoned Militants in Puerto Rico, New York Times, Sept. 13, 1999, at A1. The last paragraph of that story read as follows: "As residents of a United States commonwealth, Puerto Ricans do not pay Federal taxes but receive $ 11 billion annually in Federal aid. They are United States citizens but cannot vote for President." Id.

Initially, the statement, as drafted, is factually incorrect. Puerto Ricans do not pay Social Security and FICA taxes on income earned in Puerto Rico. See Malavet, Cultural Nation, supra note 11. But more importantly, the article implies that those who believe in Puerto Rican Independence are being ungrateful to the United States for its "generosity" in providing "Federal Aid." This characterization is carefully calculated to create a false impression of all Puerto Ricans as living off the "generosity" of the United States. Puerto Rico is a United States Territory, and Puerto Ricans are United States citizens. Therefore, the United States is simply fulfilling its obligations to citizens of the United States, not providing "aid" out of the goodness of its heart. In fact, the United States citizens residing in Puerto Rico receive federal benefits at a lower rate than citizens residing in the Continental United States. See Malavet, Cultural Nation, supra note 11.

n71 See, e.g., The Pentagon and Vieques, Wash. Post, Oct. 22, 1999, at A32 ("Chairing a Vieques hearing Tuesday, Sen. John Warner said that, doing their patriotic duty, his own constituents in Quantico sit closer to an active live-fire range than do residents of Vieques.").

n72 For example, Teddy Roosevelt, Jr., who had been appointed governor of the island by President Herbert Hoover, called the Puerto Ricans "shameless by birth" and added that he did not "know anything more comic and irritating than Puerto Rico." Puerto Rico: A Political and Cultural History 212, 220 (Arturo Morales Carrion ed., 1983). Another appointed governor, Rexford G. Tugwell, later President of the University of Chicago, referred to Puerto Ricans as "mulatto, Indian, Spanish people" who therefore made "poor material for social organization." Id. at 232.

n73 Since the outset of United States colonization, it was evident that the United States interest in conquering land did not extend equally to the colonized peoples. The Treaty of Paris, through which Spain ceded Puerto Rico to the United States, unlike the Treaty of Guadalupe Hidalgo, which ceded conquered Mexican territory, did not guarantee United States citizenship for the inhabitants of Puerto Rico. In fact,
the Spaniards on the Island could choose to retain their citizenship, but everyone else on it was left in a legal limbo. This is not to say that they were not interested at all in the people. The United States wanted consumers, not citizens. See Roman, supra note 66. Later, citizenship is given to make Puerto Ricans eligible to die for "our" country. See Rexford Guy Tugwell, The Stricken Land: The Story of Puerto Rico 70 (1946). But they are certainly not to receive all the "blessings of liberty" that are supposed to accompany that citizenship. See Malavet, Cultural Nation, supra note 11 (discussing Califano v. Torres and Harris v. Rosario).

n74 In contrasting "Americans" and Puerto Rican United States citizens, the U.S. Supreme Court stated:

Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens. It was on the American Continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents. . .

Balzac v. Porto Rico, 258 U.S. at 309 (emphasis added). See generally Malavet, Cultural Nation, supra note 11. The statement is enlightening since this case was an examination of the United States citizenship that had been granted to the Puerto Ricans in 1917; thus, the Supreme Court characterizes the U.S. citizens in Puerto Rico as not being "American."

n75 As is reflected in the Puerto Rican cultural identity discussed in Part III. See also Malavet, Cultural Nation, supra note 11.

n76 Nevertheless, the faultlines and intersectionalities of these two Puerto Rican cultures are discussed in the footnotes in Part III.

n77 U.S. troops wore green jackets during the Mexican campaigns. Military Uniforms in America, vol. 2: Years of Growth (John Robert Elting et al. eds., 1974). The U.S. troops that landed in Puerto Rico were actually wearing Civil-War era blue. Carl Sandburg, Always the Young Strangers (1953), in The Puerto Ricans: A Documentary History 97 (Kal Wagenheim & Olga Jimenez de Wagenheim eds., 1996) ("We still wore the heavy blue-wool pants of the Army of the Potomac in '65 and thick canvas leggings laced from ankles to knees.").

n78 This derivation has been widely rejected by etymologists. See Jorge Mejia Prieto, Asi habla el Mexicano 83 (1984) (no basis for "Green grow the grass" derivation); The Random House Dictionary of the English Language 841 (1987) (taking the same position as Mejia Prieto).

n79 Prieto, supra note 78, at 83 (a dictionary published in 1765 explained that "gringo" was a term used in Malaga, Spain, to refer to foreigners unable to speak Spanish easily, and was probably a bastardization of "greek," which was generally used to mean "incomprehensible language").

n80 As in the phrase, "chemical formulas are greek to me." Webster's New Collegiate Dictionary 537 (9th ed. 1984) (italics original). The medieval Latin phrase "Graecum est; non potest legi: It is Greek; it cannot be read" is the origin of the term's use in English to mean "something unintelligible." Id.

n81 E.g., Americanismos 287 (gringo is an adjective meaning foreigner or North American from the United States); Diccionario de La Lengua Espanola, vol. 1, 1059 (gringo is an adjective meaning foreign, white Europeans, North American from the U.S.).

n82 1 Diccionario de La Lengua Espanola 1059.


n84 The others arguably being The United Arab Emirates and perhaps the Commonwealth of Independent States. The term is also preferable to allowing United States citizens, who after all occupy just
one of the many countries of the Americas to make "American" their property. See also Hernández-Truyol, supra note 21.

n85 Whether many Americans feel that the term is an epithet or not is open to question, as illustrated by two personal anecdotes. My sister's godfather, a white U.S. citizen who has lived in Puerto Rico for over thirty years, likes to be called a gringo, as a descriptive name, and often describes himself as such. One of my white anglo teachers at Georgetown Law School, who was then an Undersecretary of the Treasury, used the term regularly in his class and clearly found it appropriate and not offensive. However, one of my students at the University of Florida compared it to the word "nigger" when she questioned my having used it in class (in a discussion of 28 U.S.C. § 1332(a)(2) (alienage jurisdiction)).

n86 With some minor exceptions, this section repeats the analysis of Puerto Rican culture that I presented in Malavet, Cultural Nation, supra note 11.


n88 See Carmen Aboy Valldejuli, Cocina Criolla 226 -227(1992) (a classic Puerto Rican cookbook that is also available in English); Marta Coll Camalez de Velazquez, Elizabeth Sanchez Flores, Esther Seijo de Zayas, Siluetas que Pueden Cambiar: Calorias en Platos y Alimentos de Uso Frecuente en Puerto Rico y en Otros Paises de America y el Caribe 74 (1991) (a 60-gram alcapurria has 230 calories, 16.1 grams of cholesterol, 4.0 grams of protein, and 16.6 grams of fat).

n89 The process of waiting for the hurricane in Puerto Rico has been masterfully and humorously described by the Cuban comic Alvarez-Guedes.

n90 As reflected in thriving popular cultural narratives, this identity is true and strong, in spite of the strong efforts to "Americanize" the country during the early part of the United States colony. See generally Aida Negron-De Montilla, La Americanizacion en Puerto Rico y el Sistema de Instruccion Publica 1900/1930 (1977); Malavet, Cultural Nation, supra note 11.

n91 See generally Malavet-Vega, Evolucion, supra note 39, Monge, supra note 33.


n94 One area where the clash has produced particularly unhappy results is tort law. See Guaroa Velazquez, Las Obligaciones Segun el Derecho Puertorriqueno xxiv (1964). See generally Carmelo Delgado Cintron, La Tansculturacion del Pensamiento Juridico en Puerto Rico, 45 Revista Jur. UPR 305 (1976); Carmelo Delgado Cintron, Derecho y Colonilismo (1988).

n95 See generally Malavet, Counsel for the Situation, supra note 92; Malavet, Extra-Judicial, supra note 92; Malavet, Notarial Monopoly, supra note 92.

n96 Since Spanish was used as a matter of course, the Foraker Act and the Jones Act needed to expressly stipulate that proceedings in the United States District Court, and appeals from the Supreme Court of Puerto Rico to the Circuit, had to be conducted in English. Foraker Act § 34 ("All pleadings and proceedings in [U.S. District Court for Puerto Rico] shall be
conducted in the English language.

Jones Act § 42 ("All pleadings and proceedings in the District Court of the United States for Puerto Rico shall be conducted in the English language."). In People v. Superior Court, 92 P.R.R. 580, the Puerto Rico Supreme Court denied a litigant's request to proceed in English rather than in Spanish in local court, even though both English and Spanish were the official languages. 582 P.R.R. 585, 589-590 ("the means of expression of our people is Spanish, and that is a reality that cannot be changed by any law"); See also P.R. Civil Code Art. 13 ("In case of discrepancy between the English and Spanish texts of a statute passed by the Legislative Assembly of Puerto Rico, the text in which the same originated in either house, shall prevail in the construction of said statute, except in the following cases: (a) If the statute is a translation or adaptation of a statute of the United States or of any State or Territory thereof, the English text shall be given preference over the Spanish. (b) If the statute is of Spanish origin, the Spanish text shall be preferred to the English. (c) If the matter of preference cannot be decided under the foregoing rules, the Spanish text shall prevail.").

n97 While this is true for the isla, it is not for Puerto Ricans outside Puerto Rico for whom bilingualism, and sometimes English mono-lingualism are the norm. See Celia Alvarez, Code Switching in Narrative Performance: Social, Structural, and Pragmatic Function in the Puerto Rican Speech Community in East Harlem, in Sociolinguistics of the Spanish Speaking-World: Iberia, Latin America, United States 271-298 (Carol Klee & Luis A. Ramos Garcia eds., 1991).

n98 See Amilcar A. Barreto, Language, Elites, and the State: Nationalism in Puerto Rico and Quebec 118 (1998) (the language of instruction in Puerto Rico public schools is Spanish). The Puerto Rico schools are divided into elementary schools (K-6th grade), intermediate schools (7, 8, 9 grades) and High Schools (10, 11, 12th grades). P.R. Regulations § 31-91. The language of instruction for Junior High Schools is Spanish. Id. at (5). "Every subject in the elementary schools, except English, shall be taught in the Spanish language." P.R. Regulations § 31-93.

n99 To the extent that the art form uses languages, as is the case, for example, in literature and music.

n100 Language is generally considered an essential part of ethnicity or ethnic identity. See generally Joshua A. Fishman, Language, Ethnicity and Racism, in Sociolinguistics: A reader and Coursebook 329-340 (Nikolas Coupland & Adam Jaworski eds., 1997).

n101 Religious diversity in the Latina/o communities is not rare. For a comedic take on being "jewyorican," see http://www.latinolink.com/article (visited Aug. 28, 2000) (reviewing the work of Jewish-Puerto Rican comedian Richie Bulldog (Richie Abramowitz)). For an artistic exploration and Re/construction of a Latina's identity that includes Palestinian Orthodox Christian, Polish Jewish, while growing up Salvadoran Catholic, see the artist Muriel Hasboun's exhibit Todos los Santos (All the Saints). http://www.zonezero.com/exposiciones/fotografos/muriel2/ (visited Aug. 14, 2000).

n102 On the Puerto Rican diet generally, see Carmen Aboy Valldejuli, Cocina Criolla (1992) (a classic Puerto Rican cookbook that is also available in English); Marta Coll Camalez de Velazquez, Elizabeth Sanchez Flores, Esther Seijo de Zayas, Siluetas que Pueden Cambiar: Calorias en Platos y Alimentos de Uso Frecuente en Puerto Rico y en Otros Paises de America y el Caribe (1991) (a dietary and caloric guide based on the traditional Puerto Rican diet, with bilingual index).

n103 The traditional Christmas meal will include Roast Pork, rice with gandules (pigeon peas) and pasteles. See Pedro Malavet-Vega, Navidad Que Vuelve 28-29 (1987) [hereinafter Malavet-Vega, Navidad].

n104 The Taino inhabitants of Puerto Rico used shellfish as a major part of diet, especially conch, leaving huge mounds of the discarded shells for archeologists to find. On the taino diet generally, see Irving Rouse, The Tainos: Rise & Decline of the People Who Greeted Columbus 13, 57 (1992).
Tostones are pieces of green plantain that are fried once to get the plantain soft; the plantain is then pressed and fried again until crunchy on the outside. Mofongo is plantain that is fried only until soft, and is then mixed with garlic, pork rinds and olive oil, and formed into a ball. Aboy-Valldejuli, Cocina Criolla, supra note 102, at 188, 228. The mofongo may sometimes be fried again or baked after being made into a ball. Both tostones and mofongo are often served stuffed with seafood prepared in a light tomato sauce, or with asopao, a heavy rice-based soup that is traditionally made with either chicken or seafood. Id. at 317.

Hence, the sale of bread is closely regulated by the government. See, e.g., P.R. Laws Ann., tit. 23 § 919 (1996) (regulating the labeling and weight tolerances of bread); P.R. Laws Ann., tit. 24 § 851 (1996) (defining enriched flower bread).

Rum has been produced in Puerto Rico for centuries, both legally and illegally. The illegal kind is called pitorro or the more colorful appellation lagrimas de mangle (tears from the salt-water swamp). Malavet-Vega, Navidad, supra note 103, at 37-40. Don Q (short for Don Quijote) is made in Ponce. But there are many other brands, including Bacardi, which came to Puerto Rico upon leaving Havana. Home grown brands include Palo Viejo, Ron del Barrilito (the three-star variety is an excellent dark rum aged in barrels).

See, e.g., 15 P.R. Laws Ann. § 80 (allowing for "picas" - kiosks for gambling - only during patron saint celebrations); 21 P.R. Laws Ann. § 4359(8) ("patron saint feast days" celebrations excluded from limitation on election-year spending by municipalities); 21 P.R. Laws Ann. § 4309 (municipal governments may adjust their budgets with revenues from patron saint feast days). The Attorney General of Puerto Rico issued an opinion indicating that there is no constitutional prohibition against participation of the Church in programming certain activities which are traditionally performed at municipal fiestas. Op. Sec. Just. No. 14 (1983) (author's translation from spanish original).

Though many Puerto Ricans are surprised to find that the turkey is native to the Americas.

If the music is bad, the door remains closed (unless they are really good friends!). The trullas are part of an open, outdoor celebration of Christmas that is part of the tropical tradition. Malavet-Vega, Navidad, supra note 103, at 40-42. The concept of a designated driver becomes important on these occasions.

Coquito is made with raw egg yolks, sweetened condensed milk, condensed milk, and coconut milk (made by blending coconut shavings with water), flavored with a spice broth of water in which cloves, cinnamon and nutmeg are boiled. Rum is optional. It is served chilled. Pedro Malavet-Vega, Las Pascuas de Don Pedro (1994); see also Malavet-Vega, Navidad, supra note 103, at 28-29.

The smell of arroz con dulce is unmistakable. The spices are boiled and their smells permeate the entire house with cinnamon, cloves and annis. For a good recipe and a narrative description of the process of making arroz con dulce, see Malavet-Vega, Las Pascuas de Don Pedro, supra note 112. Pegao literally means "stuck" and is a reference to the rice that sticks to the bottom of the pot. For many Puerto Ricans, this hard, crunchy byproduct of the rice cooking process is a real delicacy. The pegao from arroz con dulce, still warm, is a real Christmas treat.

The Catholic celebration of the Epiphany is also the occasion for the Promesas de Reyes (Promises to the Wisemen). Usually, when faced with a difficult situation, a family will make a religious vow to hold a large celebration in honor of the Three Wise Men if their prayers are answered. The fulfillment of the promesa requires the building of an altar to the Wisemen. The altar becomes the location for rosaries to be recited, and often sung, usually by women. The rosaries start on the night of January 5, and last into the morning of January 6. On January 6, the celebration, which always includes music, is held. Neighbors, family
and friends are invited. Malavet-Vega, Navidad, supra note 103, at 28-29. A friend who is a physician is credited with saving the life of a young boy. He is usually the guest of honor at the family's promesa, which has been held for over ten years. The family lives in modest home, but they have slowly built a large parking area and a cement building (almost as large as their home) to host the promesa.

n115 There has been some incursion of the American tradition of Santa Claus, which has meant that gifts are given to children on December 25. This is often also justified in practical terms, since kids have more time to play with their toys before having to go back to school. Nevertheless, toy sales are strongest between December 26 and January 5.

n116 The octavas are the eight days after the Epiphany. As a religious observance, the Catholic Church maintains a solemn liturgy. As part of the popular Christmas holiday, they are an extension of the Holiday Season. Octavitas is another eight day extension of the celebration or observance, which, depending on the person, could last indefinitely. Malavet-Vega, Navidad, supra note 103, at 30-31.

n117 See, e.g., Antonio S. Pedreira, Insularismo 154-155 (1971) ("Danza is a faithful reflection of who and what [the Puerto Ricans are."]); Amaury Veray, La Mision Social de la Danza Puertorriquena de Juan Morel Campos, in 5 Revista del Instituto de Cultura Puertorriquena 38-46 (1959) (though he recognizes that it is upper class music, he argues that Danza is our most refined music, which has become the best musical reflection of Puerto Ricans); Hector Campos Parsi, La Musica en Puerto Rico, in La Gran Enclopedia de Puerto Rico (1977) (Danza was a national popular musical form developed by "educated musicians, of refined taste").

n118 The adoption of Danza is definitely favored as a racist and classist construct when one focuses on the audience that listened and danced to it, which is clearly the social construct built around the cult of the Danza. But the association of Danza with whiteness and privilege is more difficult to understand when one looks "behind the music" at the most famous composers of Danzas many of whom were black, classically trained musicians, who were not members of the upper class. Pedro MalavetVega, Historia de la Cancion Popular en Puerto Rico 243-48, 315-318 (1493-1898) (1992) [hereinafter MalavetVega, Historia]. This is part of a long social construction of Puerto Rican art as being white, because it was made for whites. But it ignores the fact that those making the art were often blacks, whose contribution is often devalued by stating that the composers, musicians or other artists were slaves who were given instruments or otherwise trained by their masters. These statements do not stand up to critical scrutiny. The contribution of persons of color to Puerto Rican culture is undeniable. Id. at 469478 (analyzing the black and African influence in Puerto Rican popular music). Additionally, Puerto Rico's most famous painter was Jose Campeche, a free man, the mulatto son of a slave who bought his own freedom. Thus, the social construction of class and race conflicts with the reality. I hope to explore this problem and trace it to its origin in the development of criolla/o culture in a future article.

n119 Gonzalez specifically criticizes the "jibarism" of the plantation owners who yearn to return to the "good old days" of Spanish classism and racism. See Jose Luis Gonzalez, El Pais de Cuatro Pisos (1980) [hereinafter El Pais de Cuatro Pisos]; see also Jose Luis Gonzalez, Nueva Visita al Cuarto Piso (1987); Jose Luis Gonzalez, Puerto Rico: The Four Storeyed Country (Gerald Guinnes trans., 1993) (the English version of the original polemic).

The publication of this and other essays which so openly challenged Puerto Rican racism caused a major uproar within Puerto Rican scholarly circles. Many pointed out that Mr. Gonzalez, who self-identifies as the son of Puerto Rican father and Dominican mother, was born in the Dominican Republic and has lived mostly in exile in Mexico, where he is a professor of literature at the National Autonomous University in Mexico City. See El Pais de Cuatro Pisos, supra note 119, at 105 (essay on the author in exile).
n120 There is no doubt that even though it was made by persons who were not members of the white upper class, the Danza was embraced and adopted by Puerto Rico's white elite. See Eugenio Fernandez Mendez, Puerto Rico en el Siglo XIX: Siglo de la Lucha por la Democracia y la Autonomia, 50 Revista del Instituto de Cultura Puertorriquena 36 (1971) (Danza was the music favored by the lords of the large sugar plantations). There is also a racist tinge in what Gonzalez rightly identifies as a romanticized version of the jibaro that has been adopted by the upper classes as a counter to the African influence in modern Puerto Rico.

n121 This is contrary to Danza, which most people in and out of the Island would not be able to associate with Puerto Rico, and was popular in the nineteenth century, but not into the twentieth century. See generally Pedro Malavet-Vega, Cultura y Musica Popular Puertorriquena (Mar. 25, 1996) (unpublished essay, on file with author).

n122 The tainos had drums, palitos (wooden sticks), guiros (a dried hollow gourd with ridges that were played with a rasp), and maracas, which are still in use in Puerto Rican popular culture. See Malavet-Vega, Historia, supra note 118, at 9697, 99. But the one instrument that was produced in Puerto Rico, and which has endured the test of time is the cuatro, a small stringed instrument that got its name because initially it had four strings. Later, it developed into four double strings, and eventually a fifth set of strings was added, for the current configuration of ten (but the name is still the cuatro). Malavet-Vega, Historia, supra note 118, at 489-90. The instruments are hand made in an almost artisanal way in Puerto Rico, often by persons who are excellent woodworkers, but who lack specific training in the production of musical instruments. Accordingly, they vary greatly in quality, and keeping them in tune, especially because of their high-tension stringing, is a real challenge. The strings are metal, and playing them requires a pick and strong fingers. The sound of the cuatro is high-pitched, somewhat similar to that of an American banjo. It is an essential instrument for anyone playing seis and almost every one of the traditional Christmas songs.

n123 The seis traces its roots early in the nineteenth century, whereas the plena is a musical form of the twentieth century, with origins in the bombas, originally slave dances using drums called bombas, of the late nineteenth century. Malavet-Vega, Historia, supra note 118, at 129-39.

n124 This listing is by order of arrival. The gender problematics in music and culture generally are also being addressed from feminist perspectives. See, e.g., Frances R. Aparicio, Listening to Salsa: Gender, Latin Popular Music and Puerto Rican Cultures (1998).

n125 See Rouse, supra note 104, at 15-17; Malavet-Vega, Historia, supra note 118, at 96-98.

n126 "Criollos" means "native-born Puerto Ricans." Fray Inigo Abbad y Lasierria, Noticias de la Historia Geografica, Civil y Politica de la Isla de San Juan Bautista de Puerto Rico (1788), in The Puerto Ricans: A Documentary History 33 (Kal Wagenheim & Olga Jimenez de Wagenheim eds., 1996). In this article, the term will be used inclusively to extend to the entire Puerto Rican diaspora. But what persons, or more directly, what races, are included within the term can be a matter of controversy. An early colonial Spanish view was that "criolla/o" referred to "those who are born [in Puerto Rico], no matter from what breed or mixture. . . . The Europeans are called blancos whites, or hombres de la otra banda [men from the other side]." Id. at 33. On the other hand, some would limit the term to apply to white native-born persons. Others, more subtly, refer to the "Criollo elites," who were white. See, e.g., Jose Terrero: Historia de Espana 437 (Juan Regla ed., 1972) ("clases criollas ilustradas" the "enlightened criollo classes").

n127 Several authors of extensive histories of Puerto Rico during the eighteenth century specifically note the Puerto Rican's love for dancing and dance parties that lasted for days. See, e.g., Abbad y Lasierria, supra note 126, at 35 ("The favorite diversion of these islenos islanders
is dancing: They organize a dance for no other reason than to pass the time.

n128 A letter to the editor of a newspaper in Ponce, Puerto Rico, published on May 13, 1854, urged all "decent" parents not to allow their children to dance Danza. Malavet-Vega, Historia, supra note 118, at 237.

n129 There is some controversy over salsa's place of birth, i.e., whether it was really born in the Caribbean as a variant of the guaracha, or in the barrios of New York, as what my dad calls the "himno nacional del barrio latino de Nueva York" (the national anthem of the Latina/o barrio in New York). See Pedro Malavet-Vega, Del Bolero a la Nueva Cancion 83-93 (1988) [hereinafter Malavet-Vega, Bolero].

There is some doubt about the origin of the term salsa as applied to the Latina/o musical genre. Commercially, it appears in Venezuela, where it had been popularized in the mid-sixties by a disc-jockey, and a record titled Llego la Salsa, issued in 1966. The FANIA movie, "Salsa," filmed during a live performance in New York City in 1971, also made the term popular. The 1970s are also the beginning of the great migration from New York to Puerto Rico of the Fania All Stars. Id.

n130 Merengue was a name initially given to what today is known as danza in Puerto Rico. However, its contemporary usage refers to a form of dance music with a definitely afro-Caribbean beat that is most associated with the Dominican Republic. Recently, Juan Luis Guerra, and his group 4:40, have popularized merengues with lyrics displaying social consciousness.

n131 In a study of fifty songs that Felipe Rodriguez included in his repertoire, Malavet-Vega found that most of them discussed male-female relationships. Pedro Malavet-Vega, La Vellanera Esta Directa: Felipe Rodriguez (La Voz) y los Anos Cincuenta 395 (1987). 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. Id. at 405.

n132 On this genre generally, see Pablo Marcial Ortiz-Ramos, A Tres Voces y Guaittas: Los Trios en Puerto Rico (1991); Malavet-Vega, Bolero, supra note 129. On the strong relationship between this genre of music and Puerto Rican culture in and outside the Island, see Malavet-Vega, La Vellanera, supra note 131.

n133 "Sonora" is a Spanish term for band, and "Poncena" means coming from Ponce, a city in the South of Puerto Rico, hence, the Ponce Band.

n134 "Combo" is a Spanish term for musical group, so this band is named "The Big Band from Puerto Rico."

n135 The big bands of Cuba dominated the dance beat from the 1930s until the 1960s. In Puerto Rico, Rafael Cortijo y su Combo breaks loose in the early 1950s. This was the quintessential Latin Big Band, which transformed the Latin beat into salsa. El Gran Combo de Puerto Rico was founded in 1952. La Sonora Poncena starts in the 1950s as well, but it was really in the 1960s and 1970s that it hit its stride. (And it is still going strong.) But undoubtedly salsa then explodes in popularity in New York City, in the Latina/o community there. Malavet-Vega, Bolero, supra note 129, at 83-93. The FANIA record label - the salsa version of Motown - was founded in New York in 1964. In the early 1970s, salsa icons like Eddie Palmieri, Willie Colon, Hector Lavoe and Ismael Miranda (Maelo) are making salsa incredibly popular. The songs of Tite Curet Alonso and Ruben Blades, who first became internationally popular when he recorded with Willie Colon, also helped to popularize the genre. Id. at 161.

n136 And it has become very popular across cultural boundaries, especially with the success of New York-born Puerto Rican Marco Antonio, better known as Marc Anthony.

n137 Malavet-Vega, Historia, supra note 118, at 375 (describing Francisco Oller's famous painting "El Velorio" depicting musicians at a baquine).

n138 Malavet-Vega, Navidad, supra note 103, at 133.
n139 See generally Id. at 27.


n141 For example, in 1951, songs were produced to instruct people on how or why to fill out the ballot: Referendum, referendum, referendum quiere decir . . . / la consulta que se le hace al pueblo . . . is a song instructing 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 Puerto Rico's 1952 Constitution by popular ballot. Malavet-Vega, Historia, supra note 118, at 24. The popular vote for the Puerto Rico Constitution, which became effective in 1952, was held on June 4, 1951. Federico Ribes Tovar, A Chronological History of Puerto Rico 516-517 (1973).

n142 During the Spanish colony, for example, the song El Ciclon, (the Hurricane) was in fact a reference to Spanish colonial rulers. The author describes how the singing birds in their cages - a reference to the many persons put in jail by the new government imposed by Spain - stop singing when the Ciclon is coming. Malavet-Vega, Historia, supra note 118, at 352-357.

n143 For example, 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 now how/ to win or to die) is part of song remembering the attempted anti-Spanish revolt in Lares, Puerto Rico, on September 23, 1868. Malavet-Vega, Historia, supra note 118, at 265, 273.

n144 The opening lyrics of the Rodriguez de Tio version of La Borinquena called on Puerto Ricans to fight for independence: !Despierta boriqueno,/ que han dado la senal!/ !Despierta de ese sueño,/ que es hora de luchar! (Wake up boriqueno the signal has been given!/ Wake up from that dream/sleepiness/ that is the time to fight!). Malavet-Vega, Historia, supra note 118, at 266. “Boriqueno” is also spelled borinquo, this is a reference to the inhabitants of Boriquen or Borinquen, a bastardization of the native term for the Island today called Puerto Rico.

n145 Compare the fiery words of the Rodriguez De Tio version, to the completely submissive text of the current official version, which opens as follows: La Tierra de Borinquen,/ donde he nacido yo,/ es un jardín florido/ de magico primor . . . (The land of Borinquen/ where I have been born/ is a flowery garden/ of magical beauty . . .). It is not hard to see why Dona Lola was described by her contemporaries as a polvora (explosive black powder). Malavet-Vega, Historia, supra note 118, at 266. 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. Malavet-Vega, Historia, supra note 118, at 266-268.

n146 The musica de protesta, music of political protest, in Puerto Rico in the late 1960s and 1970s, includes a heavy dose of pro-independence sentiment. See generally Malavet-Vega, Bolero, supra note 103, at 115-150.

n147 Of course, protest can have its costs. In Puerto Rico, pro-independence artists like Luécita Benítez, Roy Brown, Americo Boschetti, Antonio Caban Vale, Sharon Riley, Andres Jimenez, Danny Rivera, and others were targeted for surveillance by the police. Malavet-Vega, Historia, supra note 118, at 21. In Argentina, 1.3% of the desaparecidos were artists. Id. at 22 (citing Nunca mas, Informe de la Comision Nacional sobre la Desaparicion de Personas, [en Argentina] 296 (Barcelona 1985)).

n148 However, as discussed, not in equal proportions, and this certainly does not translate into a homogenized racial identity, as discussed in Part IV infra.

n149 This is not to suggest that you cannot be Puerto Rican if you consume none of these items or speak no Spanish, however, these are symbols of culture and nation. They will be deployed here to identify and empower.

n150 Beiner, supra note 15, at 9 ("Appeals to universal reason typically serve to silence, stigmatize and marginalize groups and identities that lie beyond the boundaries of a white, male, Eurocentric
hegemon. Universalism is merely the cover for an imperialistic particularism.

n151 Although I find his treatment of postmodernism overly harsh, there are some helpful descriptions in David West, The Contribution of Continental Philosophy, in A Companion to Contemporary Political Philosophy (Robert E. Goodin & Phillip Pettit eds., 1993).

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 adds later in the Essay: "Postmodernists seek to disrupt all forms of discourse, and particularly forms of political discourse, which might encourage the totalitarian suppression of diversity."

n152 Beiner for example, describes what he calls the "universalism/ particularism conundrum," which he defines as: "To opt wholeheartedly for universalism implies deracination rootlessness. To opt wholeheartedly for particularism implies parochialism, exclusivity, and narrow-minded closure of horizons." Beiner, supra note 15, at 12.

n153 Addis explains:

By "shared identity" I mean to refer to an identity that bonds together, partially and contingently, minorities and majorities, such that different cultural and ethnic groups are seen, and see themselves, as networks of communication where each group comes to understand its distinctiveness as well as the fact that that distinctiveness is to a large degree defined in terms of its relationship with the Other. Viewed in this way, the notion of shared identity is not a final state of harmony, as communitarians would claim. It is rather a process that would allow diverse groups to link each other in a continuous dialogue with the possibility that the life of each group will illuminate the conditions of others such that in the process the groups might develop, however provisionally and contingently, "common vocabularies of emancipation," and of justice. I think Seyla Benhabib is right when she observed that "the feelings of friendship and solidarity result . . . through the extension of our moral and political imagination . . . through the actual confrontation in public life with the point of view of those who are otherwise strangers to us but who become known to us through their public presence as voices and perspectives we have to take into account."

Addis, supra note 14, at 127 (the notion of shared identity is not a final state of harmony, as communitarians would claim).

n154 See Malavet, Cultural Nation, supra note 11.

n155 Martha Nussbaum advocates cosmopolitan citizenship thusly:

The accident of where one is born is just that, an accident; any human being might have been born in any nation. Recognizing this, [Diogenes'] Stoic successors held, we should not allow differences of nationality or class or ethnic membership or even gender to erect barriers between us and our fellow human beings. We should recognize humanity wherever it occurs, and give its fundamental ingredients, reason and moral capacity, our first allegiance and respect.


n156 Professor Ehrenreich warns against this danger in her essay. Ehrenreich, supra note 19.

n157 Cf. Nussbaum, supra note 155. Nussbaum states that

Once someone has said, I am an Indian first, a citizen of the world second, once he or she has made that morally questionable move of self-definition by a morally irrelevant characteristic, then what, indeed, will stop that person from saying, as Tagore's characters so quickly learn to say, I am a Hindu first, and an Indian second, or I am an upper-caste landlord first, and a Hindu second? Only the cosmopolitan stance of the landlord Nikhil - so boringly
flat in the eyes of his young wife Bimala and his passionate nationalist friend Sandip - has the promise of transcending these divisions, because only this stance asks us to give our first allegiance to what is morally good - and that which, being good, I can recommend to all human beings.

Id. (referring to Tagore, The Home and the World).

n158 Walzer describes this type of nationalism:

The quality of nationalism is also determined within civil society where national groups coexist and overlap with families and religious communities (two social formations largely neglected in modernist answers to the question about the good life) and where nationalism is expressed in schools and movements, organizations for mutual aid, cultural and historical societies. It is because groups like these are entangled with other groups, similar in kind but different in aim, that civil society holds out the hope of a domesticated nationalism. In states dominated by a single nation, the multiplicity of the groups pluralizes nationalist politics and culture; in states with more than one nation, the density of the networks prevents radical polarization.


n159 In other words, nationalism does not have to be inherently fascist. See discussion supra note 15.

n160 "Richard Rorty urges Americans, especially the American left, not to disdain patriotism as a value, and indeed to give central importance to "the emotions of national pride" and "a sense of shared national identity." Rorty argues that we cannot even criticize ourselves well unless we also "rejoice" in our American identity and define ourselves fundamentally in terms of that identity. Rorty seems to hold that the primary alternative to a politics based on patriotism and national identity is what he calls a "politics of difference," one based on internal divisions among America's ethnic, racial, religious, and other subgroups. He nowhere considers the possibility of a more international basis for political emotion and concern." Nussbaum, supra note 155, at 4.

n161 Pocock uses the French Revolution as an example to describe the terrifying results of citizenship becoming dogma which justifies the destruction of your "enemies," i.e., outsiders. The French revolution went from an uprising of citizens against the ancien regime, to the terror of citizenship being deployed to justify the destruction of the enemy. Virtue became terror. See J.G.A. Pocock, The Ideal of Citizenship Since Classical Times, in Theorizing Citizenship, supra note 15, at 50.


Examples of multicultural societies like . . . the United States demonstrate that a political culture in the seedbed of which constitutional principles are rooted by no means has to be based on all citizens sharing the same language or the same ethnic and cultural origins. Rather, the political culture must serve as the common denominator for a constitutional patriotism which simultaneously sharpens an awareness of the multiplicity and integrity of the different forms of life which coexist in a multicultural society.

Id.

n163 See Habermas, supra note 162, at 264. Habermas states that one's own national tradition will . . . have to be appropriated in such a manner that it is related to and relativized by the vantage points of the other national cultures. It must be connected with the overlapping consensus of a common, supranationally shared political culture. . . . Particularist anchoring of this sort would in way impair the universalist meaning of popular sovereignty and human rights.

Id. (emphasis original).

n164 Rouse, supra note 104, at 5 ("Columbus encountered Tainos throughout most of the West Indies."). On the "discovery" and conquest of Puerto Rico, see generally Robert H. Fuson, Juan Ponce de Leon and the Spanish Discovery of Puerto Rico and Florida 71-75 (2000).

n166 This is not to suggest that there were no other influences. Immigration and smuggling were major parts of the Puerto Rican experience during the Spanish colonial period. See Inmigracion y Clases Sociales en el Puerto Rico del Siglo XIX (Francisco A. Scarano ed., 1985).

n167 On the development of Puerto Rican culture during the four hundred years of Spanish rule, see generally Malavet-Vega, Historia, supra note 118. For an interesting collection of historical Puerto Rican folktales, mostly dating to the Spanish period, see Robert L. Muckley & Adela Martinez Santiago, Stories from Puerto Rico/Historias de Puerto Rico (1999).


n169 For two narratives about Puerto Rico and exile, told from feminist perspectives, see Judith Ortiz-Cofer, Silent Dancing: A Partial Remembrance of a Puerto Rican Childhood (1990), and Esmeralda Santiago, When I was Puerto Rican (1998); see also Aparicio, supra note 168. On the plight of Latina immigrants to the United States more generally, see Oliva M. Espin, Latina Realities: Essays on Healing, Migration, and Sexuality (1997), and Espin, supra note 10.

n170 For a provocative challenge of the traditional views on Puerto Rican identity, particularly the denial of existing racism and race-based hierarchies, see El Pais de Cuatro Pisos, supra note 119; Jay Kinsbruner, Not of Pure Blood: The Free People of Color and Racial Prejudice in Nineteenth Century Puerto Rico (1996).

n171 Ramirez, supra note 168.

n172 Eileen J. Suarez Findley, Imposing Decency: The Politics of Sexuality and Race in Puerto Rico, 18701920 (1999) (while the main focus of this book is sexuality and race, class becomes an essential context for its discussion); Aurora Levins Morales, Medicine Stories: History, Culture and the Politics of Integrity (1998).

n173 Jorge Benitez-Nazario, La Intolerancia y la Cultura Puertorriqueña, in Las Carpetas, supra note 37, at 117-132. Gay men and lesbians were more likely to suffer from discrimination than the second highest group, ex-convicts. Id.

n174 Anti "foreigner" feelings were expressed, the overwhelming object (fifty-seven out of seventy-seven respondents who express anti-foreigner views) were directed at Dominicans. Benitez-Nazario, supra note 173, at 126. For an excellent study of the treatment of Dominicans in Puerto Rico, see Milagros Iturrondo, Voces Quisqueyanas en Puerto Rico 23 (2000) (discussing racism against Dominicans in Puerto Rico, and use of term "negro" (black) among Dominicans to refer only to Haitians or Africans).

n175 "Other social origin" was identified as the basis of discrimination by the study. Benitez-Nazario, supra note 173, at 126, Table I. However, the definition of "social origin" is unclear.


n177 Mort Goode, Essay, page 4, West Side Story, CD by Columbia Records/CBS, Inc.

n178 This is in keeping with the expressed purpose of the Media Panel:

Therefore, this panel addresses the question of representation of outsiders in the Mass Media. Representation has at least two dimensions (1) the literal, as in "how many persons of a particular group are 'represented' or are present?" and (2) the symbolic, as in "how are members 'represented' or portrayed?" These two types of representation have a complex relationship that overlaps culture, politics.
and law. In culture, the question of how members of a particular group are portrayed is related to how group members are allowed to be present. In politics, the questions of how many members of a group are present to be counted is related to how that particular group is represented in a legislature or other political body.

LatCrit V Substantive Program Outline, supra note 8.

n179 See generally Leti Volpp, Blaming Culture for Bad Behavior, 12 Yale J. L. & Hum. 89 (2000); Leti Volpp, (Mis)identifying Culture: Asian Women and the "Cultural Defense," 17 Harv. Women's L. J. 57 (1994); Leti Volpp, Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism, 96 Columbia L. Rev. 1573 (1996). Professor Volpp criticizes the erasure of critical voices within normative minority cultures that is effected by the seeming acceptance of faultlines as cultural traits. However, cultural faultlines are identified here as the objects of needed LatCritical praxis, not to justify discriminatory tropes.

n180 "Commodification," as used in this article, means to define something as a commodity, that is, as property. See Duncan Kennedy, A Symposium of Critical Legal Study: The Role of Law in Economic Thought: Essays on the Fetishism of Commodities, 34 Am. U. L. Rev. 939, 962-963 (1985) ("Property is the legal name for a commodity. . . ."). In economic theory, it appears to involve the valuation of almost anything and everything in order to reach the most "efficient" result. Id. However, such a conceptual scheme suffers from the limitations of economic theory, particularly its inability or unwillingness to accept idiosyncratic valuation. Professor Kennedy explains it thusly:

The idea of a completely commodified economy runs up against the problem of conflicting uses, or externalities. The idea of the commodification of valued experiences just can't tell us what to do when our valued experience generates anti-values for you. This is the familiar problem of nuisance law, but it goes far beyond the familiar. The idea of commodity embodies two opposite elements, and neither of them can be taken to its logical extreme without annihilating the other. One element is that of security of the commodity owner in the enjoyment of his thing or experience. The other element is that of freedom to use the thing for his own enjoyment regardless of the consequences for others. The property owner thinks of herself as able to do what she wants with her land, but also as able to prevent others from doing things that interfere with her "quiet enjoyment" of her land.

n181 For example, the commodification of women results in their as well as their children's subordination in Puerto Rican society. Puerto Rican men wear infidelity as a badge of honor - among other men. "Yo se mucho de [mi profesion o trabajo] y de pegarsela a mi mujer" ("I know a lot about [my profession or job] and about being unfaithful to my wife") is a commonly-used phrase among men. Serial philandering produces a re/allocation of economic and emotional resources away from the family unit and effects a commodification of women as objects of conquest and control for the men. This is not to say that other cultures do not practice infidelity, that is simply not true. But the public discussion of it, though not unique, is an essential part of our culture.

n182 Ehrenreich, supra note 19.

n183 For example, one reference reads: "It's that incredible combination of seductive voice, muy caliente moves, intense acting abilities, and - oh yeah - a whole lotta sex appeal. Can you stand his heat?" Dennis Hensley, Why Marc Anthony Makes us Sizzle, Cosmopolitan, Feb. 1, 2000, at 204, 204; see also Robert Dominguez, A Success in Any Language, New York Daily News, Feb. 9, 2000, New York Now Section, at 43 (referring to Marc Anthony as "The sexy salsa superstar"); Marc Guarino, Roadhouse Rock Doesn't get Better Than McMurtry, Chicago Daily Herald, Feb. 11, 2000, Time Out! Concert Picks Section, at 4 ("Marc Anthony, who is considered a suave, sexier Ricky Martin."). Compare Dave Tianen, He's No 'N Sync, but Manilow Still Sets Hearts Aflutter, Milwaukee J. Sentinel, Apr. 28, 2000, at 8B ("[Barry Manilow]
has none of the aura of danger that has marked musical sex symbols from Sinatra to Marc Anthony.

n184 One newspaper report distinguished Martin's sex appeal from Marc Anthony's thusly: "If Ricky Martin stands for sex, Marc Anthony represents love . . . ." John Benson, Marc Anthony, Cleveland Scene, Mar. 30, 2000, Music Section.

n185 Bender, supra note 19, at 731-32 (noting the ignorance reflected in associating a Puerto Rican with a food item that we do not have).

n186 "He's been shakin' his bon-bons since he was a boy." Behind the Music, http://www.vh1.com/insidevh1/shows/btm/rickymartin.jhtml (visited August 29, 2000); see also, Bender, supra note 19, at 733-34.

n187 The vulgar term is used here advisedly to illustrate the commodification of which Ms. Lopez has become the object.

n188 For example, and probably most notoriously, at the Sixteenth Annual MTV Video Music Awards on September 9, 1999, host Chris Rock stated, referring to Jennifer Lopez, that "she came with two limos: one for her and one for her ass." People in The News: Rock on Fire During MTV Music Awards, Las Vegas Rev.-J., Sept. 12, 1999, at 16C.

n189 The ceremony was televised live on Wednesday, February 23, 2000. Clothes Make the Lopez, http://www.vh1/thewire/news/article.jhtml ?ID=303 (visited Aug. 30, 2000). This report from the Grammys summed it up as follows:

The sound you heard when Jennifer Lopez came out on the stage of Los Angeles' Staples Center to present the best pop Album with David Duchovny was a thousand male tongues hitting the floor. And me dropping my didgeridoo sic. Casting a jaded eye over the gauzy green Versace robe that barely clung to Lopez's talents, Duchovny said, 'This is the first time in five or six years that I'm sure no one is looking at me.'

The dress has now come to be known as the "Jennifer Lopez dress." See, e.g., Tom Carter, Travel with Steves for the Fun of It, Wash. Times, Aug. 19, 2000, E1 ("We passed the Versace boutique with the Jennifer Lopez dress in the window . . . .").

n190 Since Ms. Lopez is socially constructed in the United States as "foreign" despite her American citizenship, her racialized commodification can occur even among "people eager to be culturally 'sensitive.' " Espin, supra note 10, at 8. Dr. Espin explains: "Under the guise of respect, they may racialize and exoticize immigrant women, particularly those who come from non-European countries. Many well-intentioned people believe that the 'true' immigrant has to be 'different' even if she does not want to be. Tragically, they contribute to the oppression of immigrant women in the name of respecting their culture and preserving their values." Id. at 8-9.

n191 Accordingly, Latinas/os are generally constructed as the "Other" within United States borderlands:

The existing, essentialist notion of the "American" has excluded "others" who look or sound foreign to the self-selected norm setters, creating a class of aliens within the borders. This "American" ideal excludes many, particularly Latinas/os, who cannot blend into the "melting pot" because of the colorizing, feminizing, Spanishizing, and latinizing consequences of their membership. This "American" definition of normativity has created an exclusive/elite community with fronteras denying access to "others."

Hernandez-Truyol, supra note 17, at 926 (footnote omitted); see also Berta Esperanza Hernandez-Truyol, Sex, Culture, And Rights: A Re/Conceptualization Of Violence For The Twenty-First Century, 60 Alb. L. Rev. 607 (1997); Berta Esperanza Hernandez-Truyol, Women's Rights As Human Rights - Rules, Realities And The Role Of Culture: A Formula For Reform, 21 Brooklyn J. Int'l L. 605 (1996).

n192 Bender, supra note 19, at 732. Tamales are not a regular part of the Puerto Rican diet, nor are jalapeno peppers, since Puerto Rican cooking is generally spicy but not spicy-hot. Marc Anthony has stated
that he has never eaten a jalapeno and dislikes references to them addressed at him. Bender, supra note 19, at 732.


n194 See, e.g., La Sonora Ponceña's song Descendencia (Being descended of) in the Album "Birthday Party": "Somos latinos, somos la esencia de Puerto Rico, quien me discute ese honor . . . Orgulloso de mi cantar, Latina, yo siempre estoy, . . . Mezcla de español, africano y taino. Author's translation: "We are Latinos, we are the essence of Puerto Rico, who argues/challenges this honor? . . . Proud of my singing, Latin, I always am, . . . A Mixture of Spaniard, African, and Taino."

n195 During the Congressional debate on the 1917 Organic Act for Puerto Rico, United States Representative Joseph Cannon stated that the "the racial question" made the Puerto Ricans ineligible for statehood and made them suspect as "people competent for self-government." He supported his argument with the following statistical analysis: "Porto Rico is populated by a mixed race. About 30 per cent pure African. . . . 75 to 80 percent of the population . . . was pure African or had an African strain in their blood." Race and Races, supra note 66, at 346.

n196 The paradox of citizenship for Puerto Ricans is rather striking. On the one hand, they are citizens of the United States, but on the other hand, they are socially constructed as being "foreign." Pro-independence Puerto Ricans always have a hard time with this one, since they want to be foreign, relative to the United States, they want to be a citizen of the Republic of Puerto Rico. For a good scholarly discussion of the paradox, see Ediberto Roman, The Alien-Citizen Paradox And Other Consequences Of U.S. Colonialism, 26 Fla. St. U. L. Rev. 1 (1998); For an American perspective on Puerto Ricans being constructed as foreign, see Tugwell, supra note 73, at 70, 481.

n197 See Johnson v. MacIntosh, 21 U.S. 543 (1822) (ruling that the "right of discovery" and the "right of conquest" gave Europeans legal title over the American Continents).

n198 See Johnson, 21 U.S. 543. The court stated that Native Americans could not be assimilated, i.e., they could not "be incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected." Id. at 584-585. Incorporation was not "practicable," thus requiring the Europeans to choose between "abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword." The Supreme Court justified genocide as follows:

When the conquest is complete, . . . the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people . . . .

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

On Latina/o assimilation generally, see Johnson, supra note 193 (a poignant discussion of growing up Latina/o in
n199 Bender, supra note 19, at 745.

n200 Ehrenreich, supra note 19, at 799.

n201 So do Lopez and Martin. Martin, in fact, first became successful with Spanish-language albums. But Marc Anthony presents, in my view, a wider variety of musical genres in his concerts and CDs.

n202 Professor Bender describes this incident in his article. Bender, supra note 19, at 735.

n203 Discussing the term "Latin Music Invasion," Professor Bender identifies the irony of referring to the success of these artists as "invaders" given that of the group already identified, only two were born outside United States territory: Carlos Santana, who was born in Mexico, and Enrique Iglesias, who was born in Spain. The others are U.S. citizens born on U.S. territory (Martin was born in Puerto Rico).

n204 There may be progress here, represented by the Jennifer Lopez and Marc Anthony video duet in Spanish, which is being shown on VH-1. The artists themselves do not hide, and in fact embrace their Spanish language openly. The question is, will the American mass media culture accept it? Professor Bender does cite one troubling example in which Linda Ronstadt was heckled for singing in Spanish in support of her album Canciones de mi Padre. Bender, supra note 19, at 726-27.

n205 However, the language of success can be constructed in different ways. For example, the success of bilingual Latinas/os might symbolize that Spanish poses no threat to English in the United States, and that bilingualism is not a horrible thing. Prof. Steven Bender develops this theme in his article. Bender, supra note 19, at 727.

n206 It was impossible to miss the hundreds of Puerto Rican flags on prominent display in Madison Square Garden for the Marc Anthony's live HBO concert. However, that would require that Americans recognize the flag. Initially, they would have to distinguish it from the equal design of the Cuban flag, which changes the color scheme. The Puerto Rican flag has a blue triangle and red stripes, and the Cuban flag has a red triangle and blue stripes. Additionally the blue stripes of the Cuban flag are often in a much lighter shade of blue than the navy blue of the Puerto Rican flag's triangle. Both flags were designed on the same day in the late 1890s on 25th Street in Manhattan in New York City. Olga Jimenez de Wagenheim, Puerto Rico: An Interpretative History from PreColumbian Times to 1900, 198 (1998).


n208 The VH-1 specials dedicated to Jennifer Lopez and Ricky Martin are probably examples of this (although both are also rather exotically packaged). Marc Anthony's HBO Special Live from Madison Square Garden is also an opportunity to see the broad range of this performer.
I. Introduction

I first heard salsa in 1993, and began learning to dance to its polyrhythmic melodies shortly thereafter. In those days, the Latin clubs in Denver were filled primarily with Latinos/as--I met many Puerto Ricans and Newyoricans, Peruvians, Colombians, Mexicans, Venezuelans, a few Cubans--and when I mentioned to white folks that I was "into salsa" they thought I was going through a Mexican cooking phase. There were definitely a few Anglos/as like myself going to Latin music nightclubs at that time, but not many. Most Anglos/as who knew salsa were the ballroom dance crowd, and they tended, in this area anyway, not to frequent the clubs.

Things have changed dramatically since then, however. Over the last year or two, Anglos/as have begun flooding the local salsa nightspots. First they came as gawkers, but eventually they ventured out onto the dance floor. And whereas, before, Denver nightclubs could rarely afford to dedicate more than one night a week to Latin music, eventually the leading spot was open on Thursday, Friday, and Saturday nights. At the dance classes that open the evening at most clubs, there are two to three times as many students, mostly Anglos/as, in attendance as there used to be.

Both on the dance floor and off, this new-found Anglo/a appreciation of Latin music and dance has been received with decidedly mixed emotions. Anecdotally, I can report that some Latinos/as in local Denver clubs are doing a certain amount of grousing about the change in atmosphere that they feel has resulted, in places they rightfully thought of as theirs--not to mention the number of feet that get stepped on when you fill a dance floor to capacity with a crowd full of beginners. But one also senses a certain pride to the reaction in some cases--or even a sort of acquisitiveness. Some of the young Latinos and Latinas seem to be serving themselves up for consumption by the generally more affluent Anglos/as--who themselves often seem to be seeking the hyper-sexuality that whites associate with both Latin music and those who dance it. This may be their ticket, some of these young Latinos/as seem to (perhaps unconsciously) feel, to status, money, legitimacy--to all that's valued by the mainstream culture.

Journalists and academicians also are having mixed reactions to the recent white fascination with Latin cultural productions. As the writings in this volume (and elsewhere) indicate, some approach it with cautious optimism, citing the increased visibility of Latin music and the economic boon to Latino/a artists and their associates that this newfound stardom represents, while others are less sanguine about the possibility of long-term good flowing from the sale of a few Latin pop CDs. Most seem to be at least wary of this gift horse with its rather large teeth. They struggle with how to tell the difference between appreciation of their cultures' artistic productions on the one hand and appropriation of those productions for profit and orientalizing exploitation on the other.

As such mixed reactions to the "Latin music craze" illustrate, recent changes in white musical tastes (along with other not-so-recent developments such as the increased interest in "Mexican" food epitomized by the success of the Taco Bell chain and other "Mexican" restaurants) raise important issues that have implications far beyond the already-not-insignificant world of music. I would argue that, among other things, white reactions to salsa invite an engagement with, and critique of, the rhetoric of pluralism and tolerance for diversity by which the dominant white society defines itself. That is, these reactions raise questions about what constitutes appreciation of any "other"--about what makes a society truly pluralistic.

In this essay, I use the subject of Latin music and dance, and especially my own involvement with salsa as a EuropeanAmerican, as a vehicle for exploring these broader issues of cultural ownership, cultural identity, and cultural interaction. I ultimately conclude that one should reject any impulse to interpret Anglo/a interest in Latin cultural productions as either unequivocally good or unequivocally bad. Moreover, I
caution that seeing the issue as a question of appropriation versus appreciation reinforces a static and essentialized view of culture, ignoring centuries-old currents of cross-fertilization among EuroAmerican, African, and Latin American societies. Such a binary opposition also thereby constructs the dominant society's popular culture (including its music) as white, rendering invisible the important contributions to that culture by people of color in general and Latinos/as in particular.

In Part II, then, I begin by engaging the tension between appropriation and appreciation, arguing in favor of each interpretation of the "Latin music craze" in turn, and thereby demonstrating that neither can be completely endorsed or rejected. In Part III, I struggle with my own rather negative reaction to the influx of Anglos/as into Latin clubs, interrogating my initial feelings of possessiveness about this dance form and probing the colonialist potential in such a reaction. I go on, however, to reject essentializing notions of cultural ownership that would condemn my identification with Latin music, ultimately suggesting an approach that looks for common ground in substantive (and perhaps even political) commitments that transcend identity issues by forging connections through shared respect and shared resistance to power hierarchies. In Part IV, I relate this discussion of Latin music to broader issues of multicultural coexistence and, in particular, to "pluralism" as a solution to group conflict in the broader society. I argue that cultural pluralism, as that term is frequently used, is a facile, feel-good concept that suggests it is possible for the privileged few to include the subordinated many simply by "accepting" them, without any commitment to the structural change and redistribution of wealth and power that are essential to any real inclusion of "others" into mainstream United States society. [798]

II. Appropriation and Appreciation: Should We Like It That They Like Ricky Martin?

A. Appropriation: the McDonaldization of Latin Music

In my experience, the use of the term world music is a way of dismissing artists or their music as irrelevant to one's own life. It's a way of relegating this 'thing' into the realm of something exotic and therefore cute, weird but safe, because exotic is beautiful but irrelevant; they are, by definition, not like us. Maybe that's why I hate the term. It groups everything and anything that isn't "us" into "them."

--David Byrne n10

In this society everything gets commodified and homogenized. There is little attention to historicizing these cultural products, understanding their connection to specific peoples and their lives and struggles. Instead, Latin dance is just the flavor of the month, a new sensation to taste and leave behind for the next thrill.

--Margaret Montoya n11

The Anglo/a turn to "world music" in general, and Latin music in particular, raises a number of problems. First of all, it is troubling at the economic level. Musical tastes may come and go, but unless they are translated into Latino/a ownership of record companies and high-placed Latino/a executives within the music industry, Latin music will fall back into oblivion as soon as the fad passes. n12 Singers will once again be discouraged from singing in Spanish or using horns in their music, n13 and few influential figures will remain to be credited with leaving a long-term mark on the musical traditions of this country.

In addition to the short-lived nature of any economic benefit, there are also important questions to be raised about the representational/rhetorical impact of recent Anglo/a interest in Latin music. The most obvious negative ramification of such interest is the tendency of both media and promoters to exoticize Latin artists. As Steve Bender [*799] describes in his article in this symposium issue, depictions of Latino/a performers (by both others and themselves) often invoke the familiar stereotype of the "hot Latin lover"--an erotic, promiscuous, sexually voracious figure that has long been a staple of the Anglo/a imagination. n14 Such stereotypical images are disturbing for a number of reasons. At the most obvious level, they construct Latin men as animalistic (emphasizing, as they do, physicality over intellect) and Latin women as "bad girls" (thereby, among other things, potentially hampering their ability to receive vindication for rape and sexual harassment n15). In addition, depictions of Latino/a recording artists as imbued with "hot Latin rhythm," like the notion that African Americans are naturally good at basketball, n16 minimize the hard work that goes into Latin recordings and performances, treating those performers' successes as merely the natural result of innate traits.

It is important to note that this exoticization takes place simultaneously with an orientalization of Latin artists, as Bender so thoroughly and convincingly describes. n17 That is, these performers are not only constructed as hypersexual, but are also constructed as "not us." Despite the fact that many are United States citizens, they are depicted as Spanish-speaking foreigners, their music an alien art form that is invading North American soil. n18 By denying their "American"-ness, media representations of Latin artists emphasize their different-ness, keeping them at a distance by treating them as an exotic "other."
This emphasis on the performers' foreign-ness also constructs the United States in general, and North American pop music in particular, as [800] white. By emphasizing the "invasion" or "crossing over" of Latin music to "American" shores, n19 media coverage of Latin artists rhetorically constructs those shores as white and EuroAmerican. The implicit message is that pop music up to this point has been exclusively white (or perhaps white and African American), n20 and that the infusion of Latin influence is something new. This message obscures not only the fact that many of the Latin artists are themselves United States citizens n21 but also the many contributions that Latin musicians and forms have made to traditional "American" pop. n22

Media representations of Latino/a cultural productions are troubling not only in this tendency to exoticize and orientalize Latin artists, but also in the way that they often conflate pre-packaged, (North) Americanized versions of Latin culture with that culture itself. Just as tacos and tortilla chips have come to represent Mexican cuisine to many non-Latino/a Americans, the danger is that Ricky Martin will come to represent Latin music. Now, I do not want to be misunderstood as saying that there is some pure, superior, "true" version of Latin music to which people should be listening. What I object to is the metonymic reduction of the rich quilt of salsa, merengue, cumbia, samba, son, lambada, mambo, bolero, and many other Latin musical forms that I have yet to learn, to "Livin' La Vida Loca." n23 Such reductionist, monochromatic visions of Latin culture diminish its richness, thereby contributing both to its overall devaluation and to a general lack of awareness of its contributions to the mainstream culture.

But why, some might ask, is it a bad thing for European Americans to need to be introduced to whitewashed versions of other societies' cultural productions in order to appreciate them? At least they are evincing an interest in music and food that are different from their own; at least they are trying something new. Surely their increasing openness to Latin [*801] music has the potential for producing a parallel openness to Latinos/as, a new-found respect for other ethnic groups. This set of arguments raises, however, a very dangerous aspect of the mainstream society's tendency to "Americanize" unfamiliar cultural forms. The danger is that, by conflating a one-dimensional, homogenized representation of a culture's music or food with its actual music or food, white Americans will convince themselves that they have actually understood and appreciated some aspect of that culture. I will discuss this point further in Part IV.

B. Appreciation: Ricky Martin as Cultural Ambassador?

The fact that one can make the case for seeing the Anglo/a infatuation with Latin music as a fleeting and even harmful appropriation of Latino/a cultural productions does not, however, mean that such interest is purely negative. It clearly brings economic empowerment to individual performers (and often their employees and immediate families); draws positive attention to the musical artistry of Latinos/as, thereby validating their culture and its members; and provides role models for Latino/a youth. n25 The Anglo/a fascination with Latin music and dance can also, I would argue, work a fundamental transformation in some individuals--a transformation which effects important, although admittedly incremental, social movement towards true multicultural understanding and appreciation.

To develop this latter point more fully, it is necessary to recount a bit of my own personal history with and experience of Latin music. The irony of the discussion just presented was surely not lost on many readers. For I am, of course, one of those "white Americans" whom I have just indicted for having appropriated, commodified, and generally misunderstood Latin music. Yet my felt experience of salsa has been broadening, educational, even (dare I say) profound. I believe that the experiences of going to Latin nightclubs, talking with the people there, n26 listening to the music, and dancing have taught me many things, and left me fundamentally changed. If I am correct in that belief, then, at the individual level as well as on the economic and cultural fronts, the Latin music craze is arguably in some ways a good thing.

It is embarrassing, but nevertheless important, to admit some of the ignorance from which I suffered before my encounter with Latin music. Before beginning to dance salsa, I did not fully appreciate the fact that many Latinos/as are also "black"--that they are phenotypically African American and share African ancestry. The reason I say I did not "fully appreciate" this fact is that, while I certainly must have "known" (or at [*802] least heard at some point) that slavery had existed in the Caribbean, this knowledge had not been fully integrated into my expectations and assumptions about the world. In other words, when I first saw Black people in the clubs, I would (unconsciously) assume they were African American, and would then be surprised when I learned they were from the Dominican Republic, Brazil, Cuba, Puerto Rico, etc. I had always thought of Latinos/as as lighter-skinned than that. Learning about the brown/black tensions in some of those other countries--as well as about the differences among the various countries--
also helped me to appreciate the complex racial and ethnic politics of our own diverse population, and to avoid the pan-Latino image that Bender describes. n27

I also gained political knowledge from dancing salsa; the most important fact I learned was that Mexico was ruled by a very repressive, one-party system that had been in place for over 70 years. n28 Again, let me reiterate--the fact that I did not know this is both hugely embarrassing and extremely important. It is incredible that an educated, daily-newspaper-reading citizen of the United States would be unaware that the government of our immediate neighbor to the south, the government that agreed to open its borders to North American corporate power by signing NAFTA and GATT, n29 was not a democracy. Nevertheless, I strongly suspect that most Anglo/a Americans suffer from similar knowledge gaps. Moreover, this ignorance is, in some sense, understandable, for the mainstream media virtually never mentioned Mexico's dictatorship and our government virtually never condemned it. n30

Salsa was also, for me, an introduction to the immigrant world, and (most importantly) put a human face on "the immigrant condition." I met a Peruvian attorney who left his country because of political repression and worked at Taco Bell, a Mexican MBA who built window blinds in a Denver factory because he could not find a job at home, an Ecuadorian athlete who supports himself by running in international races and trains in Boulder half the year. I discovered that Mexico suffers serious unemployment and underemployment, n31 and that, as a result, millions of Mexicans live and work here in the U.S. n32 I learned how much it costs to get someone to run you across the border from Mexico and saw the fear that INS raids on local workplaces--or even a simple traffic stop, for that matter--can instill in an undocumented worker. I heard stories of such extreme bureaucratic ineptitude at the INS that it was hard not to see such ineptitude as conscious harassment. I met people who hated it here and went home to Mexico, only to return because there was simply no work to be found there. I also experienced, for the first time in my life, rude and unfair treatment by the police treatment that occurred as I was leaving a Latin nightclub, and therefore, I believe, came from an officer who probably thought I was Latina.

The music and dancing themselves were also educational, and even transformative, for me. Just as many forms of dance (plus some sports and other outdoor activities) do for other people, salsa provided me with an important escape from my intensely cerebral, academic world. But perhaps more than some of those other activities, Latin dance also provided a new form of nonverbal human connection. n34 Perhaps partly because salsa is danced in couples who hold onto each other, in order to dance it effectively, one has to be intensely aware of one's partner and sensitive to slight physical movements in which he or she engages. One also often interacts with the partner on a personal level, as each responds to little miscommunications or missteps--or particularly great moves--one or the other makes. Dancing salsa is, in short, a cooperative undertaking, and successfully executing a series of moves is not only exhilarating but also often creates a sense of human connection and warmth. That nonverbal sense of connection, I want to suggest, is often missing from the competitive, hyperintellectual, and coolly cordial style of interpersonal interaction that characterizes many (Anglo/a) professionals' lives. n35

Salsa not only provides an alternative, nonverbal foundation for human connection, but also offers opportunities to sever sensuality from sexuality, allowing people to experience their sensual selves in interactions free of sexual content or implications. Latin dance is, of course, very sexy. All those moving hips, all that touching and turning. But the interaction between two dancers need not necessarily be about sex at all, and wiggling one's hips is not necessarily interpreted as a come-on. There are, of course, bounds of propriety about what one does and does not do, and the respectful dancer does not cross them. But there definitely can, at times, be a disjunction between the sexy and the sexual that allows people to experience a sensual connection with another person without fearing or suggesting further sexual interaction. I would argue that the richer palette of human connection provided by this disjunction is a good thing.

In this regard, I find Patricia Williams' comment about Anglo/a reactions to the blues particularly relevant. Williams indict white society for reducing the blues to a "mood," abstracting it out of the cultural context that generated it and thereby losing the political and human content that makes it profound. n36 I would suggest that, similarly, Anglo/a depictions of and reactions to salsa tend to reduce it to a crass form of commercialized sexiness ("hot tamale," "hot Latin rhythms," etc.) that misses the much more complex set of meanings attendant to what Latinos/as call sabor. n37

Finally, the salsa world also offers an interesting alternative model of female attractiveness. It is unnecessary to reiterate here feminist critiques of the fixation on physical attractiveness and reduction of women to their bodies that characterize both EuroAmerican and Latin cultures. What is of interest to me is the challenge to that fixation which Latin
dance can implicitly provide (at least to Anglos/as like myself). As a result of years of frequenting Latin clubs, I have found my own notions of sexiness have broadened, so that they now include how someone moves rather than just his or her still-photo features. In contrast to (white?) notions of female sexiness that focus principally on physical appearance (with the magazine model—or, depending on your sensibilities, the Playboy centerfold—as the prototype), salsa sensibilities n38 provide a notion of sexiness that stems as much from how a woman dances as from how she would appear in a magazine ad. n39 I find this more dynamic, action-oriented model of female attractiveness a useful contrast to more static, passive standards of beauty. n40

In acknowledging these positive effects that Latin dance has had on me, I do not mean to minimize or trivialize the serious gender inequalities that characterize Latin societies and communities, or to romanticize Latinos/as by attributing to them an idealized, "natural" sexuality untainted by culture, artifice, or power. My point is simply that dancing salsa—like living in an integrated neighborhood or working in an integrated workplace—provides the opportunity for a meaningful and educational cross-cultural experience. Anglo/a interest in Latin dance does not guarantee that experience, but makes it a possibility. n41 The Latin music craze opens up viable avenues of valuable multicultural exchange; it [*806] has the potential to change individual lives in ways that are clearly beneficial to the project of developing a truly multicultural society.

III. Moving Beyond the Binaries: Whose Culture Is It Anyway?

A. The Inevitability of Both Appropriation and Appreciation

The preceding discussion of the appropriation/appreciation debate (along with other discussions in this volume) raises a number of related questions. Is it possible for subordinated groups to use media exposure and popular culture to challenge their subordination, or do the commodifying, homogenizing impulses of North American mass media make that project futile? Is it possible to value and promote Latino/a cultural productions without essentializing Latinos/as, or does the identification of a distinctly Latin artistic sensibility inevitably confine and stereotype individuals? Or, to put this second point differently, is it possible to condemn representations of Latino/a culture as inaccurate or orientalizing without implicitly constructing a canon of "authentic" Latin music or art that is just as problematic as the stereotype one is challenging? The appropriation/appreciation debate, in short, raises issues of cultural identity and cultural membership. All identity groups struggle with how to define the group, and grapple with the disintegrative implications of intersectionality analysis and postmodernism. All such groups struggle with what Martha Minow has called the "dilemma of difference." n42 They try to eliminate stigma by valorizing their particular traits, and attempt to protect themselves from supposedly universal white norms by emphasizing that those norms do not apply to them. But in focusing on their difference, they risk reessentializing the group and erasing differences within it. In a similar vein, the increased attention given to Latin musical artists can both challenge and reinforce stereotypes. It can emphasize their difference in a way that exoticizes and stereotypes, or that valorizes and destigmatizes. It is not possible to pick one of these outcomes as the likely or principal one. There are no pat answers here.

Thus, I would argue that the answer to each question posed above is "both/and" (both "yes" and "no"). Cultural productions always contain both liberatory and subordinating possibilities. Like all other sites of social interaction, they provide opportunities for resistance to dominant [*807] power structures but also present the risk of reinforcing those very structures. Thus, the important question is not whether it is good or bad that the Anglo/a society again has become interested in Latin music. Rather, the question is how subordinated groups take advantage of that interest to reinforce its good sides and critique its down sides, n43 and how Anglos/as react to that critique. n44 Those factors will determine where, between the two unlikely ends of the continuum—savior and disaster—the "Latin music craze" will fall.

B. Problematizing the Notion of Culture

But there are a number of reasons to move beyond the appropriation/appreciation debate besides the fact that it is unsatisfying and ultimately irresolvable. That debate also implicitly relies upon a problematic conceptualization of what a "culture" is that is more harmful than helpful. As the discussion above makes clear, the notion of "appropriation" contains within it the idea that there is a legitimate possessor of a cultural production and an illegitimate one. That is, it assumes that there are, on the one hand, certain people (assumedly, the members of the particular group in question) who know what the production means and should be its principal beneficiaries (in both economic and non-economic terms), and, on the other hand, certain people (non-members) who do not necessarily understand its meaning and should not be its principal beneficiaries. In other words, the appropriation/appreciation binary raises questions of
cultural membership and cultural ownership. Who "owns" Latin culture and Latin cultural productions? Against whose reality should media interpretations of those productions be measured? Or, to apply the question to the explicit context of this article: how can an Anglo/a possibly have the chutzpah to imply that she knows the "right" way to interpret or appreciate Latin music? My ultimate answer to these questions will be to problematize and challenge the unitary vision of culture that I believe they presume. But before I turn to that critique, let me first engage the last, and obviously most charged, of the questions I have posed.

1. Who "Owns" Cultural Productions?

As I mentioned above, my initial reaction to the influx of Anglos/as into the Latin dance nightclubs in Denver was rather negative. I saw their interest in salsa as largely uninformed, exoticizing, and invasive. I resented their intrusion into this multicultural enclave I had found in my mostly white world. I realized, of course, that this was a rather problematic attitude, since I myself was arguably just such an interloper. But I distinguished myself from the recent wave of Anglo/a immigrants into the Latin scene, reasoning that since I had come in ahead of the curve my interest was more genuine: I not only appreciated Latin music; I understood it.

I realized even then, as I do now, that this was a very problematic assumption. The potential for hubris in such an attitude is undeniable, the risk of re-colonization great. I struggle with whether this way of looking at the situation is legitimate, and I have discussed these ideas with many people, as well as interrogated them by myself for many hours. In feeling this sense of possessiveness about Latin music and dance, am I embodying the very act of appropriation that I propose to condemn in others? Am I fooling myself in thinking that I have any more ability to understand this music than any other Anglo/a? Am I trying to possess this cultural production like a cute doll--as my special little something that I do not want to share with other whites? Is my behavior any different from (although clearly on a much smaller scale than) the efforts of colonial powers to protect "their" lands from other white aggressors? And, fundamentally, how does one distinguish the exhilaration of true multicultural exchange and personal growth through real human connection from the exhilaration of acquisitive possession and conquest?

In struggling with these questions, I have found it instructive to think about a hypothetical Latina who, in contrast to myself, does not dance salsa or speak Spanish. Is salsa nevertheless "her" music? Is it appropriate for her to feel possessive about Latin dance or the Spanish language? Is it legitimate for her to be angered by "English only" policies or posters advertising "hot" Latin music? It seems to me that the answers to these questions clearly are (depending, of course, on the particular person) yes, yes, and yes. A number of reasons explain why it seems that such an individual could rightfully feel proprietary about Latino/a cultural productions and resentful of their misuse by Anglos/as. First of all, she might have a vivid sense of the role of Latin music and dance, as well as of the Spanish language, in her culture. While she does not dance salsa or speak Spanish, her parents might have, and she might appreciate the role that the music or language played in their lives. Similarly, she might have relatives who spoke only Spanish, or she might have heard stories about music and dance that make them part of her cultural identity. And of course, she is affected by stereotypes of Latinas that Anglo/a language policies and Anglo/a misrepresentations of Latin music help reproduce, even if she cannot roll her "r"s or dance a lick.

This discussion suggests that the answer to the question about "ownership" of cultural productions (and hence, the question of group membership as well) is substantive and/or political—that it turns on the particular life experiences of the individual, and on the particular substantive relationships to such productions generated by those experiences. In this sense, then, my feeling of possessiveness towards Latin music may be just as legitimate as that of the Latina who does not dance, and for the same reason. The legitimacy of my reaction turns on the substantive attitudes that I have towards Latin music, artists, cultures, and people, rather than on whether I can claim any ethnic or racial identity to validate it. Just as there can be male feminists, so there can be white antiracists—and white salseras. There can also, of course, be white "LatCritters."

2. Rejecting the Notion of a Pure, Homogeneous, Static Culture

The fact that the appropriation/appreciation binary suggests a formalistic and biological definition of group membership, rather than a substantive and political one, is not the only thing that makes it unhelpful. The appropriation/appreciation binary also implicitly relies upon a notion of culture that creates false conflicts between identity groups, erases Latino/a contributions to Anglo/a culture, and essentializes identity.

To suggest that Anglo/a culture appropriates Latino/a cultural productions is to construct Latino and Anglo/a cultures as discrete and separate entities, with fixed
and impermeable boundaries. It is also to construct each culture as internally consistent and invariable (in short, homogeneous), and as static and unchanging. But none of these images accurately captures either culture. n52 To return to music as an example, neither Latin music nor EuroAmerican pop music n53 is a pure and unadulterated expression of its particular group's "culture." Rather, the history of both bodies of music is replete with instances of cross-cultural borrowing. n54

Thus, as I noted above, n55 to treat mainstream (white) North American pop music as separate and distinct from Latin music is to construct the former as pure and white, thereby erasing the Latin influences upon it. In the same way that placing Marc Anthony's CDs in the "world music" section of the music store erases his North American citizenry and constructs the United States as white (and English-speaking), n56 indicting the Anglo/a society for appropriating Latin music implies that, before the act of appropriation, mainstream North American music was purely the product of white musicians.

Posing the issue as one of appropriation versus appreciation thus constructs North American culture as homogeneous. To suggest that white "America" should not appropriate (or should be careful in how it appropriates) Latin musical forms is to suggest that those forms have not always been a part of the white musical scene in the United States. Rather than recognizing the multiple strains of influence within supposedly "white" North American music, the appropriation argument instead sets up a dichotomy between "American" music, which is assumed to be white, and "Latin" music, which in turn is assumed to be produced by non-white South or Central-Americans. It reinforces, in other words, the * apportionment" of Latin American artists and, hence, of Latinos/as in general. n57

Moreover, the idea that cultures are homogeneous and distinct in turn lends support to the notion that identity groups' interests often conflict, and that there are inevitable tensions within a progressive position committed to gender, sexual, racial and ethnic equality. Leti Volpp, in her excellent work on the cultural defense, n58 vividly illustrates the flaws in such an analysis. Volpp describes how cultural defense cases are often seen as requiring a choice between protecting women from abuse or forced marriage and protecting patriarchal cultures from ethnocentric imposition of "American" values. In short, such cases seem to pose a conflict between feminism and multiculturalism. Volpp criticizes this understanding, however, pointing out that it reduces the allegedly sexist "culture" at issue to its male members, rendering invisible women of that culture who oppose patriarchal practices within it. It simultaneously, she contends, constructs United States culture as egalitarian, ignoring the numerous patriarchal practices within our own society. n59 To the extent that the appropriation/appreciation binary reinforces the notion that cultures are homogeneous, I suggest, it facilitates the same type of thinking that Volpp indicts.

Finally, the focus on the appropriation/appreciation binary also tends to reinforce a view of cultures as static and unchanging. In so doing, it misses the extent to which culture is always and ever being negotiated, just as identity is. n60 A culture is not a static, concrete thing, but rather a living and changing set of practices and interactions--in short, a process. Like any particular social practice, a culture is a site of political struggle--over both material resources and rhetorical meaning-making. It is not so much something that a group possesses, but rather something that it performs. n61 In this sense, appropriation is always occurring, and it [*812] is the nature of the particular appropriation, what generates it and what it leads to, that matters. n62

The Latin music craze creates opportunities for social transformation and retrenchment, for exploitation and resistance. It constitutes yet another social interaction through which groups negotiate their relationships to one another--and through which they construct their own identities. The important thing is not to label it categorically good or bad, but to engage with it, to participate in it, to write about it.

IV. Why I Hate Pluralism: EuroAmerican Lip-Service to Cultural Tolerance

Mainstream United States society prides itself on its cultural eclecticism and cosmopolitanism. We do not have a national cuisine, it is often said; instead, we eat a wide variety of other cultures' foods: Italian, Chinese, French, Japanese--even Ethiopian, Vietnamese, Thai, Peruvian. We are increasingly eclectic in our holidays as well, with whites going to Kwanzaa celebrations, Cinco de Mayo festivals, Brazilian Carnaval parties, and so on. Recent years have seen a move away from the assimilationist melting pot ideology towards the notion that we can and should all live peacefully together, appreciating each other's differences. n63 This is a noble ideal, but one that is too often oversimplified--as if all that we need to do to overcome the problems of inequality in this society is to like each other's food and music. Like the North American tendency to reduce discrimination to individual bad acts, the new pluralism implicitly attributes the problems of inequality in this society to individual intolerance, and suggests that the solution.
lies in changing attitudes, rather than in redistributing wealth and power.

I worry that the turn to world music in general, and the Latin music craze in particular, encourage this disturbing tendency. To make this point differently, it is not enough to examine how the Latin music craze constructs Latinos and Latinas--to look at the positive and negative images of them that it creates. It is important as well to look at the cultural capital that it produces for the dominant white society--at how it constructs Anglos/as. n64 As I discussed above, the versions of Latino/a cultural productions that tend to gain entry into the mainstream (white) "American" consciousness are often the more whitewashed ones.

The danger, then, is that European Americans' appreciation of such productions will lead them to conclude that they have fundamentally changed their ideas and attitudes about cultures with which those works are associated. Confusion of the whitewashed representation with the original (i.e., with the full complement of cultural productions of a particular society) reinforces the conceit that the United States is a uniquely pluralistic and inclusive country. The practice of producing and consuming "Americanized" cultural productions constructs the dominant white society as uniquely tolerant of difference. n65

Thus, the recent fascination with Latin dance not only puts dollars in the pockets of white recording companies and reproduces stereotypical images of Latin music and musicians. It also reinforces a self-congratulatory image of the national culture that is widely held in the United States--an image that, by constructing EuroAmerican society as open-minded, pluralistic, and tolerant of diversity, obscures the structural and distributive inequalities (as well as the ignorant and intolerant treatment) that mark the lived realities of many racial minorities in the United States, and that color the country's interactions with other nations as well.

Some readers might perceive an apparent inconsistency in the discussion that I have presented thus far. On the one hand, I seem to be indicting popular representations that construct Latin musicians as different, as other, when in fact they are often United States citizens and have always contributed to North American music. On the other hand, I seem to be saying that popular representations tend to "Americanize" Latin music, and hence to minimize its uniqueness, richness, and value. Nevertheless, I would argue that these positions are not inconsistent, but rather accurately describe the complex and contradictory nature of mainstream North American cultural identity and ideology.

As the discussion in the preceding section suggests, EuroAmerica needs people of color in general and Latinos/as in particular to define itself. National cultural identities, like individual and group identities within particular societies, are relationally constructed. n66 EuroAmerican society defines itself to itself by what it is not; it is the contrast between ourselves and other cultures that confirms our own self-perception. Thus, it is crucial for EuroAmerican self-identity that there continue to be cultural "others"--and that those "others" continue to be defined as different, and inferior, to "us." At the same time, white "American" society's self-perception simultaneously requires that it see itself as pluralistic, inclusive, and uniquely tolerant of cultural diversity.

I would suggest that the paradoxical messages conveyed by media representations of Latin music, which simultaneously imply that it is very different and yet that it has been understood and accepted by the EuroAmerican public, ingeniously negotiate this complex set of cultural needs. Whitewashing the music that is labeled as Latin makes it easier for European Americans to accept it; constructing it as foreign and other reinforces their belief that, in so doing, they are fully appreciating and tolerantly accepting a very different and inferior culture from their own. These complex messages reinforce American exceptionalism (the idea that the United States is different and better) at the same time as they reinforce American pluralism (the idea that the United States doesn't think of itself as different and better). It is no wonder this ideology remains so opaque--and so powerful. n67

V. Conclusion

The different parts of this essay are in tension in another way as well. The initial discussion of the appropriation/appreciation debate implicitly assumes that it is meaningful to talk about cultural ownership and group identity, while the subsequent discussion of intracultural diversity and crosscultural borrowing challenges the notion of discrete, identifiable cultures and impermeable cultural boundaries. Yet, again, I would suggest that these tensions are inevitable, and hence unavoidable. Just as the notion of identity is both problematic and useful, so is the notion of culture. It is appropriate to assume both that cultures have coherent identities and that they are overlapping and fraught with internal conflict.

Thus, in writing this essay, I have sought to avoid reifying and universalizing either Latino/a cultures or EuroAmerican culture(s), while still acknowledging that differences nevertheless exist between peoples and places. It is crucially important to recognize the diversity within individual cultures, and the exclusions that are worked when such diversity is
ignored. Yet, at the same time, it is equally important to acknowledge the extent to which cultures differ. To conclude that "we are all the same," that all cultures are really a mishmash of everything (or perhaps variations on the same theme), is to lose the ability to challenge global power structures that disparately disadvantage certain societies (and certain groups within societies). Just as the category "woman" is a useful heuristic device to use for the limited purpose of strategically challenging gender-based inequalities (recall Spivak's "strategic essentialism"), so the category "Latino/a" is useful in articulating a critique of worldwide EuroAmerican hegemony. Yet it is also important to remember that such "EuroAmerican" hegemony is itself opposed not only by those beyond the borders of the United States but also by some within those borders. In that sense, dancing salsa is not simply a purely physical pastime; sometimes it is an act of resistance as well.

FOOTNOTE-1:

n1 Assoc. Prof. of Law, Univ. of Denver College of Law. This essay was originally delivered at the fifth annual LatCrit Conference, held May 4-7, 2000, in Breckenridge, Colorado. I would like to thank the other participants on the panel entitled, "Multi/Cultural Artistic Re/Presentations in Mass Media: Capitalism, Power, Privilege and Cultural Production" -- as well as the audience attending the panel for their reactions to the ideas I presented there. I am also indebted to Steven Bender, Dennis Greene, Pedro Malavet, Juan Velsasco, and Ruby P. Andrew--as well as the audience for their reactions to the ideas I presented there. I am also indebted to Steven Bender, Roberto Corrada, Pedro Malavet, Charles Piot, and Sherryl N. Weston for their comments on an earlier draft of this piece, and to Kasey MacIntyre for her tireless research assistance.

n2 I use the word "salsa" here as it is sometimes used colloquially - to include a wide variety of Latin rhythms (and the dances that go with them), including salsa, mambo, merengue, and cha cha cha, among others.

n3 Newyoricans is a term that many Latinos/as use to refer to children of Puerto Rican parents who were born or raised in New York.

n4 Most of the people I met were not PeruvianAmerican, Mexican-American, etc; they were immigrants. But I don't mean to suggest here that the impressions I obtained from social encounters necessarily reflect an accurate picture of the entire the population that frequented the clubs.

n5 All of the nightclubs with which I am familiar that feature Latin music in the Denver area, with the exception of one, are owned by Anglos.

n6 Of course, the general phenomenon of white interest in, and attempts to identify with, the cultural productions of people of color is far from new. For a nuanced, but not unproblematic, discussion of this phenomenon as it affects African-American cultural productions, see N.R. Kleinfield, Guarding the Borders of the Hip-Hop Nation, N.Y. Times, July 6, 2000, at A1.


n9 The word "appropriation" has been used in many different ways in academic literature. As will become clear below, as I use it here I mean to capture only the negative side of cultural borrowing. Thus, I use "appropriation" to include use for economic benefit, use that misunderstands or misrepresents, and use without attribution. Cf. Deborah W. Post, Appropriation and Transculturation in the Creation of Community, 20 B.C. Third World L.J. 117, 140 (2000) (appropriation can be good or bad; it is good when it inverts hierarchies). For a discussion of the deployment of mainstream gender symbolism in drag performances that is, the appropriation of dominant group imagery by subordinated groups, the opposite phenomenon from the one I will be discussing here - see Judith Butler, Bodies that Matter: On the Discursive Limits of "Sex" 133-37, 137 (1993) (concluding that the documentary on drag queens, Paris is Burning, "is not an appropriation of dominant culture in order to remain subordinated by its terms, but an
appropriation that seeks to make over the terms of domination.


n11 Margaret Montoya, e-mail communication (Nov. 10, 1999) (on file with author).

n12 In his remarks on the "Media" panel at LatCrit V, Dennis Greene reminded the audience that this is not the first wave of infatuation with Latin music. It was also all the rage during the ballroom dance phase of the 1950s. Panel Presentation, Lat Crit V Conference, Breckenridge, Colorado, May 6, 2000. See also Bender, supra note 7, at 741 n.105. On the history of Latin influence on EuroAmerican musical styles, see John Storm Roberts, The Latin Tinge: The Impact of Latin American Music on the United States (2d ed., 1999).

n13 Bender, supra note 7, at 727 n.27-28.

n14 Id., at 736-37 n.74-82. This stereotype is deeply ironic, of course, given the fact that many Latinos/as view European-Americans as promiscuous. I am indebted to Pedro Malavet for this point.

n15 Those charged with rape and sexual harassment often defend by claiming that the victim had actually consented to the encounter. Such defenses are more believable if the decision maker holds stereotypical preconceptions of the victim as hypersexual or "loose." See generally, Gary D. LaFree, Rape and Criminal Justice: The Social Construction of Sexual Assault 100, 201-08, 217-18, 224-25 (1989).

n16 See Bill Hendrick, Racial Stereotypes Found in Sports Articles, The Atlanta Constitution, Aug. 13, 1995, at A15 (reporting research results that found "African-American athletes were often described as having 'natural' or 'innate' abilities, but the skills of whites who play similar positions were attributed to 'hard work,' patience and intelligence.").

n17 Bender, supra note 7, at 734-35 n.66-72.

n18 Terminology can be problematic here. I try to avoid using the term "America" unmodified, as Central and South America are part of the Americas, too. When referring to mainstream United States culture, I will use "EuroAmerican" or "North American." Unfortunately, this phrasing not only still retains the "America" problem to some extent (there are European Americans in Argentina, for example), but also conflates the United States and Canada in ways that will not always be ideal. Nevertheless, it seems preferable to reinforcing the illusion that the U.S. is the only "America."

Returning to the point in the text, one of the many interesting quotes in Bender's richly documented discussion is this one from Marc Anthony, a native of New York City: "I don't know what we're crossing over from or to. We've been here all along." Bender, supra note 7, at 735n.69.

n19 Bender, supra note 7, at 735 n. 69-71.

n20 Thus, Bender relates Marc Anthony's "lament that when he asks for his Spanish language albums in Times Square record stores, they direct him to the international section in the back of the store: 'I recorded it on 47th Street! How can you get more local than that?'" Id. at 735 n. 68.. In fact, this New York native's music is just as "American" as, say, John Denver's. Moreover, the Spanish language is arguably as American as English. See Juan Gonzalez, Harvest of Empire 211-12 (2000) (Spanish has always been an indigenous language to the U.S.). But acknowledging these facts is inconsistent with the notion that this is a white nation.

n21 Bender, supra note 7, at 729n.42.

n22 Carlos Santana's return to prominence on the crest of the Latin music wave has highlighted the Latin roots of his music. But I still remember the surprise I felt a few years ago when I realized how many of his songs - and numerous other rock classics - used the chachacha-styled rhythm (e.g., Oye Como Va, Black Magic Woman). On the Latin influences on American music, see generally Roberts, supra note 12. For further discussion of the disadvantages of constructing "America" as white, see infra text accompanying note 57.

n23 In this context, Bender's discussion of the media's production of a "pan-Latinoa/
identity" - their blurring of the cultural differences among Latino/a artists - is particularly relevant. Bender, supra note 7, Part II.B.

n24 See infra text accompanying notes 63-67.

n25 Bender, supra note 7, at n.129, and accompanying text.

n26 The fact that I speak Spanish (with what I can best describe as "rusty fluency") has meant that I can chat with virtually everyone I meet in the nightclubs.

n27 See supra note 23.

n28 On Sunday, July 2, the conservative oppositional candidate for the Mexican presidency, Vicente Fox, defeated the candidate of the Institutional Revolutionary Party (PRI), which had maintained its seven-decade lock on the office through electoral fraud, repression of dissent, and limitations on press freedom. See Terry L. McCoy, Mexico's Crisis is Rooted in a Flawed Political System, St. Petersburg Times, Feb. 17, 1995, at A12; World News Tonight: Vicente Fox Wins Mexican Presidential Election (ABC television broadcast, July 3, 2000).

n29 For one argument about how such accords disadvantage Mexico, see George A. Martinez, Dispute Resolution and the Treaty of Guadalupe Hildago: Parallels and Possible Lessons for Dispute Resolution Under NAFTA, 5 Sw. J. L. & Trade Am. 147 (1998) (criticizing NAFTA).

n30 I asked a research assistant to review all of the articles on Mexico in the New York Times over a twelve-month period. (I purposely did not include coverage of the recent elections, when, for the first time in recent memory, the likely dramatic result caused Mexico's political system to receive substantial attention in the press.) Her search produced 100 articles, 44 of which also mentioned the word "government." Reading those 44 articles, she found only three in which the reporter mentioned the undemocratic nature of Mexico's political system and none in which any U.S. government official commented on that undemocratic system.

n31 Twenty seven percent of the Mexican population is below the poverty line, The World Factbook 2000, http://www.odci.gov/cia/publications/factbook/geos/mx.html, and inflation in the country is at nine percent (although it was fifteen percent when this essay was first drafted). Id. The per capita gross domestic product in Mexico is $ 9,100, as compared to $ 36,200 in the U.S. Id. Thus, a Mexican worker can much more successfully support his or her family by working here and sending a big chunk of the money home.


n33 White privilege is alive and well.

n34 It is very unnerving to try to write about this aspect of salsa, for I fear that most who have not experienced this different way of relating will simply dismiss what I have to say as either New Age flakiness or orientalizing exoticization.

n35 I first learned the sharp, competitive, humorous style of verbal interaction so common at law school faculty lunch tables and social events when I was an undergraduate student at Yale. After engaging in that form of communication - which I have come to call "witty repartee" - for a half-year or so, I, along with a number of other students in my "entryway" (a vertical dorm floor), began to realize that it was ultimately a very distancing way of relating. Eventually, we all agreed to stop doing it. Unfortunately, I had to revive my old skills when I joined a law faculty. It's unclear to me how much of this style of relating is attributable to race and how much of it is attributable to class. That is, I do not know whether professional Latinos/as communicate in this way, or, if they do, whether they are intentionally assimilating or prefer other styles of relating.

n36 Patricia J. Williams, Alchemical Notes: Reconstructing Ideals from

For blacks, describing needs has been a dismal failure as political activity. It has succeeded only as a literary achievement. The history of our need is certainly moving enough to have been called poetry, oratory and epic entertainment but it has never been treated by white institutions as a statement of political priority. Some of our greatest politicians have been forced to become ministers or blues singers. Even white descriptions of 'the blues' tend to remove the day-to-day hunger and hurt from need and abstract it into a mood. And whoever would--how ever to-legislate against depression? Particularly something as rich, soulful and sonorously productive as black depression.

Id. (citations omitted).

n37 Those reactions, as Margaret Montoya has pointed out, abstract the historical and cultural content out of the music as well. Montoya, supra note 11 and accompanying text.

n38 By "salsa sensibilities" I simply mean impressions that can be gained from dancing salsa. I do not mean to equate "salsa sensibilities" with "Latino/a sensibilities." Nor do I mean to suggest that the notion of sexiness I am attempting to describe is more common among Latinos/as than Anglos/as. In fact, the better line to draw here, as opposed to Latino/Anglo, might be dancer/non-dancer.

n39 I do not mean here to minimize the patriarchal aspects of Latin cultures, or to trivialize the harm produced by gender hierarchy within Latin communities. See Ana Castillo, Massacre of the Dreamers 63-84 (1994). But I feel it is also important to point out the benefits that an Angla can derive from this cultural contrast, especially given the Anglo/a society's tendency to stigmatize Latinas as hyper-patriarchal through their association with "machismo." Gloria Anzaldúa, Borderlands/ La Frontera: The New Mestiza 83 (1987).

n40 Anecdotally, I know at least one large white woman who, after having had a very limited social life in the Anglo/a world, felt much more accepted at the Latin clubs - and eventually found a Latin partner. But again, this experience may have more to do with the sensibilities of dancers.

n41 Of course, it remains an open question whether and in what way the influx of white patrons into Latin clubs will change the atmosphere in those clubs. One need only consider the "drunken escapism" (Steve Bender's term) of the Spring Break scene in Mexican resort cities (the extreme end of the continuum, of course) to recognize that Latin dance clubs could, over time, become places where such valuable interactions are much less likely to occur. While I doubt that the Anglo/a influx will ever have such an extreme impact, it could nevertheless significantly change the current "feel" of the Latin nightclub.

n42 Martha Minow, Learning to Live with the Dilemma of Difference: Bilingual and Special Education, 48 L. & Contemp. Probs. 157,159 (1985), cited in, Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 Colum. L. Rev. 1118, 1153 (1986) ("The recognition of difference can serve as a justification for existing inequities. On the other hand, to hide the fact of difference...means being treated according to a 'faulty neutrality,' or a standard that, because it was not created with the difference in mind, advances the dominant group to the detriment of those who are not, in fact, like it.") (cites omitted).

n43 For instance, Marc Anthony has been very critical of media representations of him. He has noted the irony in a Newyorican like himself being called a "hot tamale" and has objected that he is not part of the "Latin music explosion," but rather is just an American pop artist. Bender, supra note 7, at n.55 and accompanying text.

n44 I find Gayatri Spivak's notion of "strategic essentialism" helpful here. Identity groups can deploy essentializing images of their groups when it is useful to do so without necessarily forgetting that things are really much more complicated. Gayatri Spivak, In Other Worlds: Essays IN Cultural Politics 205-06 (1987).
n45 See supra Part I.

n46 I am indebted to Lisa Iglesias for posing the question in this way.

n47 To put this differently, litmus tests do not work in either direction. Just as speaking Spanish and dancing salsa do not guarantee an absence of colonialism in my attitudes or behavior, so a Latina's inability to do either does not delegitimize her identification with Latinos/as.

n48 I recognize that salsa is not danced in all Latin American societies, but some form of dance seems to be important in each of them.

n49 This is not to deny that there are likely to be some problematic aspects of my own reaction - that there is probably a kernel of truth in the questions I posed to myself above - which I must continue to interrogate.

n50 In a similar argument, Deborah Post, supra note 9, at 141, argues that appropriation that symbolically inverts the status quo is good, and appropriation that supports the status quo is bad. Although I hesitate to use that precise definition, I nevertheless believe that Post's position is consistent with my notion that political or substantive commitments define group membership for the purpose of assessing the legitimacy of a critique such as the critique of Anglo/a appropriation of Latin music that I present here.

Post presents her views in the context of a discussion of people she calls "wiggers" - whites who identify as African American. I must say that, while I found her discussion illuminating, I find the term (which is not hers, I realize), with its close resemblance to the extremely offensive racial epithet, a rather distasteful one to use. (But then, that may be the point. The term may mean to subject whites both to the overt racism that Blacks experience through the use of such a racial epithet and to the sense of familial connection that comes from their appropriation of that term for use amongst themselves.)

n51 "LatCritters" is a term coined by Celina Romany at the LatCrit IV annual conference, to describe those who write LatCrit theory and engage in LatCrit praxis. As my comment in the text suggests, the issues raised by current media representations of Latin music and dance implicate broader questions of cultural ownership, identity, and interaction. Thus, the same questions I have raised about my engagement with Latin dance can also be raised about Anglo/a participation in the LatCrit enterprise. In fact, it is that parallel which helped me to clarify my thinking about my relationship to salsa, and reaffirmed my conviction that we must reject essentialized and formalistic definitions of identity in favor of political and substantive ones.


n53 By "EuroAmerican pop music," I mean pop music that white Americans listen to and that is usually thought of as having been produced by white artists.

n54 Roberts, supra note 12. Such borrowings have also, of course, occurred between Latinos/as and African Americans, id. at 40, and between African Americans and European Americans. See e.g, John Philips, The African Heritage of White America, in, Africanisms in American Culture (J. Holloway ed., 1990).

n55 See supra Part I.

n56 See supra note 20.

n57 Deborah Post has argued that the long history of intra-cultural borrowing suggests that appropriation is neither new nor inherently problematic. In an interesting, though somewhat different, argument from the one I make here, she contends that, just as Latinos/as have been drawing on Anglo/a culture for years (becoming culturally bilingual in a way that actually helps them to challenge white power), so they should not be surprised (or necessarily resentful) when North American actors make use of Latin cultures. Post, supra note 9, at 136-40.

n58 Leti Volpp, Blaming Culture for Bad Behavior, 12 Yale J. L. & Human. 89, 90 (2000); see also Leti Volpp,

n59 Volpp, Blaming Culture for Bad Behavior, supra note 58, at 104, 111.

n60 Cf. Devon W. Carbado & Mitu Gulati, Working Identity, 85 Cornell L. Rev. 1259, 1278 (2000) (discussing how racial identity at work is performed, as part of a strategy both conscious and unconscious - for responding to racial stereotypes held by employers and coworkers).

n61 See, Homi K. Bhaba, The Location of Culture (1994); Judith P. Butler, Gender Trouble: Feminism and the Subversion of Identity (10th ed. 1999); Butler, supra note 9.

n62 Cf. Post, supra note 9, at 141.

n63 I recognize that not all segments of U.S. society have changed their ideas in this way. Many people still believe, for example, that immigrants should assimilate, dropping their native languages and adopting "American" practices and tastes. Nevertheless, those who see themselves as more politically liberal and enlightened have rejected such attitudes. It is to this latter group that I intend to address this discussion.

n64 See Edward Said, Culture and Imperialism (1993).

n65 In so doing, it also reduces the differences between cultures to the differences between tortilla chips and potato chips, thereby suggesting that the wide gulf between EuroAmerican culture and other cultures is in fact merely a crack. This minimizing of differences in turn facilitates the white society's tendency to confuse its own particular cultural traits with the universal human condition, for it is the invisibility of differences that leads powerful groups to misconceive their particular perspective as an objective or universal one.


n67 As this discussion suggests, I think LatCrit scholarship is valuable not only when it points out the material and ideological effect of legal policies on Latinos/as, but also when it explores what those policies say about Anglos/as. That is, legal rules and practices affecting people of color are not simply the product of prejudices or acts of political self-interest by white power-holders. They are also strikes in a rhetorical war in which the foundational components of white identity are being challenged by minority demands for meaningful, not merely superficial, inclusion. Understanding legal policies as desperate attempts to shore up a particular national identity may increase our comprehension of the strong emotions that often attend legal policy debates, as well as the challenges in our attempts to make that identity a reality.

n68 It also risks a return to invisibility - a return to the (unstated and assumed-to-be-universal) white norm.

n69 Spivak, supra note 44, at 205.
The arrival of the current post-Civil Rights, postcolonial, post-Cold War era has presented movement activists and progressive scholars with a unique set of challenges. Mobilizing constituencies within, let alone across, identity, national, and class lines has proven difficult as 19th and 20th century forms of white supremacy, imperialism, and Fordist forms of capitalism fade from view. Scholars of the (now older) New Left generation, as well as those of the poststructural and postcolonial Left have responded to the changing circumstances with calls for fundamental theoretical and strategic ground-clearing, in many cases suggesting nothing short of a fundamental redefinition of the political. Progressive legal scholarship necessarily processes the crisis through its own longstanding ambivalence regarding law's relationship to politics. Indeed, as social conflict and systemic contradiction seem increasingly to be channeled and managed through expanding transnational and domestic legal processes, the sphere of the political seems to shrink and itself fade from view.

Briefly surveying the range of left-liberal scholarly responses in the United States, we can discern three categories of prescriptions for what progressive politics should look like under current conditions. Some commentators, disaffected by Civil Rights-style race, gender or sexuality-based coalitional politics, attribute perceived social movement stagnation to the rise of "identity politics," to them, a form of politics that is divisive and lacking in material focus. Instead, these writers envision a kind of progressive populism that would circumvent identity politics and emphasize common economic and quality-of-life concerns shared across social groups and economic strata. Others combine a post-structural aversion to politics based on essentialized group identities with a loss of faith in the various meta-narratives of emancipation (socialism, feminism, color conscious anti-racism, and anti-colonial nationalism). Politics, from this perspective, should remain pluralistic, open-ended and shifting, ever vigilant against reductive ideological claims regarding fixed identities (sexual, racial, gender, national) and broad-scale emancipatory projects. A third group that advocates a form of postmodern (neo) pragmatism foregrounds the political potential inherent in the affective forces of human compassion and the harmonycreating dynamics of procedural fairness, even in the face of the postmodern contingency of truth, knowledge and justice claims. From this perspective, too, politics remains provisional, and emphasis is placed on situational and local responses and necessarily shifting solidarities.

Behind such substantive prescriptions for a defensible progressive politics in the postmodern era are deeper theoretical problems regarding the very possibility of political contestation, questions about whether "the political" still even exists and in what form. Disagreements regarding the progressive potential of identity politics, the continued salience of class struggle (and the relationship between the two), and the meaning of globalization imply less openly debated but, nevertheless, divergent understandings of the current structure of the political. A theoretical reworking of the political seems especially crucial if we are indeed experiencing an epochal shift in the constitution of authority and power of the magnitude suggested by prognostications regarding the demise of the nation-state. What each of the progressive prescriptions outlined above shares is a certain national imaginary or sovereign ontology that seems to inadequately respond to globalized conditions of authority and domination.

The four articles critically analyzed in this essay speak to various problems of the nation and its transcendence, while implicating the broader
theoretical problems of a globalized political. E. San Juan's essay on violence and the nation is in large part a repudiation of particular postcolonial/poststructural n10 rethinnings of the modern political. Ratna Kapur's article on the political significance of subaltern sexuality in the case of Indian sex workers stands as an indictment of the international antitrafficking movement's use of legal reform to address the multiform subjugation of subaltern sex workers. Charles R. Venator Santiago's paper on the spatial determinants of the neocolonial form of Puerto Rican statutory citizenship argues that modern racist ideology played a mediated role in the creation of Puerto Ricans' second-class citizenship. Santiago's emphasis on the operation of ambiguity in the "Othering" of Puerto Rican citizens reveals the hegemonic force of a race jurisprudence that corresponds to more recent, global forms of race-based domination. n11 Finally, Sylvia R. Lazos Vargas's piece on the role of racism in the Spanish-American War and its colonial aftermath, which also contains a reflection on positivist historiography, exemplifies a studied pragmatism vis-a-vis the question of race as a structural historical determinant. Lazos Vargas thus advocates a more "disciplined" vision of politically relevant critical race scholarship, which in this case means understanding the fundamental imbrication of race and nation.

Reading through these pieces, one becomes aware of a common sense of urgency, albeit uniquely expressed by each writer. It is almost as if the writers were trying to warn of an impending catastrophe awaiting progressives pursuing the wrong political strategy. In at least three of the pieces there is a sense that some of us may be unwitting accomplices to a politics we would otherwise wish to avoid. In some real sense a "crisis of the political" seems to animate the work of these highly perceptive intellectuals. I propose reading the articles in this section as responses to the political dilemmas posed by "Empire," an emerging system of global domination that is distinguishable from previous modern political forms of imperialism. n12

I have grouped the articles thematically in pairs, looking first at San Juan and Kapur, then Santiago and Lazos Vargas. I will highlight the points of convergence and disagreement within the pairs of articles and, in the final section, consider the political crisis that is, arguably, the unnamed referent of these four articles. I will suggest how each writer's work contributes to a reconceptualization of the (postmodern) political.

San Juan's essay works as part of a longer critical project he has pursued over a span of years. His recent book, Beyond Postcolonial Theory, critiques mainstream postcolonial theory from the perspective of radical political economy and Fanonian identity politics. n13 As a general matter, San Juan views postcolonial theory's interest and faith in "hybridity, heterogeneous and discrepant lifestyles, local knowledges, cyborgs" and "borderland scripts" as tending to "obfuscate the power of the transnational ideology and practice of consumerism and its dehumanizing effects." n14 In the present essay on violence and the nation San Juan offers a provocative argument in favor of a Fanonian understanding of violence on behalf of and through the nation as the "expression of subaltern agency." In making this argument San Juan asserts the political relevance [n821] of the nation in contradiction to the central thrust of postcolonial/poststructural theories of the nation.

San Juan's disagreement with postcolonial/poststructural theorists reflects the deeper ongoing dilemma of discerning the proper form and focus of anti-systemic politics. As the revolutionary politics of the 1950s and 60s recede further into the past, culturalist understandings of the political have, understandably, proliferated. Anti-systemic scholars, perhaps as a result of having been weaned on the political ennui of the Reagan-Bush and Clinton years, have turned their critical attention to the ideological functions of prominent modern institutions—the nation-state, the nuclear family, Enlightenment systems of knowledge production, etc. For two generations of progressive humanities scholars, poststructuralism has provided a convincing answer to questions regarding their field's political relevance. n15 A parallel response to a similarly perceived "crisis of legitimacy" among critical legal scholars can be seen in various poststructural approaches that increasingly problematize law as discourse. n16

San Juan subjects these "culturalist empiricist" trends, which he suspects of tending toward a depoliticized liberal individualism, to materialist analysis. Whereas postcolonial/poststructural theory may categorically reject such political mega-subjects as the nation, race, women, or gays/lesbians, San Juan seeks to evaluate the political meaning of such collectives within given contexts. He thus invokes the structuralism of Ernest Gellner and Benedict Anderson, whose work situated the modern nation-state squarely within the trajectory of the modern political economy of commodity exchange. San Juan does not fully dismiss the culturalist claim regarding the mythical basis of nationhood so much as he insists on a "both-and" approach that immediately positions the imagined national community within a broader structural critique of modern socioeconomic hegemony. For San Juan there is irony in postcolonialism/poststructuralism's categorical disparagement of the nation, for him a
regarding the nature of the political. For San Juan, the disagreement with postcolonial/poststructural theory stands in fundamental opposition to the way in which the capitalist system necessarily operationalizes international boundaries. On a more general level San Juan's analysis of the modern paradox of closed nation-states sanctioning an open global economy by foregrounding how the class dialectic works through the closed/open paradox, as the way in which the capitalist system necessarily operationalizes international boundaries.

On a more general level San Juan's analysis of the nation and nationalism can explain the basic paradox of modern international political economic organization. This paradox lies in the dual function of the nation-state as constrainer of cross-border flows (of goods, people, capital, etc.) and enabler of global economic organization, multinational corporations and intergovernmental financial institutions. From a culturalist perspective, San Juan argues, this paradox remains unanalyzed since nationalist ideology implies a centripetal principle of organization that would contradict neoliberal economic organization. San Juan would instead explain the modern paradox of closed nation-states sanctioning an open global economy by foregrounding how the class dialectic works through the closed/open paradox, as the way in which the capitalist system necessarily operationalizes international boundaries.

Violence for San Juan cannot be understood in a purely culturalist register because that limits the focus to the "violence" of unifying ideas and cultural forces that "suppress difference or negate multiple 'others' not subsumed within totalities such as nation, class, gender, etc." Violence so construed leads to a truncated understanding of politics as an "epiphenomenal manifestation of discourse and language-games." Indeed, San Juan sees culturalist "contextualism" as partly responsible for the continued salience of identity politics, since such a critical posture "reproduces the condition for refusing to attack the causes of class exploitation and racial violence." Perhaps most disappointing for San Juan is his sense that postcolonial/poststructural critics summarily dismiss all Third World revolutionary projects, even those pursuing emancipatory goals.

San Juan turns to Fanon's analysis of anti-colonial violence in working towards an alternative framing of the problem. In Fanon's synthesis of historical materialism and (an early version of) critical race theory, San Juan finds a corrective to culturalist interpretations of national culture and violence. San Juan describes this Fanonian synthesis in terms of a national culture whose content comes directly from the emancipatory energy of counterhegemonic social collectives. Thus, San Juan insists on analyzing nationalist violence beyond a rational/primordial binarism, seeing the nation form instead as neither inherently destabilizing/primordial, nor stabilizing/rational. Dialectical triangulation means always adding the material/historical dimension to the discursive analysis of such conceptual binaries.

San Juan further questions whether culturalist approaches to the nation and nationalism can explain the basic paradox of modern international political economic organization. This paradox lies in the dual function of the nation-state as constrainer of cross-border flows (of goods, people, capital, etc.) and enabler of global economic organization, multinational corporations and intergovernmental financial institutions. From a culturalist perspective, San Juan argues, this paradox remains unanalyzed since nationalist ideology implies a centripetal principle of organization that would contradict neoliberal economic organization. San Juan would instead explain the modern paradox of closed nation-states sanctioning an open global economy by foregrounding how the class dialectic works through the closed/open paradox, as the way in which the capitalist system necessarily operationalizes international boundaries.

On a more general level San Juan's analysis of the nation and nationalism can explain the basic paradox of modern international political economic organization. This paradox lies in the dual function of the nation-state as constrainer of cross-border flows (of goods, people, capital, etc.) and enabler of global economic organization, multinational corporations and intergovernmental financial institutions. From a culturalist perspective, San Juan argues, this paradox remains unanalyzed since nationalist ideology implies a centripetal principle of organization that would contradict neoliberal economic organization. San Juan would instead explain the modern paradox of closed nation-states sanctioning an open global economy by foregrounding how the class dialectic works through the closed/open paradox, as the way in which the capitalist system necessarily operationalizes international boundaries.
Fanon transcends the particular/universal dilemma of liberal philosophy (for example, as now reflected in the cultural relativism debates in the field of human rights) by theorizing anticolonial national culture and violence as a particular "original idea propounded as an absolute." n18 The parallel notion of a "concrete universal" is important for San Juan in that it countenances a poststructural epistemological stance, while also embracing the nationalist framings of liberation struggles. On one hand, Fanon (San Juan) rejects the liberal universalism that underwrote white supremacist, Eurocentric colonial civilizing missions. On the other hand, the particular instances of nationalist anti-colonial struggle can be categorically endorsed contrary to postcolonial/poststructural approaches that reject both the underlying essentialization of subalterns into a revolutionary nation and the accompanying emancipatory metanarrative. The universal thus propounded--nationalist revolutionary anticolonialism--grows from the particular historical context of colonial domination and resistance thereto, hence the term "concrete universal."

Fanon's historicist understanding of national culture (that is, as tied to politics and economics) underwrites San Juan's claim that culturalist postcolonial/poststructural theory relies on an abstraction when it celebrates liminality, border ontologies, and transcultural syncretisms at the expense of collectivities such as the nation. For San Juan, the "peoples" behind such abstractions represent compromised visions of the political. San Juan wants to re-wed the more loosely conceived postmodern notions of social justice to a modernist collective goal of national self-determination. To the extent that postcolonial/poststructural theory insists on an anti-nationalist understanding of social justice, the political domain within which such a project can be pursued is similarly sub- or anti-national. San Juan feels that this parsing of the political creates an unnecessary dichotomy. Following Fanon, he asserts that national self-determination and social justice struggles can be interdependent, particularly when they involve a fundamental commitment to anti-capitalist struggle. The resulting notion of the political is thus imbued with both material and identity-based elements.

An important part of San Juan's reworking of the political is his insistence that a critical distinction be made between, on the one hand, the notion of sovereignty as a function of the emancipatory politics of a nation or people and, on the other, the hegemonic role of state "sovereigns" as instruments of elite class interests. San Juan works this distinction through his analysis of violence. He expands the definition of violence to include the pervasive structural violence of the bourgeois state (and the commodifications and markets it enables) that he finds inscribed in the very rule of law of the Rechtstaat. Moreover, drawing on Walter Benjamin's distinction between the divine ends of justice and the profane means of law (as force), San Juan suggests a transvaluation of political violence to take place beyond the usual liberal rational dichotomy of means versus ends. This dichotomy insidiously precludes critical appreciation of political confrontation through the application of such enshrined cliches as "ends can never justify means."

Thus San Juan would have us view the "legal" means of the liberal state--which collapses justice into due process without regard for social outcome--as violence, while understanding that the violent "means" used by the nation/people to achieve anticapitalist self-determination are "justified" because they grow from the historical dialectic of class struggle. (San Juan is quick to point out that both violent and peaceful means of struggle may be necessary and should be evaluated according to the narrative of emancipation from oppression.) For San Juan, a central shortcoming of postcolonial/poststructural theory, if it misunderstands the significance of violence and misconstrues the domain of the political, lies in the way it mirrors the ends/means rationality of liberal philosophy. In particular, just as violent struggle may sometimes be the appropriate outgrowth of the colonial dialectic, so too can totalities such as the nation, the working class and so on be appropriate political agents of change, regardless of our postmodern aversion to such essentialized "means."

Finally, San Juan adapts Benjamin's resolution of the ends-means dualism in buttressing his defense of the nation. Benjamin concluded that the possibility of justice ("divine ends") was foreclosed in the realm of law (the debased means for enforcing the liberal social contract). Benjamin saw educative and communicative power as counter-forces to the state's juridicalcum-violent, enforcement of social contract hierarchies. For San Juan, Benjamin's notion of educative power and communication implies the collective action of the nation. San Juan's reading of Benjamin here is ingenious since it plumbs the complexity of a thinker who was a sophisticated critic of Enlightenment rationality, historicist notions of progress, and liberal political and legal structures, but who also arguably preserved a modernist faith in the redemptive power of truly emancipatory, quasisovereign collective forms of agency. San Juan has us see this faith as a nuanced conceptual embrace of contestational political agency, collective or otherwise. Indeed, a normative aversion to sovereign power, as Carl Schmitt famously recognized, is a classical conceit of liberals, a label San
Ratna Kapur's work contrasts in many ways with San Juan's, though one may certainly find some overlapping concerns as well. Kapur's subjects are subaltern sex workers, with particular focus on sex workers in postcolonial India. Kapur argues that sex work can be an arena of politics wherein subaltern women empower themselves through acts of economic self-determination, while also resisting the patriarchal and repressive sexual mores of postcolonial society. Kapur traces the current framing of sexual work and sexuality in India to the colonial period. British imperialists and Indian nationalists similarly manipulated representations of Indian women's sexuality for political advantage. For the British, "sexual contamination" in the colonial encounter became a common rationale behind efforts to legislate disciplinary Victorian morality. For Indian nationalists, Indian culture--as preserved in the Indian home--was an important trope of resistance to colonization. Indian cultural purity came to be equated with Indian women's chastity. There is an irony in the way both sides of the colonial equation are informed by their opposite numbers in the encounter. As Kapur points out, Indian nationalists were influenced by British Victorian morality and, as Laura Ann Stoler and others have shown, European sexuality itself was heavily influenced by the colonial experience.

Kapur argues that one type of Indian feminism, which frames itself as anti-imperial and nationalist, has conflated a traditionalist image of "authentic" Indian female subjectivity with sexual purity. From this conservative feminist perspective, sex work represents a derogation of Indian female subjeecthood. Indian sex workers, in contrast to Western sex workers, are coerced by economic destitution into prostitution. This coercion represents a particularly insidious and communally significant form of violence since it deprives these women of their culturally authentic sexual chastity. Western sex workers are not subject to such violence since they operate within a market culture that brooks no exogenous moral code. The broader debate among feminists regarding the question of sex work legalization thus resolves according to a familiar (and patronizing) East-West cultural binarism, with legalization being appropriate in the nontraditional market cultures of the West but not in the more conservative and moralistic cultures of the East.

Kapur points out that this form of feminist cultural relativism serves the conservative agenda of the Hindu Right in India. Government policies that have been promulgated in the area of sex work have not protected the human rights of the women workers involved, but rather have increased the disciplinary reach of officials over the women in the name of preserving Indian cultural integrity. In particular, the handling of the AIDS crisis has shown the tendency of the state, encouraged by conservative feminists, to deal with sex work-related issues through the further criminalization and disciplining of sex workers at a time when they need enhanced government services and protections. Moreover, the notions of rescue and rehabilitation, central to proactive state and conservative feminist approaches to sex work, bespeak the kind of disempowering victim-subject image Kapur finds at work behind the subjugation of subaltern sex workers.

A central point of contention in feminist debates regarding sex work is whether women can ever really engage in consensual sex for pay. Some feminists group prostitution with rape, maintaining that consent is contextually vitiated by the objectification and commodification of the female body inherent in any sex-for-pay transactions. Others have argued that consent to sex for pay is not only possible, but that such consent is crucial to understanding the social and political agency of women sex workers. This notion of agency is important to a feminist conceptualization of the political as a site of resistance to the constraining morality of nationalist and patriarchal culture. Kapur points out that the consent debate actually instantiates an East-West binarism by presenting the quintessentially nonconsenting prostitute as a Third World woman subject to coercive forms trafficking. Kapur argues that even those Western feminists who defend consensual sex work engage in a form of cultural imperialism by distinguishing between Third World victim prostitutes and First World consenting sex workers.

Kapur draws on the work of Kempadoo and Doezema in positing a less ethnocentric approach to the issue of political empowerment for sex workers. From this perspective, both First World and Third World sex workers may be engaged in acts of self-determination. Thus, rather than assessing the consent question...
Kapur suggests that we understand both subaltern and Western sex workers as autonomous market actors. Kapur advocates an approach that moves past the false binaries of culture and consent towards a rights-based agenda that takes the political wherever it can be found. Unfortunately, Kapur finds little in recent legal reform efforts to suggest a systemic move in that direction.

Kapur argues that both international law and domestic statutory schemes that target trafficking in women and children are premised upon the subject-victim image of the subaltern sex worker. In both cases, the primary legal thrust is criminalization of the act of trafficking informed by a concern that national borders are being violated. Moreover, the legal interventions are heavily moralistic in that the crime of trafficking depends upon an underlying persecution of prostitution. Trafficking for purposes of domestic labor, for example, would fall outside the purview of these reforms. The laws (of the United States in particular) favor "pure victims," i.e., those who do not willingly cross borders in pursuit of their profession, who are thus "innocent" of consensual transnational sex work.

Of particular concern in the case of the United States' law is the way in which anti-trafficking concerns have become subsumed into an anti-immigration and neo-imperial foreign policy framework. Kapur points out how anti-immigration discourse informed the drafting of anti-trafficking legislation, as well as the extent to which that law imposes sanctions on (Third World) countries that do not implement measures to curb the cross-border traffic in sex workers. Ironically, it is precisely the institutionalized policing of borders and increasingly Kafkaesque immigration regulation that make trafficking a profitable underground activity.

As a counterpoint to regressive feminist and juridical approaches to sex work, Kapur describes the efforts of Indian sex workers who exercise their agency through social movement organizations that advocate sex workers' rights. Some of these organizations are also waging a cultural battle against the moralistic Right by challenging narrow definitions of sexuality and the suturing of such quasi-Victorian notions of sexuality to conservative political agendas. The initiative taken by Indian sex workers directly refutes the victim-subject construction by asserting transnational market actor status for the women involved. Moreover, Kapur finds in the sex workers' political agenda a departure from feminist interpretations of sex work as derivative of patriarchal culture and economic necessity. Instead, the overt politicization of sex work is premised upon sex workers' conscious crafting of a strategy to escape the patriarchal culture of the family and marriage, institutions tied to the conservative definition of female sexuality.

Importantly, the sex worker movement works towards legitimizing women workers' rights to transnational mobility. Thus, the politicization of sex work, which openly challenges the construction of sex work as national moral decay, leads in turn to a reframing of the legal "problem" of trafficking. As the antitrafficking campaign has been mainstreamed within the law-making institutions of Western democracies, the political space that had been opened up by feminist and women-and-development activists has been closed down or corrupted. The true assertion of political agency by the sex workers would represent a re-capturing of that space. The anti-trafficking legal reforms Kapur discusses are revealed as nationalist and moralistic diversions from the rights-oriented approach of progressive activists in the field. We should note the importance of this ongoing "politicalization from below" as a necessary corrective to the cycle of co-optation that occurs when the political initiative of transnational advocacy, such as the anti-trafficking campaign, becomes side-tracked by the official "human rights" law-making apparatus.

Much could be gained by reading writers like San Juan and Kapur as complementary, a move that may not seem obvious given the two writers' contrasting theoretical standpoints and apparently distinct normative commitments. On the one hand, a historicizing defense of the nation and national violence could be enriched by further specification with regard to the question of gender oppression. Many of the postcolonial and race nationalisms of the recent past do not fare well under the scrutiny of gender (or for that matter sexuality) critique. Granting San Juan's point about the need to historicize our analysis of the nation, we might still heed the "internal" critique of Third World and critical race feminists who are themselves constituent adherents of collective nationalist and race conscious politics. Progressive nationalism, as one important political project of antiEmpire, should certainly reject bourgeois culturalism, but also patriarchal (and homophobic) ideology and practice. n25

On the other hand, Kapur's critique of the anti-trafficking law-making and defense of the agency of sex workers in the face a concomitant victim-subjectification could be deepened by a historicization of the market for sex work. Positioning sex workers as market actors is a necessary corrective to the Victorian morality play n26 scripted by both liberal humanitarians and conservative nationalists. However, a further critical step could be taken by problematizing the truncated agency allowed by the market within
which the women exercise their "autonomy." Such a step would perhaps entail looking both to the demand side of the sex industry (subjecting the subject-consumer to race, class and sexuality analysis) and to the political economy of sex work (how surplus value is created and appropriated, how commodification and transnational circulation contribute to worker oppression, etc.). Liberalizing the movement of [*830] workers--certainly a reasonable demand in the face of the distorting effect on markets of national borders--begrts the question posed from the perspective of radical political economy regarding the structural violence of the market in forcing the uprooting of workers from their communities. n27

Looking at the structural dimension of sex workers' political empowerment can flesh out Kapur's notion of a "politics of desire," which offers important insights into how struggle over cultural meaning can empower Third World women. After all, Western sex workers, presumably less constrained by the moralistic power of conservative nationalism than their Third World counterparts, must still politically confront the structural determinants of their subjugation. "The recuperation of desire as a political strategy" should not make of necessity a virtue by failing to address the structural limits of sex worker empowerment within a transnational capitalist economy of desire. Contestation at the level of the state and in the realm of production (a la socalled "old social movements" n28) remains indispensable.

Interestingly, Kapur and San Juan present potentially complementary visions of the political, especially with regard to the place of law in progressive politics. San Juan is obviously skeptical of the rule of law as a means for achieving social justice, seeing it as a potent purveyor of structural class violence. Likewise, Kapur provides a concrete account of how legal reformism fails to fulfill an emancipatory political agenda. Meanwhile, San Juan's rehabilitation of "essentialized" collective political subjects such as the nation, and his defense of confrontational political action such as anti-imperialist violence on behalf of national self-determination do not gainsay the importance of "micro-level" political action by non-national collectivities such as women, especially where such groups are further defined through the segmentation of national and international labor markets as in the case of domestic and sex laborers. n29 And while, as San Juan suggests, the human rights establishment may indeed be complicit in neoliberal Empire, a rights-based campaign such as the one Kapur documents on behalf of sex workers may indeed be important in the type of Gramscian war of position facing progressives under current political conditions. n30 [*831]

The second pair of articles addresses the question of relations between the United States and peoples who are under U.S. imperial control. Charles R. Venator Santiago assesses the relationship between, and the relative importance of, racism and spatial ontology in the creation of second class (statutory) citizenship for Puerto Ricans. Santiago argues that there is no linear causal link between late 19th century U.S. racism and the treatment of Puerto Rico at the time of United States' overseas imperial expansion. Instead, Santiago argues that the dominant racist ideology of the day was infl ected through a uniquely spatialized imperial imagination that created, in addition to an "inside" and an "outside," a kind of permanent threshold or liminal space that defined the boundary between the two. To illustrate, Santiago analogizes to Foucault's notion of the liminal in the case of the madman's journey whereby those deemed insane were sequestered in a kind of permanent voyage between the early modern city and its exterior.

Santiago's argument here resonates with the important work of Rob Walker in the field of international relations. Walker has cogently argued for the primacy of the spatial binary (inside/outside) in the constitution of the modern political imagination. n31 Santiago's extension of this critical insight is that an ambiguous "in-between" space structures the political possibilities of marginal colonial groups such as Puerto Ricans. This argument provides a nuanced understanding of United States-style colonialism (and, I would add, racial hegemony), in that it analyzes how a racist hierarchy works even in the absence of rigidly distinct categories of racial difference, such as those inherent in biologicist forms of white supremacy. As Hardt and Negri argue, such a shifting, amorphous understanding of difference is endemic to conditions of racial management that characterize Empire. n32 In effect, liberal jurisprudence governs difference on behalf of neoliberal political economy through the deployment of ambiguity. n33

Following Santiago, we can see the roots of today's liberal race jurisprudence in the imperial law of the SpanishAmerican War. Santiago traces the creation of the ambiguous or liminal space of Puerto Ricans through the Treaty of Paris, the post-War military regime, the Foraker Act of 1900 and, finally, the pronouncements of the Insular Cases. The resulting legal regime defined the United States' relationship to Puerto Rico in a way that is at once both unique and nested within evolving forms of modern racial hegemony. Santiago discusses three features of this relationship in particular: the doctrine of Puerto Rican unincorporation (subject to U.S. sovereignty, but "foreign in a domestic sense"), [*832] the colonial status of Puerto Rico as possession of, but not part of
the United States, and the affirmation of a distinct form of Puerto Rican "citizenship.

Santiago is careful not to place the colonial regime that was created for Puerto Rico and the concomitant construction of Puerto Ricans as an "alien race" completely outside the broader flow of United States' racial formation. What is remarkable is the apparent ease with which the racial order was able to accommodate yet another category of racial otherness and subsume it under the existing "racial contract." n34 From Santiago's reading of the Insular Cases it is clear how the Justices projected the dominant racist imaginary onto the new territories and their inhabitants. However, as Santiago points out with regard to the relatively privileged "nonalien" status granted by the Court to Puerto Ricans under the otherwise racially exclusionary immigration laws, modern racial jurisdiction was infinitely flexible in applying its forms of exclusion and subjugation to some but not all racial categories. Each distinct "juridical space" is a mutually reinforcing part of an interlocking web of racial discipline and stratification. Indeed, it is important to note that the modern spatialization of racial difference highlighted by Santiago actually had a counterpart in Black-white relations of the same period, most apparent in the Court's Jim Crow ("separate but equal") jurisprudence.

The second piece dealing with this historical period, by Sylvia R. Lazos Vargas, adopts a method known in the social sciences as most similar systems design. n35 Lazos Vargas asks what explains the different outcomes of the otherwise mostly similar nineteenth wars of conquest--the mid-century Mexican American War and the Spanish American War of fifty years later. The discrepant variable Lazos Vargas sets out to explain regards the disparate treatment of, on the one hand, Mexican citizens in the conquered territories pursuant to the Treaty of Guadalupe Hidalgo and, on the other hand, Puerto Ricans and Guamanians under the Treaty of Paris. In the former case, Mexicans in the conquered territories were given the choice of becoming United States' citizens. In the latter, no such choice was granted Puerto Ricans and Guamanians, and instead a second-class juridical status is created.

Lazos Vargas's research hypothesis was that a racist "smoking gun" would be found to explain the treatment of the Puerto Ricans and Guamanians. Although Lazos Vargas failed to turn up such a smoking gun, she is able to conclude that a more complex, nationalist racial formation obtained, resonant perhaps with Santiago's notion of an ambiguous or liminal racialized space. n36 Along the way Lazos Vargas raises some important theoretical and methodological points and, as important, challenges critical race scholars to embrace a philosophical pragmatism in their work.

One of the more provocative points Lazos Vargas makes involves rethinking the place of the Spanish American War in the trajectory of United States' racial formation and the construction of Latino identity and social status. Following Walter Mignolo, Lazos Vargas centers the Spanish American War in the modern trajectory of Latino racial identity in the United States. In agreement with Santiago, Lazos Vargas sees the late 19th century as a turning point of sorts, away from strictly biologicist forms of white supremacy toward an increasingly cultural understanding of racial Otherness. In this new form, white supremacy cast itself in humanitarian garb and assumed the position of a civilizing force of progress out to uplift "backward" cultures. n37

As Hardt and Negri point out, this culturalized (postmodern) version of racial difference is more insidious than the outright biologistic forms of racial exclusion that liberalism eschews. Race as cultural difference can be framed in the same absolute terms as biological difference (radical incommensurability), and can be defended under liberal dogma (individual freedom) as a moral basis for group-based exclusion. n38 Lazos Vargas argues that this shift retroactively affects interpretation of the earlier Mexican American War conquest and, thus, influences the formation of Chicano subaltern status. This argument contrasts with the work of Chicano Studies scholars who have argued that the earlier conquest had created an internal colony, an "occupied America," n39 and a material, territorial, and cultural legacy of racial Otherness that has since determined Chicano social history. Lazos Vargas posits instead an "overarching structure" of Latino cultural Otherness resulting from the later imperial period. This framework would also explain the United States' culturally inflected (Anglocentric) foreign policy toward Latin American countries throughout the twentieth century. [*834]

Lazos Vargas includes a thoughtful reflection on the benefits of pragmatist self-critique in overcoming the problem of positionality in historical analysis. This reflection takes seriously the charges leveled against critical forms of legal scholarship from conservatives such as Richard Posner and racial neoconservatives such as Dan Farber and Suzanna Sherry. These writers have attacked the objectivity of progressive scholars who use history or critical race methodology to push for legal reforms. Lazos Vargas calls for a pragmatist commitment in response to these attacks. Such an approach would force the ideological and identity positionality of critical race scholars to the fore ("field positionality"), leading ultimately toward the...
production of a more effective racial critical scholarship. Moreover, legal scholars would acknowledge "law's troubled relationship with history" ("disciplinary positionality") and commit themselves to a more studied approach to historical research that would include the use of primary and archival sources.

In the critical race and LatCrit context, this call to a more self-reflective form of scholarship amounts to a re-visioning of the political to include pragmatist knowledge production. Implicit is the understanding that an avowedly activist scholarly disposition may not be the most effective way of operating on the current intellectual plane. Stating this argument in Gramscian terms, the present war of position--over ideas, values, knowledge, etc.--requires a less agonistic scholarly stance. Critical scholars cannot simply ignore the rules of the scholarly game, a game in the social sciences that is still heavily positivist in its commitment to testable hypotheses, falsification and empiricist notions of objectivity and ontology.

Interestingly, each of these four writers sheds light on the problem of the political through analysis of colonialism's juridical legacy. In each case the structure of post-colonial legal liberalism is shown to condition late modern forms of hegemony and, importantly, the processes by which authority is constituted. Assessing the conditions of possibility for anti-systemic political contestation under post-colonial legal regimes is, of course, an important part of a theoretical reworking of the political. These articles move us closer to an understanding of how postcolonial legal liberalism as a historical system, i.e., one homologously related to colonial and imperial expansion, conditions current and future prospects for the emergence of a viable progressive political space. In the next section I will expand on this point by reading these articles through the lens of postmodern international political theory.

Crisis and Beyond

I understand the "crisis of the political" to refer to a set of conditions under which we are no longer sure about where and how progressive politics can be effectively pursued. Our uncertainty probably results primarily from the fact that power and, even more importantly, particular authorizations to wield power, now seem to originate and flow in ways not accounted for by traditional theories of revolutionary politics. n40 What good does it do to "topple the state," if the state is merely the valet of more imperious forces operating across the many "scapes" that combine to form the postmodern social matrix. n41 The debates on the Left about whether "old" or "new" types of social movements are better suited to the task of challenging for power (control of the processes of authorization) reflect the underlying uncertainties about where we should locate the political in order to deal with changing system(s) of domination. n42 Should we continue the traditional revolutionary path and vie for state power, alter redistribution situationally through workers' associations, focus on international or transnational norm construction and the institutions and regimes to enforce them, try to rebalance power in the family or the local community, struggle against the production of capitalist, racist and patriarchal subjects through the various culture industries, or target our efforts toward management of the ecosphere using public and private means to achieve our goals? The array of choices is dizzying. n43

In addition to the destabilizing political experiences "on the ground," we are further unsettled by a growing awareness that our most fundamental political concepts themselves (sovereignty, freedom, the nation, representation, rights, civil society, etc.) have always been essentially paradoxical. These conceptual destabilizations are particularly evident in the problematic of globalization. Whatever globalization might entail as a new set of actual practices, it has become a discursive lighting rod for the voicing of doubts about received notions of what constitutes a legitimate and meaningful political sphere. Most notable, perhaps, has been the de-privileging of sovereignty as an unchallenged and foundational concept in Western theories of the political. In addition to the now commonplace pronouncements regarding the demise of the state as an institution, a great deal has also been written about the conceptual limits of theories of sovereignty. In the shadow of globalization, poststructuralists have exposed the discursive contingency of sovereignty, while feminists, materialists, and race crits reveal aspects of sovereignty's social constructedness. n44 These situated assaults on the sovereignty of sovereignty, as it were, move us in the direction of new conceptions of what, where and by whom "legitimate" politics can be.

Several recent projects to rethink the political, which specifically adopt a global perspective and, thus, attempt to move beyond the modern sovereignty-bound political imaginary, warrant the attention of critical race and postcolonial scholars. As I argued at an earlier LatCrit conference, racial justice paradigm formation would benefit from looking back and re-engaging with the anti-imperialist, internationalist past of race-based struggle. n45 In this section I would like to consider whether, and how, we might also look out at critical international political theory emanating from the postmodern Left in pursuing critical race globalism. I will limit the analysis here to three such postmodern theoretical projects (Hardt and Negri, n46 Walker n47 and Agamben n48), which I take as
representative of a fairly wide range of new theoretical perspectives. For the sake of road mapping (only), we might label these approaches postmodern [*837] materialist (Hardt and Negri), poststructural IR n49 (Walker), and deconstructive (Agamben). Through the lens of this body of international political theory, I will suggest some more expansive readings of the four articles analyzed above.

Hardt and Negri's concept of Empire is a very workable starting point for understanding the changing conditions of power and authority. Opposing Empire to the modernist system of imperialism, Hardt and Negri suggest that a new form of power, a "postmodern sovereignty," has replaced modernist forms that had been exported from Europe through colonialism and imperialism. n50 Applicable across a range of social formations and concepts, the theory of Empire captures the shifts in political and economic order accompanying globalization. Of primary importance are the new ways in which power now operates as if there were a globalized "universal republic." n51 Analogous to the United States' revolutionary break with monarchic and absolutist forms of sovereignty, postmodern sovereignty utilizes an "open" and expansive version of network power, whereby "sovereignty can be exercised within a vast horizon of activities that subdivide it without negating its unity and that subordinate it continually to the creative movement of the multitude." n52 Modern transcendent forms of power and authority (transcendent sovereignty) are replaced by this postmodern form, which approximates the deterritorialized, flexible and mobile workings of markets. n53 Capitalism's "plane of immanence," characterized by effective management of social difference (race, religion, sexuality, gender) and a lack of any single transcendent, territorialized locus of power and authority replaces modernist, unitary and territorialized forms. n54 [*838]

Thomas Frank's recent cultural critique of "market democracy" can be taken as an elucidation of the "plane of immanence" concept in the ways it surfaces (and ridicules) the now pervasive faith that the market can serve as a functional equivalent of a democratic political institution. n55 Frank sees this faith, which is shared across the political and social spectrum, as confusing the economic notion of exchange with the political notion of consent. Markets as "democratic" and populist institutions are increasingly seen as being capable of bestowing political legitimacy in the same way that popular democracy does. n56 The problem of Empire, as Hardt and Negri view it, is precisely that the new power networks pluralistically incorporate in their expansiveness all peoples, cultures and societies without subjecting them to modern, territorialized forms of domination and discrimination, but at the same time without democratically empowering the multitudes n57 it incorporates. Empire's plane of immanence may exude a certain populist cultural aura, as neoliberal markets do, but it frustrates democratic forms of social and political action.

The shift that Hardt and Negri identify, from transcendent (modern) to Empire-based (postmodern) forms of power and authority, corresponds to, and even gives the appearance of suspending a set of conceptual paradoxes at the heart of liberal political theory. Rob Walker describes these basic paradoxes as they operate on two levels, one internal and one external to the territorialized political unit of the nation-state. n58 Internally, the paradox involves squaring liberal background normativities regarding individual freedom and equality (and the implicit theory of the subject) with the sovereign imperative of submission to the single authority of the state. Externally, the paradox pits the particularist primacy of the nation-state as sole legitimate political unit against the great liberal authorizing myth of a single human community and the possibility of universal peace and prosperity. n59 Walker identifies the tension between these founding aspirations (individual freedom and equality, human community and universal peace) and the virtually unquestioned [*839] legitimacy of the sovereign nation-state, as the enabling paradox of liberal political theory. The territorially contingent modern political imagination, evidenced in the boundedness of the nationstate, is closely tied to the constraints of this liberal paradox.

Liberal theories of territorialized political authorization thus take shape as a dual narrative: populist, democratic, humanist, on the one hand, but sovereign, dominating and command/control-oriented on the other. In other words, there are equal and opposite commitments to liberal freedom and sovereign order in the original liberal framing of political authority. Giorgio Agamben has described this duality in terms of a philosophical dilemma at the heart of the modern theory of sovereignty (and thus politics), whereby a pre-social state of nature, or "bare life," is posited as the foundational condition behind the formation of the modern political order. Sovereignty, a la Hobbes, is the political philosophical settlement that brings together the subject of this bare life with its conceptual counterpart, political order. That which is sovereign, as Carl Schmitt famously declared, decides upon the state of exception n60; that is, sovereignty is the power to decide upon the application of general rules and the particular instances when those rules will not apply. Importantly, Agamben equates the sovereign's declaration of the exception with a re-imposition of bare life. When sovereigns
declare exceptions, and thus re-impose conditions of bare life, the human lives thus affected cease to enjoy the modern liberal political trappings of individual rights, freedom, voice, etc., but nevertheless are still subject to the awesome power of the state and its monopoly over organized violence.

Agamben's understanding of the current political crisis is that we are experiencing a shift from the state of exception (and banishment to the realm of bare life) as a temporal, and temporary category to a topological and permanent one. n61 In Agamben's view, therefore, modern liberal political concepts such as sovereignty, nation, people, democracy, and Rousseau's general will have nothing to do with the original meanings ascribed them. n62 The break is catastrophic for those relegated to the conditions of bare life under sovereign powers.

"Contemporary politics is this devastating experiment that disarticulates and empties institutions and beliefs, ideologies and religions, identities and communities [\textsuperscript{840}] all throughout the planet, so as then to rehash and reinstate their definitively nullified form." n63

Both Agamben and Hardt and Negri analyze postmodern forms of power in terms of Foucault's notion of biopolitics. Foucault identified a modern political shift toward what he termed governmentality, a form of authority and power that relied on so-called apparatuses of security and "biopolitics" (biopower). Both concepts convey a dispersed, non-Machiavellian, nonterritorial understanding of authority and power. n64 Whereas early modern sovereign forms of power targeted territory and sought direct means to control it while exercising the power of death over subjects, postmodern biopolitics takes as its primary object, the population and life itself, which are both nonterritorialized constructs. Politics is no longer about the ostensibly central categories that derive from the founding modern story of sovereignty and citizens but rather about life itself. To the extent that we are still focusing on the categories of sovereignty and the political rights and capacities of citizens, we are not even in a realm of the political that matters. n65

Importantly, the great originators of liberal political theory (Hobbes, Locke, Kant, Rousseau) all relied on now increasingly dubious accounts of unified and autonomous individual subjects as the natural "building blocks" of the political sphere. n66 These highly problematic individual subjects, in a supposedly natural state of perpetual freedom and violence, find a more efficacious liberty under sovereign law and order. n67 As Walker shows, the modern theory of sovereignty and the territorialized political dimension, which that theory prescribes, is irreducibly linked to the positing of imaginary individual subjects. Together, the territorial and subjectified premises of political life set the outer limits on what legitimate [\textsuperscript{841}] politics can look like. Transnational and/or group-based politics, for example, are illegitimate forms ab initio. n68 External to the nation-state, Walker identifies a limit concept in the humanist cosmopolis, which is paradoxically both universalist and modern. This imaginary universal community, which is integral to liberal framings of a utopian international sphere, also prefigures legitimate and illegitimate political subjects and projects. Here, a range of "tribalist," premodern fundamentalist, and anti-developmental political projects would be categorically illegitimate. n69

Having read these postmodern accounts of the crisis, one comes away with a sense that the conceptual veneer of Western liberal accounts of the political are about to crack. Factoring in the changing material capacities of communication technologies, and what these mean for the cross-border transferability of capital, goods and know-how, the highly territorialized story of authority becomes even harder to comprehend. Also, as international lawyers are well aware, the various national legal systems have long since become "transnational," with institutions from the highly structured WTO to the more informal ISO, globalizing the letter and practice of trade, property, and products law. n70 Nevertheless, the obstacles presented by the old conceptual frameworks remain with us in important ways. Indeed, it is the political deployment of these frameworks that is most noticeable from a critical race perspective.

Responses to so-called politics of difference present a case in point. In the form of a majority/minority problematic, the questions posed to liberal political theory about how to handle "surplus" people excluded from the category of "we the People" n71 have been finessed in various ways. n72 In the United States and other settler societies, the problems were handled by declaring that segments of the population fell outside "civilization" and, therefore, outside the political framework. They were either [\textsuperscript{842}] treated as de jure noncitizens (slaves, "savages," "nonwhite aliens ineligible for citizenship"), or they were relegated to a de facto second-class citizenship status. Pursuing race-based politics in the post-Civil Rights period has meant, however, responding to a different strategy of exclusion, perhaps best captured in the charge of "balkanization" that has been leveled at those who dare play the "race card" in American politics. Here, the politics of difference is delegitimized through the old modern political theoretical framework that does not view subnational (racial, religious, sexuality-based, gender-based) communities as legitimate political units of obligation and action. n73 Recently revised theories of pluralism (multiculturalism), designed to combat
this deployment of liberal theory, remain contained by
the nation-state discourse, as liberal writers from
Taylor to Walzer illustrate. n74 The traditional stories
thus remain powerful in their gate-keeping function.
They continue to authorize authorization.

Furthermore, the mutually reinforcing quality of the
reciprocal originary moments of liberal political
philosophy identified by Agamben (bare life, order
under law) is most clear in the ways the constitutional,
constrained version of sovereignty, which in its liberal
form is subject to the types of universalist democratic
commitments Schmitt distrusted, has coexisted with an
almost fascistic, "permanent state of exception"
applied to racial minorities and other outsider groups.
This basic tension, manifest at liberal democracy's
core, betrays the virtually constitutive particularism
behind these putatively universalist commitments.
Given liberalism's notable inability to eradicate race-
based social disparities, and indeed, its reliance on
social and economic hierarchy in general, its
legitimacy hinges on a fundamentally compromised
universalism. Cultural difference and "social
pathology" (read together as racial difference) serve as
boundaries delimiting the universal. n75 As Charles
Mills has argued, rather than a social contract at the
heart of Western liberal notions of the political, we
might, here, more accurately refer to it as a racial
contract. n76 The notion of a racial contract captures
the operation [^843] of the fundamental
inclusion/exclusion dynamic always at work,
historically the most socially relevant along racial
lines, in the "egalitarian" project of western liberal
democracy. n77 Whether this conception of authority
is based on more absolutist notions of the "national
will" or is constitutionally divided and limited seems
almost beside the point from an outsider perspective.

These highly theoretical framings of the political
crisis, dense though they may be, help shed greater
light on the creative approaches to politics contained in
the work of engaged anticolonial and critical race
scholars such as those discussed here. Working
through different paths, each of the theorists outlined
above ends up in a similar prescriptive place. Each
insists that progressive politics must respond to the
current crisis by dispensing with the familiar
conceptual and institutional apparatuses of subjectivity
and sovereignty. The critical implications of this body
of theory involve potentially every aspect of our
political imaginary, from divorcing ourselves from the
modernist commitment to territorially bounded
thinking, to giving up our postmodern fascination with
hybrid or border subjectivities. n78 Let us now
consider what may be gained from reading the four
articles analyzed above through the theory of
postmodern political crisis.

San Juan's defense of robust nationalist political
struggle, together with his refutation of
postcolonial/poststructural theory, presents the
problem as one of identifying the proper anticolonial
political subject. Properly defined collective
subjectivities, though their positing may risk gliding
over important underlying social divisions, appear to
San Juan as indispensable means for combating the
depoliticization of social hierarchization. The liberal
fragmentation of political agency, aided in San Juan's
opinion by postcolonial/poststructural theory, presents
a primary barrier to progressive political mobilization.
San Juan's defense of subaltern nationalism appears at
first glance to champion a traditional sovereign form of
power and contestation, and thus, to be out of step with
the theoretical reworkings of the political we have
considered. However, crucially, San Juan is at pains to
divorce his defense of subaltern nationalism from the
sovereign state form. This effective rejection of a
politics [^844] of sovereignty is the primary
distinction between a conception of the nation as a
political mechanism for protection against
subordination, Westernization, and global Empire, and
that of the nation as an ideological tool for internal
repression of difference. n79 San Juan's objection to
the separation of society from nation establishes a
proximity between his apparently modern conception
of the subaltern nation and Hardt and Negri's
postmodern multitude, n80 or the bare life of
Agamben's "people." n81 While San Juan's nation
partakes of a familiar modern politics of militant
resistance, it evinces a Fanonian refusal to re-inscribe a
sovereign (bio)politics of exclusion, or national
totalitarianism.

San Juan's choice of national violence is important in
that it implicitly targets a deep binary tension in liberal
political theory, the bright-line distinction between
violence and law. For Agamben, sovereign power's
authority to decide between violence (the exception,
bare life) and law (the rule) masks a fundamental
indifference between the two: "the sovereign is the
point of indistinction between violence and the law, the
threshold on which violence passes over into law and
law over into violence." n82 The sovereign's
theoretical privileging follows from its having been
imbued with nature's permanent state of violence (the
war of everyone against everyone, according to
Hobbes n83), from which it can project order, law,
social solidarity and the like. The hypocrisy of
liberalism is that it delegitimizes all forms of
"violence" that threaten the constituted social order,
and yet preserves as legitimate in its core political
essence the threat of an arbitrary constituting power
over life and death.
San Juan and Agamben intersect in their recourse to Benjamin, who exposed the link between violence and law. n84 However, it appears that San Juan and Agamben interpret Benjamin differently with regard to his notion of "divine violence," which for San Juan grounds his defense of a nationalist, political third-way beyond the dialectic of state violence and law. n85 San Juan's work, which is supported in various ways by that of Arif Dirlik, Benita Perry, Aijaz Ahmad, R. Kothari and Alex de Waal, uses a postmodern appreciation of the shortfalls of modern liberal to [\*845] redeem a modernist narrative of political authority as popular sovereignty. Violence tied to the nation, in this sense, should be understood as a metaphor for a broader argument about the possibility of confrontational politics, a robust return to public forms of the political and a renewal of support for revolutionary struggle.

Kapur's work differs from San Juan's in positing the subaltern sex worker as the proper progressive political subject. Neither the nation, nor a similarly collective feminist subject (women) would represent superior forms of agency for enacting Kapur's notion of a politics of desire. However, Kapur's analysis of Indian sex work suggests even a further elaboration of the political space of desire. By emphasizing the heightened autonomy sex workers acquire both as market actors and through their related efforts to claim labor rights (including health and safety protections) and other civil rights such as the right of free movement, Kapur moves toward a notion of the political that operationalizes the relative openness of markets. n86 Echoing critical international legal scholar David Kennedy's provocative call to activate the potential inherent in the ways political power is deployed through the private actions and "regimes" of the market, n87 Kapur provides concrete evidence that such efforts may provide a useful vehicle for progressive politics. In this sense, Kapur's argument is compatible with the call by Hardt and Negri to forge an anti-imperial politics from Empire's own economic, social and cultural productive matrix and the openings in its capitalist plane of immanence. n88

This possibility is inherent in Empire's new structuring of production to include all aspects of life, the very social and cultural relations of the multitude. n89 As Hardt and Negri argue: "In the postmodernization of the global economy, the creation of wealth tends ever more toward what we will call biopolitical production, the production of social life itself, in which the economic, the political, and the cultural increasingly overlap and invest one another." n90 One aspect of biopolitical production is the rise in prominence of "affective labor." Affective labor refers to production which occurs through corporeal means, but which results in immaterial [\*846] "products." "What affective labor produces are social networks, forms of community, biopower." n91 Kapur's research reveals the extent to which subaltern sex workers indeed constitute alternative social networks and forms of community, and her work raises the interesting possibility of what Hardt and Negri refer to as "a kind of spontaneous and elementary communism." n92

Immaterial forms of production (informational, communicational, affective) are radically decentralized, n93 as opposed to the paradigmatically centralized forms of factory production. In this decentralization lies a great capacity for resistance to the control of productive processes. Kapur's work maps this inherently political capacity of subalterns in the sex work industry, whose mobility is the expression of disruptive potential. n94

The non-victim subject position of sex workers that Kapur seeks to inscribe through her work bespeaks the type of postmodern political identity that Agamben calls "whatever singularities." n95 Kapur asserts that the emergence of the postcolonial sexual subaltern pursuing a politics of desire not only exposes the limitations of the victim-subject, but also combats the idea of the Indian woman as tied to the (conservative) figuration of the national culture and community. Agamben argues that sovereign political domination can easily abide the assertion of any claim for identity, so long as it is tied to a "representable condition of belonging." n96 "Whatever singularities" that form communities without a coherent sense of social identity are, for Agamben, the true bearers of postsovereign politics. Kapur shows how the social and political subjectivities readied for postcolonial sexual subalterns by reformist anti-trafficking legal interventions, which Agamben's work would classify as state-sanctioned and emptied of real content, cannot undermine the politics of desire she favors.

Santiago's analysis of the determinants of Puerto Rican juridical marginalization captures the nuanced workings of the political constitution of Empire as it relates to management of difference. This connection becomes clear when one notes that the colonial encounter is constitutive of Western political identity. n97 The Othering of putatively non-politically evolved peoples helped set the outer limits of the properly political world of Europe and its offshoots. The second important constitutive alterity of [\*847] political modernism, as discussed above, has involved internal Others who were also denied political subjecthood. The case of Puerto Rico presents an important bridge between these two types of identity-creating constructions of difference. As Hardt and Negri observe, a new logic governing difference and identity obtains under conditions of Empire. Rather than a
The hierarchical relationship of dialectical opposition between rigidly (biologically-defined) notions of identity and difference, as typical of strictly modern forms of dominance and exclusion, Empire instead acknowledges the hybridity of identity and manages it.

Although Santiago does not specifically invoke the question of national self-determination for Puerto Rico, the concept is implicated in his work. The juridical space that imperial lawmakers opened up for Puerto Rico, which is a space literally neither here (imperial center) nor there (colony), in effect frustrates the application of self-determination discourse, a modern international legal doctrine that extended the liberal political settlement (sovereignty and statehood) to colonial peoples. Practically every other peripheral space, i.e., throughout the colonies of Asia, Africa and Oceania, warranted application of the "right" of self-determination. In this regard, however, Puerto Rico has remained truly liminal to the international juridical order of the 20th century, being neither fully absorbed by, nor definitively liberated from, the imperial bond.

Santiago's (and Lazos Vargas's n99) work provides an important perspective for understanding the problem of self-determination as it applies to Puerto Rico. If, as Santiago argues, the modern dialectic of (biologicist) racism did not determine the juridical status of Puerto Rico, this might help shed light on the complexity behind debates about the "status question," and why both sovereign and non-sovereign (or perhaps quasi-sovereign) forms of resistance have been an important part of anti-imperial political agency there. In order to understand this connection, the link must be drawn between modernist forms of racism and sovereignty. There are several ways of conceiving this link. Antony Anghie's work has established a constitutive historical link between colonial racism and the evolution of modern sovereignty as an international legal concept. Anghie persuasively argues that sovereignty doctrine is irreducibly racialized in the colonial encounter. With regard to the ontology of sovereignty, one might consider the ways that Hobbes himself constructed his notion of Leviathan against what Fitzpatrick calls the "specular repository" of America's "savages." The concepts of both the modern political subject and his (sic) sovereigns, beginning with Hobbes and continuing up through Hegel, have been constructed through a racialized logic of projection and negation. First, an archetypal (albeit counterfactual) disorder is projected onto the savage and primitive racial Other and then that disorder is transcended in positing the politically modern Western subject and his corollary, the sovereign.

The turn to later modern and postmodern forms of culturalist racial differentiation coincides with a turn away from modern political paradigms that were closely tied to biologicist forms of racism. As Santiago suggests, Puerto Rico, in being subjected to this new form of racial differentiation, slips into a kind of differently territorialized political status, characterized as a juridically constructed ambiguous "space." Given this relatively deterritorialized form of neocolonial subjugation, and the commensurately altered form of racialization it implies, the case of Puerto Rico must be stretched to fit into modern, nation-based political categories. Without presuming to assess the highly charged status debate, I would like to sketch a few consequences for understanding Puerto Rican political struggle from the theoretical perspective suggested by Santiago.

One of the problems with applying the principle of self-determination in the case of Puerto Rico has been defining the relevant "self" who should be politically enfranchised. The question is complicated by at least two factors. First, it is estimated that seventy-five percent of all Puerto Ricans live in the United States. Second, residents of Puerto Rico include non-Puerto Ricans, many of whom are economically powerful due to the tax incentives Congress has provided for U.S. businesses which locate there. In a strictly territorialized application of self-determination, the result would be an unacceptable (and neocolonial) under-and over-inclusiveness that would inscribe within the definition of the politically relevant "self" the very conditions of colonial dependence (economic diaspora and corporate imperialism). Expanding on the perspective derived from Santiago's work, we can draw different lines around the concept of self-determination.

Redrawing the lines around the modern principle of self-determination can also prove supportive of the types of coalitional struggle that have arisen recently around the question of sovereignty in Vieques. Paradoxically, the protests over territorial control of Vieques by U.S.-based Puerto Ricans and prominent African Americans suggest a non-territorialized conception of the political. The Vieques protests have increasingly taken on transnational significance as they site not only the local political agency of Vieques Islanders who seek control of their immediate environment, but also the aspirations of Puerto Ricans in New York City who seek to elect the first Puerto Rican mayor in coalition with African Americans.

Indeed, Santiago's point about expanding race-critical paradigms with an appreciation of Puerto Rico's ambiguous juridical space might also be useful in
understanding how race itself in Puerto Rico underwent a significant transformation from the period of Spanish rule to that of U.S. colonialism.

As Angel Oquendo has argued, the White-over-Black racial dualism of the United States has been displaced in Puerto Rico by a "single Afro-Antillean ethos." This apparently homogeneous (modern) construct is, importantly, articulated as an ethos and not a nation. It is a notion that resonates with the non-identitarian "identities" called for by Hardt and Negri, and Agamben. Santiago's expansion of the race framework may go a long way toward explaining the highly racialized status of Puerto Ricans living in the United States, and the differently structured "ethos" on the island. Ultimately, by building on Santiago's work, we may be able to develop a political model that would work both the juridical liminality and racial hierarchy negatively affecting Puerto Ricans into a vision of political contestation in a reconstructed (transnational? post-sovereign? race-global?) political space.

Finally, I would argue that Lazos Vargas's reflection on the need for a pragmatist commitment in outsider legal scholarship works through some of the epistemological aspects of the political crisis by problematizing the specific antinomies inherent in pursuing anti-foundationalist, critical scholarly agendas. The theoretical link between epistemology and sovereignty that explicates this dimension of Lazos Vargas's work can be understood through Walker's discussion of the parallels between sovereignty-based stories of authorization and current (IR) disciplinary practices that constrain knowledge production. Pointing out a bitter irony for critical IR theorists, Walker writes:

\[\text{The primary difficulty posed by [mainstream IR] rhetorics of structural/natural necessity and empirical knowledge is that they are claims to authority of precisely the same kind as the claims to authority that constitute modern forms of politics. Hobbes, for example, not only worked out a paradigmatic account of what is involved in constructing a modern politics out of determinately free and equal individuals; he also did so on the basis of the kinds of philosophical categories involving dualisms of language and world, man and nature, perceiver and perceived and the rest that still find their more elaborate parallels in various debates about the epistemology of scientific inquiry. Much of contemporary scholarly debate about how one should study politics resembles nothing so much as a parody of Schmittean sovereigns struggling to decide the limits of what is scholarly, scientific, rational, or professional and what is exceptional or even pathological.}\]

Not only can one point to these formal similarities between sovereign political authorizations and the border policing function of disciplinary epistemology, but, again, one may note the conceptual link between Hobbes' positing of a particular kind of rational subject and his political theory of sovereignty.

Hardt and Negri, in a book that predates the working out of their theory of Empire, show how the communitarian subject implicitly reinscribes the state form. The key to their argument, paralleling that of Walker, lies in seeing how the communitarian logic fails to dispense with the notion of rational, though reflective/situated subject.

The community of these subjectivities that matters, i.e., the community that most coherently comprises these rational-situated subjectivities, must be embodied in the state form. Other groupings will remain only partial communities since they cannot claim the state form. "In the final instance, the communitarian preoccupation with the theory of the subject leads to the proposition of the State as the only fully realized and autonomous subject." To the extent that pragmatism forces a critical engagement with the Hobbesian (and communitarian) subject, it may also serve to destabilize the conceptual paradigms of political modernity. In this sense, for example, the pragmatist method offers a process for moving toward resolution of a central political antinomy of modernity--identified by Agamben as the split between "the People" and the people--by offering dissident and outsider voices a place in the communal conversation about truth and knowledge, if not a guarantee that their justice concerns will be met through such coming to voice. Under pragmatist rules of the game, the participants must avow the partial, particular and situated nature of their truth and justice claims, i.e., are foreclosed from propounding their "particular idea as an absolute." They may not claim their positions as representative of either the People as sovereign Self, or of the authentic national-popular "concrete universal" of an oppressed group. Rather, the participants would agree in advance to an openness, a resistance to premature closures and suturings of knowledge and truth claims. In this way pragmatism potentially disarms the potent public-private split of traditional liberalism--put in crisis by the recent multicultural, pluralist turn--which has tended to elevate particular and situated (private) notions of the good to (public) universals.

Some caveats would apply, of course. In one sense, calling for scholarly self-reflection (acknowledgment of the critical scholar's own positionality) does not automatically provide conceptual purchase on an...
emerging, post-sovereign political space. Indeed, such a call could even be seen as reinforcing the venerable liberal firewall erected between politics and knowledge, even as it insists on the socially positioned quality of all knowledge creation. Certain (conservative) appropriations of pragmatism may even offer a way around the anti-disciplinary consequences of the positionality thesis, originally a critical ethnographic concept that, as it "traveled" across disciplines, destabilized hegemonic claims to disinterested and transparent knowledge production. As Richard Rorty's neopragmatist manifesto itself illustrates, pragmatism can further a naive individualism nearly devoid of structural analysis. The pragmatist can recognize other perspectives, relativize her own, but in the last instance retain a troubling coherence or foundation in the form of an inertial acceptance of the status quo order.

I would argue that a strong normative commitment--something like Mari Matsuda's notion of a "weighted pragmatism," Cornel West's "prophetic pragmatism," David Theo Goldberg's "anti-racist pragmatism," or Dara Roithmayr's "radical pragmatism"--is necessary to avoid the liberal trap-door in pragmatism's non-foundation. It certainly seems appropriate from the perspective of postmodern progressive political theory to simply declare that we (Critical Race Theorists, LatCritters, etc.) are part of different epistemological tribes from the Posners, and Farber/Sherry's of the world who challenge crits' depictions of history and narrative.

My argument is that a commitment to pragmatist anti-absolutism works differently for outsiders than it does for the mainstream. Whether they reflect a simple bad faith will to power (possible), or the workings of more complex structural and systemic racism and elitism (likely), I do not experience the mainstream attacks on critical race projects as invitations to a pragmatist talking circle. They are designed to disqualify outsider voices, and indeed, to roll back policies that have only recently brought outsiders into the academy.

Conclusion

The question the critical race project might ask of post-sovereignty politics is: how does one do your politics. As someone who is intellectually disposed to post-sovereignty theory, I always find myself flipping through the texts to gather the fragments of evidence about what that politics looks like. I'm aware that critical race advocates, many of whom hold praxis dear, will want to know what they should be doing politically to avoided the dangers of sovereign ontology. The answer to the question is, unfortunately, not so straightforward as far as I can tell. Indeed, to someone who commits time and energy to political struggle, in the conventional meaning of the term, the politics of de-subjectification, de-territorialization and desovereigntyization probably do not feel like real politics at all. They do not feel like truth being spoken to power, and they do not feel like power being checked or wealth redistributed. I agree with San Juan's point about the false premise of means-ends logic as it is applied by post-isms of various kinds, but I also think that those involved in anti-systemic political struggle might easily apply their own basic means-ends analysis in concluding that the celebrated transgressions of postmodernity (hybridity, mobility, diasporas, indeterminacy, etc.) are not emancipatory. Indeed, these "transgressions" may even appear as means toward continued subordinations.

For progressive postmodern political theory to speak to movement actors, it obviously must remain engaged with them. To an extent, this analytical essay has attempted to model a dialogical method for letting postmodern theory inform engaged research. The LatCrit and Critical Race project to which the four articles discussed here contribute is precisely the kind of "local" political project (albeit in the realm of research and scholarship) that postmodern political theory should address. An instructive example of how to understand post-sovereignty (post-national) politics under conditions of globalization is S. Sayyid's elaboration of the postmodern notion of diaspora in the context of Umma--the Muslim community of believers that may well constitute an actual post-sovereign political presence. Sayyid writes:

The idea of the Muslim Umma is an attempt to come to terms with the limits and the crisis of the nation-state. As forces and developments associated with globalization have weakened the institutional rigidity of the Westphalian state, cracks and gaps begin to appear in the international state system that provided the terrain for politics. Given the mobile and constructed nature of social identities, these fissures within dominant institutional forms of the nation-state have allowed different kinds of collectives to be articulated, taking advantages of these gaps. These formations seep through the Westphalian edifice, creating political formations that are neither in nor out of the nation-state, but that have an undecidable relationship to it. In this sense, diaspora is the name of this undecidable political formation.

In this quote we see Sayyid effectively navigating the choppy analytical waters between identity and anti-essentialism, culture and politics, the local and the global, and importantly, the modern and the postmodern. Diaspora, in Sayyid's hands, is neither an empirical claim (communities are living outside their
national homes), nor a normative commitment (celebration of hybrid identity forms), but rather a political theoretical device for understanding the relationship between and among the actual and potential transnational Muslim "movement," exploitative systems of globalization, and the existing political containers of nations and states. Sayyid's postmodern political framework for understanding the Umma is superior because it avoids the "pathos" in notions of diaspora that fail to problematize the "unevenness by which nations are transformed into diasporas" n135--there are winners and losers in the process and a political theory of diaspora must speak to the political consequences of those outcomes.

Is progressive postmodern political theory correct in assessing the current crisis of the political and concluding that we are living in a post-sovereign world? The answer is undoubtedly to be sought by studying the real political formations, successes, and failures of globalization's multitudes.

FOOTNOTE-1:

n1 See discussion infra notes 40-44 and accompanying text for a definition of the "political crisis" as discussed in this paper.

n2 See generally Morton Horwitz, The Transformation of American Law, 1870-1960: The Crisis of legal orthodoxy (1992) (presenting the intellectual history of modern American legal thought as fluctuating between several traditional polarities that draw their real meaning from the underlying separation of law from politics); Eric K. Yamamoto, Interracial Justice: Conflict and reconciliation in a Post-civil Rights America 128-149 (1999) (discussing critical race theory's "practical turn" that is based on an understanding of the real limitations and potentials of using law and legal process in the pursuit of racial justice).

n3 The anti-globalization Left offers an interesting case for understanding the limits of movement politics in the current conjuncture. To date, this impressive movement has primarily targeted the international legal and governmental institutions (WTO, World Bank, IMF, Global Economic Forum, G-8) that structure globalization from above. The pressure the protest movement creates is therefore likely to lead to legal reform through these institutions. It is as yet unclear how effective anti-globalization can be as a movement that structures change "from below." For an interesting analysis of the various responses to globalization, see generally Patrick Bond, Strategy and Self-Activity in the Global Justice Movements at http://www.fpif.org/papers/gjmbody.html (representing a "Foreign Policy in Focus Discussion Paper" that presents excerpts from a forthcoming book by the author describing the approaches of various anti-globalization movements) (last visited Sept. 12, 2001).

n4 I focus here only on post-Civil Rights and postLabor models. Of course, the older forms of race and class struggles remain the operative models for many, if not most politically active individuals and groups on the Left. Various critical approaches to identity and law (Critical Race Theory, LatCrit, postcolonial legal studies, Third World Approaches to International Law) that have emerged recently have debated the issues and approaches mentioned here.


n6 See, e.g., E. San Juan, Post-Colonialism and the Question of Nation-State Violence, 78 Denve. U. L. Rev. 889 (2001) (discussing and critiquing this approach). The LatCrit project has incorporated certain elements from this category in its fundamental organizing philosophy, although its very name implies a program based on the assertion of a collective (perhaps necessarily "essentialized") racial grouping. See Francisco Valdes, Afterword: Theorizing 'OutCrit' Theories: Coalitional Method and Comparative Jurisprudential Experience--RaceCrits, QueerCrits and LatCrits, 53 U. Miami L. Rev. 1265, 1278-1294 (1999) (discussing the coalitional model of LatCrit and the "antiessentialist essentialism" of LatCrit method).

n7 See generally Richard Rorty, Contingency, Irony, and Solidarity (1989) (frequently cited as a leading neopragmatist text, written by a scholar of the American pragmatist tradition).

n9 See generally David Kennedy, Receiving the International, 10 Conn. J. Int'l L. 1 (1994) (mapping the various understandings of how internationalization may affect politics).

n10 I will use the term postcolonial/poststructural as shorthand for the particular body of theory that San Juan critiques. It should be clear that the term on its face could include theoretical approaches that San Juan does not specifically critique here, and with which he may be in substantial agreement. The reader should refer to San Juan's article for a closer designation of the particular postcolonial and poststructural theory he critiques. See E. San Juan, Post-Colonialism and the Question of Nation-State Violence, 78 Denv. U. L. Rev. 891 (2001).

n11 See infra text accompanying notes 97-98.

n12 See Hardt & Negri, supra note 8. Hardt and Negri develop a theory of Empire that is a sophisticated rethinking of the dilemmas facing traditional notions of the political. Hardt and Negri explain that "along with the global market and global circuits of production has emerged a global order, a new logic and structure of rule--in short, a new form of sovereignty. Empire is the political subject that effectively regulates these global exchanges, the sovereign power that governs the world." Id. at xi. See infra text accompanying notes 50-57.

n13 E. San Juan, Jr., Beyond Postcolonial Theory (1998).

n14 See id. at 8.

n15 See Robert C. Holub, Crossing Borders: Reception Theory, Poststructuralism, Deconstruction 111-12 (1992) (explaining the rise of poststructuralism in the humanities as, in part, a reaction to the demise of radical student movements of the 1960s).

n16 Several "law ands" and "new approaches" that have arisen over the past decade indicate this trend. Law and anthropology, law and literature, and New Approaches to International Law, for example, tend to emphasize the discursive aspects of law. Yamamoto critiques the trend as it is manifested in progressive race theory. See Yamamoto, supra note 2, at 143 ("Progressive race theory's tendency toward preoccupation with discourse is problematic, however, because it comes at the overall expense of the concrete and particular.").

n17 To appreciate how San Juan understands "nation" or "people," one might recall Gramsci's notion of the "national popular collective will," a term that indicated a counterhegemonic and non-statist collective political formation. See Antonio Gramsci, Selections from the Prison Notebooks 130-31 (Quinton Hoare & Geofffrey Nowell Smith eds. and trans., 1971).
n18 See Frantz Fanon, The Wretched of the Earth 41 (Constance Farrington trans.) (1963). Fanon dedicates a chapter to the question of violence in anti-colonial nationalist movements. In the passage quoted he is discussing the relationship between universalist rationality and the particular historical dialectic of de-colonization.

n19 See also Prabha Kotiswaran, Preparing for Civil Disobedience: Indian Sex Workers and the Law, 21 B.C. Third World L.J. 161 (2001) (discussing Indian sex work from a similar perspective as that of Kapur in her contribution here).


n21 For a recent article that proposes moving past this debate, see generally Beverly Balos & Mary Louise Fellows, A Matter of Prostitution: Becoming Respectable, 74 N.Y.U.L. Rev. 1220 (1999) (arguing for decriminalization, but also a civil cause of action that prostitutes could use against those profiting from what the authors argue amounts to a violation of their civil rights).

n22 See, e.g., Kathleen Barry, The Prostitution of Sexuality 36-38, 79-90 (1995). Barry argues that understanding prostitution as something other than rape creates a distinction without a difference. Both rape and prostitution are male-driven sexual subordinations of women. The overall maledominated economy of sexual power renders these acts experientially equivalent. Parsing sexual subordination along the lines of individual consent misses the point as far as Barry is concerned. The patriarchal sexual order works equally well through rape or consensual prostitution. Individualized notions of the political that are inherent in the claim that women as market actors can "consent" to prostitution prevent the formation of effective feminist political consciousness necessary to combat the system of domination.

n23 See generally Global Sex Workers (Kamala Kempadoo & Jo Doezena eds.) (1998) (taking this position in the international context of sex work and trafficking). For works taking a non-abolitionist stance, see generally those cited in Balos & Fellows, supra note 21, at 1291 n.323.

n24 See Global Sex Workers, supra note 23.

n25 It should be noted that San Juan's book includes an incisive life history of Maria Lorena Barros, a feminist Filipino nationalist, which occasions a serious engagement with the question of women and anti-colonial nationalist struggle. See San Juan, supra note 13, at 43-50.

n26 I examine the staging of something resembling a Victorian morality play in the anti-trafficking discourse in Gil Gott, Caught in Traffic 5 (Aug. 2001) (unpublished manuscript on file with author).


n28 See discussion infra note 42.

n29 See San Juan, supra note 13, at 44-5.


n31 See Walker, supra note 8, at 43-49.

n32 Hardt & Negri, supra note 8, at 190-95.

n33 The U.S. Supreme Court's post-Civil Rights race jurisprudence has, ironically, embraced poststructural antiessentialism in dismantling the legal reforms that relied on clearcut racial categorizations, group-based harms and systemic notions of discrimination.

n34 The "racial contract" is Charles Mills' term to describe the actually existing social contract of the United States and other European-based settler societies, self-


n36 Several writers have analyzed the role of racism in the Spanish-American War from a cultural studies perspective, i.e., by examining a different set of data from that examined by Lazos Vargas. See, e.g., Maria DeGuzman, Consolidating AngloAmerican Imperial Identity Around the Spanish-American War (1898), in Race and the Production of Modern American Nationalism 97-122 (Reynolds J. Scott-Childress ed., 1999) (examining literary and graphic representations of Spain in 19th century America and arguing that the imperial notion of Manifest Destiny was racially coded). See generally Michael Hunt, Ideology and U.S. Foreign Policy 46-91 (1987) (tracing the impact of racism on U.S. foreign policy, including during the era of imperialism).


n38 See Hardt & Negri, supra note 8, at 190-95.

n39 See generally Rodolfo Acuna, Occupied America (1972); see also Mario Barrera, Race and Class in the Southwest (1979).

n40 For one of the most sophisticated articulations of a more traditional leftist politics, i.e., as informed by the writings of Marx, see Ralph Miliband, Marxism and Politics 154-190 (1977).

n41 I refer here, of course, to Arjun Appadurai's notion of scapes, a suffix he uses to capture the fluid and differentiated, yet structurally similar global networks of force. Appadurai lists ethnoscapes, mediascapes, technoscapes, financescapes, and ideoscapes as five dimensions of the new global cultural economy. See Arjun Appadurai, Modernity at Large 27-47, 33 (1996).

n42 The designations "old" and "new" distinguish the worker movements of the early to mid 20th century from the later civil rights and identity-based movements, including environmentalism. For an excellent summary of the old versus new social movement debate and a new theory of "subaltern movements" that transcends the somewhat artificial dichotomy of the old/new debate, see Laura Pulido, Environmentalism and Economic Justice: Two Chicano Struggles in the Southwest 3-56 (1996).

More broadly, the relationship between social movement theory, which has been a predominantly backward-looking project aimed at explaining (if not preserving) a notion of 1960s radicalism, and more recent theoretical work on civil society is indicative of the underlying dilemma of the political. Social movements, once deemed a crucial vehicle for contesting power outside the confines of state institutions, spoke directly to the power of the state, maintaining a vision of contesting power over state apparatuses. Moreover, social movements were seen as operating apart from markets, if not radically opposing them. To the contrary, civil society purportedly sites action that is, theoretically at least, nonstatist in nature. In addition, civil society is viewed as fundamentally compatible with, if not directly functional within, the market. Both conservative and progressive visions of civil society have been circulated, but also critiqued from the perspective of global justice advocates, especially outside the West.

Critics of the recent faith in civil society are skeptical of the progressive political potential in a private domain of "free association" that is made possible by the very same liberal system of individual property rights that legitimates social exclusion and inequalities in wealth, power and freedom. Somewhat less credibly, criticism of "new social movements" adopts this historical materialist perspective. However, as Hardt and Negri point out, the salience of new social movements might better be understood by appreciating the "profound economic power" they embody, given the "increasing indistinguishability of economic and cultural phenomena." Hardt & Negri, supra note 8, at 275.
The decidedly cynical coverage of recent antiglobalization protests from Seattle (WTO) to Genoa (G-8) has seized on the necessarily multivariate responses to globalization in discounting the entire movement as chaotic and misguided. Liberal and neoconservative columnists deploying this rhetoric correctly identify this symptom of the political crisis in the proliferating forms of resistance, but they of course use it for propagandistic ends. See, e.g., Thomas L. Friedman, Foreign Affairs; Evolutionaries, N.Y. Times, July 20, 2001, at A21 ("To be against globalization is to be against so many things --from cell phones to trade to Big Macs--that it connotes nothing. Which is why the anti-globalization protests have produced noise but nothing that has improved anyone's life.").

See, e.g., Cynthia Weber, Simulating Sovereignty: Intervention, the State and Symbolic Exchange (1995) (deconstructing sovereignty); Jens Bartelson, A Genealogy of Sovereignty (1995) (arguing that sovereignty is historically constructed through a contingent discourse of "insides" and "outsides").

See Gott, Critical Race Globalism?, supra note 27.

Hardt & Negri, supra note 8.

Walker, supra note 8.

See works by Agamben, supra note 8.

IR is commonly used as an acronym for the field of study known as international relations.

Hardt and Negri, supra note 8, at 138.

Id. at 166.

Id. at 162.

Id. at 160-203.

Id. at 325-350. Theorists have often sought to resolve the dilemma (seemingly always at the heart of bourgeois liberal political order) by championing one or the other of the two versions of authority as more authentic or more utilitarian, perhaps even more ethically defensible than the other. Most recently, under neoliberalism's "Washington consensus," authorization in the form of the market mechanism and capitalism's imperatives has been winning the day, at least rhetorically. Conversely, Carl Schmitt began a conservative tradition that valorizes the transcendent approach to sovereignty when he lamented the loss of the political, defined in absolutist terms as the authority to decide exceptions to the rule of law. Schmitt thought that liberal democracy submerged the essential political experience, which he conceived as an untethered binary process rigidly distinguishing friends from enemies, and law from that which is excepted from law's "universalist" operation. Schmitt reviled what he saw as the basic hypocrisy of liberal democracy, which indulged a radical promise of equality while maintaining an essentially nonpolitical (nonbinary) process of decision-making (compromise) and commitment to unconstrained individual liberty. For Schmitt this combination meant that private interest and private power would become the real bearers of authority at the expense of the political. Of course, Schmitt, a Nazi supporter, did not aim to bring about the realization of substantive social equality in Western democracies, although his work has resonated with both left-progressive and authoritarian conservative theorists. See Tracy B. Strong, Foreword: Dimensions of the New Debate Around Carl Schmitt, in Carl Schmitt ix-xxvii, xxiv-xxvii supra note 8 (discussing Schmitt's revival among scholars from both ends of the political spectrum).


Of course, this recent conflation of the market with the political must overcome a longstanding trend in American social philosophy to view such privatization of the political with skepticism. Dewey referred to such reduced notions of the political as merely "the shadow cast on society by big business." See Robert B. Westbrook, John Dewey and American Democracy 440 (1991).

Hardt and Negri use the term "multitude" to refer to the "new
proletariat" that is both the productive force that Empire harnesses to its productive and accumulatory needs, and the potential subject of an anti-imperial (anti-Empire) political future. See Hardt & Negri, supra note 8, at 393-413.

n58 See Walker, supra note 8, at 36-49.

n59 Id.

n60 See Carl Schmitt, Political Theology (George Schwab trans., 1985) (1934).

n61 Agamben writes: "The state of exception is thus not so much a spatiotemporal suspension as a complex topological figure in which not only the exception and the rule but also the state of nature and law, outside and inside, pass through one another. It is precisely this topological zone of indistinction, which had to remain hidden from the eyes of justice, that we must try to fix under our gaze." Agamben, Homo Sacer, supra note 8, at 37. In this sense, Agamben defines the nomos of modernity to be the (concentration, or refugee) camp. See id. at 166-180.

n62 See Agamben, Means Without End, supra note 8, at 110.

n63 Id.

n64 See Michel Foucault, Governmentality, in The Foucault Effect 87-104 (Graham Burchell et al. eds., 1991).

n65 The creation of the category "citizen" is only possible through the original separation of bare life from a political realm appurtenant to the erection of the sovereign. This splitting of human life from political life was described by Karl Marx as the distinction between human and political emancipation. See Karl Marx, On the Jewish Question, in The Marx-Engels Reader 26, 35 (Robert Tucker ed., 2d ed. 1978) (1972).

n66 To the extent that poststructural, critical race and feminist theories have displaced this modern notion of subjects congealing in homogeneous communities, along with the ways in which such subjects may be effectively "represented" in the organs of democratic government and thus in the nation-state, the founding moment of legitimate liberal politics is destabilized.

n67 However, Will Kymlicka argues that liberalism has, until recently, viewed national minority (groupbased) political demands with ambivalence, although he does not extend this analysis to subnational (racial, gender, sexual) minorities. In the U.S. context his analysis would apply to Puerto Ricans, Native Americans, Native Hawaiians and Native Alaskans. See Will Kymlicka, Ethnicity in the USA, in The Ethnicity Reader 229-247 (Montserrat Guibernau & John Rex eds., 1997).

n68 In addition to the spatial dimension discussed here, Walker identifies a constraining temporality in liberal political theory, through which all future alternatives have already been mapped along developmental trajectories emanating from a modern present. See Walker, supra note 8, at 36-42.

n69 ISO is the commonly used name for the International Organization for Standardization, the "private" international organization responsible promulgating over 13,000 industrial standards applicable in over 140 countries.

n70 Agamben identifies this key ambiguity embedded in the term "people" as it is used in liberal political theory: "It is as if what we call 'people' were in reality not a unitary subject but a dialectical oscillation between two opposite poles: on the one hand, the set of the People as a whole political body, and on the other, the subset of the people as a fragmentary multiplicity of needy and excluded bodies . . . of the wretched, the oppressed, and the defeated." Agamben, Homo Sacer, supra note 8, at 177.

n71 See generally Rogers M. Smith, Civic Ideals: Conflicting Visions of Citizenship in U.S. History (1997) (discussing the recent treatment of the problem of exclusionary definitions of citizenship, interestingly, written by the co-author of a monograph arguing against standard birthright citizenship).
n72 A particularly distasteful mutation of this nationalist elision of race has occurred in the conservative response to the movement claiming reparations for slavery. Polemicists like David Horowitz argue that slavery benefited "Americans," including Blacks. Horowitz's infamous "10 reasons" advertisement states that "the claim for reparations is premised on the false assumption that only whites have benefited from slavery. If slave labor created wealth for Americans, then obviously it has created wealth for black Americans as well, including the descendants of slaves." David Horowitz, Ten Reasons Why Reparations for Blacks is a Bad Idea for Blacks and Racist Too, David Horowitz's Notepad, at http://www.frontpagemag.com/horowitzsn otepad/2001/hn01-0301.htm (last visited Sept. 10, 2001). The inverse of this argument is that the harm of slavery was to "America," since Blacks are a constituent part of that collective.

n73 But see Kymlicka, supra note 68.


n75 See Mills, supra note 34.

n76 Agamben, following Jean Luc Nancy, refers to this contradictory logical operation at the heart of liberal political theory as the "ban." The ban, which more accurately captures the orignatory logic than does social contract, signifies the fact that the exception is the basic structure of sovereignty, that sovereignty, and thus law, refer back to bare life and simultaneously exclude and suspend it. The notion of a movement from bare life toward order under law (and occasionally back to bare life under the state of exception), which social contract theory monumentalizes, "condemned democracy to impotence every time it had to confront the problem of sovereign power and has also rendered modern democracy constitutionally incapable of thinking a politics freed from the form of state." Agamben, Homo Sacer, supra note 8, at 28-29, 58-59, 109.

n77 Hardt & Negri, supra note 8, at 138. "What if a new paradigm of power, a postmodern sovereignty, has come to replace the modern paradigm and rule through differential hierarchies of the hybrid and fragmentary subjectivities that postmodern theorists celebrate?" Id.

n78 Hardt and Negri argue that the "ambiguous progressive functions of the concept of subaltern nation exist primarily when nation is not effectively linked to sovereignty, that is, when the imagined nation does not (yet) exist . . . . As soon as the nation begins to form as a sovereign state, its progressive functions all but vanish." Hardt & Negri, supra note 8, at 109.

n79 See supra note 8.

n80 See supra note 8.

n81 Agamben, Homo Sacer, supra note 8, at 32.

n82 Hobbes, supra note 67, at 87.

n83 See Agamben, Homo Sacer, supra note 8, at 63-67.

n84 Agamben instead develops Benjamin's concept of "bare life"--for Agamben the link Benjamin drew between sovereign violence and law. In Agamben's theory, therefore, bare life, perhaps best understood as the anti-systemic subject of biopolitics, emerges in the emancipatory role that San Juan ascribes to the nation as bearer of subaltern agency. See id. at 6367, 187-88.

n85 It is important to note that markets are relatively open, that is, especially in comparison to more traditional social systems that blocked most forms of social or economic mobility. I would certainly not make the argument for markets as the new populist hope, as made by many neoliberal apologists. See generally, Frank, supra note 55.

n86 See Kennedy, supra note 9, at 25 (arguing for a progressive rethinking of the political that goes beyond an international institutional regime to countenance "all the forms of power and sites of choice accompanying the international market.").

n87 See supra text accompanying notes 54-57.
To grasp this concept, one might recall the hermit from Twain's Connecticut Yankee, whose act of praying the Yankee modernizer, Hank Morgan, turns to the ends of production by attaching ropes and pulleys to him in such a way as to harness the energy created as the hermit performs his perpetual bowing motion. See Mark Twain, A Connecticut Yankee in King Arthur's Court 280-81 (Webster 1890)(1889). See Hardt & Negri, supra note 8, at 208-18 (discussing new forms of production).

Hardt & Negri, supra note 8, at xiii.

Id. at 293.

Id. at 294. "Today productivity, wealth, and the creation of social surpluses take the form of cooperative interactivity . . . . In the expression of its own creative energies, immaterial labor thus seems to provide the potential for a kind of spontaneous and elementary communism." Id.

Id. at 294. Hardt and Negri place heavy emphasis on "nomadism" or the voluntary mobility of the multitude as a fundamental political activity under postmodern conditions of labor. See id. at 362-64.

Agamben, Means Without End, supra note 8, at 86-7.

Id. at 87.

See Hardt & Negri, supra note 8, at 103.

See Id. at 190-203. Hardt & Negri write:

Colonial racism, the racism of modern sovereignty, first pushes difference to the extreme and then recuperates the Other as negative foundation of the Self . . . . [Empire-based] order, in contrast, has nothing to do with this dialectic. Imperial racism, or differential racism, integrates others with its order and then orchestrates those differences in a system of control.

Id. at 194-95.

Much of this particular analysis of Santiago's work could apply, mutatis mutandis, to Lazos Vargas's. For the sake of brevity and breath of coverage, I will focus my comments regarding Lazos Vargas's work on the epistemological questions it raises and the significance of those for political theory. See infra text accompanying notes 114-131.

For a strong argument that the U.S. should grant Puerto Rico self-determination rights (in the form of free elections) see Ediberto Roman, Empire Forgotten: The United States' Colonization of Puerto Rico, 42 Vill. L. Rev. 1119 (1997).


See Id. at 63-91.

See supra text accompanying note 38.

For different perspectives on the status debate, all of which suggest the complexity of the questions raised, see generally Pedro A. Malavet, Puerto Rico: Cultural Nation, American Colony, 6 Mich. J. Race & L. 1 (2000) (arguing that Puerto Rican cultural nationhood be recognized by the United States, perhaps as a prelude to nonassimilationist statehood, or association); Lisa Napoli, The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico, 18 B.C. Third World L.J. 159 (1998) (arguing that a plebiscite be held regarding status and that Puerto Ricans living in the United States be allowed to participate); for a book length treatment by one of the architects of the current Commonwealth status, see generally Jose Trias Monge, Puerto Rico: The Trials of the Oldest Colony in the World (1997).

See Trias Monge, supra note 105, at 2.

See Roman, supra note 100, at 1192-93 & n.354 (1997).

For one columnist's assessment of the coalitional aspect of the Vieques protests, see Salim Muwakkil, The Division Potential; Blacks need to Form Political


n110 Id. at 101.


n113 Walker, supra note 8, at 13.


n115 See Id. at 257.

n116 Mari Matsuda sees value in pragmatism as a method (not per se as a normative commitment unto itself) because it "recognizes multiple consciousness, experimentation and flexibility as tools of inquiry." Mari J. Matsuda, Pragmatism Modified and the False Consciousness Problem, 63 S. Cal. L. Rev. 1763, 1764 (1990) [hereinafter Matsuda, Pragmatism Modified]. "Multiple consciousness" is the term Matsuda uses to refer to her re-thinking of the unitary modern political subject from the perspective of the various axes of identity and subjugation--especially race, gender and class. See Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 Women's Rts. L. Rep. 7-10 (1989).

n117 Following Matsuda, I want to insist that we understand pragmatism's strengths (as a method), but also see the necessity of augmenting it with some normative first principles. See infra notes 127-131 and accompanying text.

n118 See supra note 71.

n119 See David Theo Goldberg, Racist Culture: Philosophy and the Politics of Meaning 221 (1993). Goldberg develops a pragmatic approach to race in the last chapter of the book that provides helpful distinctions between a liberal and anti-racist pragmatism. See id. at 206-37.

n120 See Stuart Hall, Conclusion: The Multicultural Question, in Unsettled Multiculturalisms: Diasporas, Entanglements, Transruptions 230 (Barnor Hesse ed., 2000) (discussing the ways the multicultural question has revealed the incoherence of the public-private distinction).

n121 Farber and Sherry's quasi-pragmatist polemic against "radical multiculturalism" is a case in point. For example, Farber and Sherry ask rhetorically, "what should we seek and what should we speak if not the truth? The unhappy answers are politics, and political power." Daniel Farber & Suzanna Sherry, Beyond All Reason: The Radical Assault on Truth in American Law 102 (1997).


n124 See Rorty, supra note 7, at xv (1989) (tracing a pragmatist project through the individualized figure of the "liberal ironist"). But see Allan Hutchinson, The Three 'Rs': Reading/Rorty/Radically, 103 Harv. L. Rev. 555 (1989) ("Rorty's passionate account of cruelty and humiliation as 'the worst thing we do' places too much emphasis on individuals and too little on structural arrangements.") Id. at 564.
n125 San Juan critiques this tendency of pragmatism toward status quo maintenance in his book. See San Juan supra note 13, at 70.

n126 See Matsuda, Pragmatism Modified supra note 117, at 1764-69 (1990) (arguing for a pragmatism that gives special consideration to the perspectives of subordinated groups and that is committed to anti-subordination).

n127 See generally Mark David Wood, Cornel West and the Politics of Prophetic Pragmatism (2000).

n128 See Goldberg, supra note 120, at 214-237 (arguing for a racial pragmatism that proactively resists racism).

n129 See Roithmayr, supra note 124, at 1678-84 (arguing for a pragmatism that is purposive and politically instrumental to outsider interests).

n130 I take the term "epistemological tribes" from S. Sayyid. Beyond Westphalia: Nations and Diasporas--the Case of the Muslim Umma, in Unsettled Multiculturalisms: Diasporas, Entanglements, Transruptions 50 n.8 (Barnor Hesse ed., 2000). Lazos Vargas, too, suggests that these epistemological differences are on the order of an "irresolvable paradigm gap," but would counsel "engagement" between the different perspectives.

n131 See supra note 18 and accompanying text.

n132 See Hardt and Negri, supra note 8, at 150. "Simplifying a great deal, one could argue that postmodernist discourses appeal primarily to the winners in the processes of globalization . . . . In other words, the current global tendencies toward increased mobility, indeterminacy, and hybridity are experienced by some as a kind of liberation but by others as an exacerbation of their suffering." Id.

n133 Sayyid, supra note 131, at 49.

n134 Id. at 43.
Introduction

In 1986 Mira Nair produced a rather provocative film called India Cabaret. The film depicted the professional and personal life experiences of female strippers in a Bombay bar and the contradictory lifestyles of their clients, who came from traditional "Indian" family values backgrounds. Nair foregrounds the bar space, which contains the dressing room where the strippers talk of their emotional lives and involvement with their children, lovers, and friends, as well as the dance space, where they perform voluptuous, pelvic thrusting, hip-gyrating dance sequences from the chartbuster songs of popular Indian commercial cinema. Throughout the performance, these women negotiate commercial transactions, continuing their sexual performances to bring in better bids, before disappearing with a client, for what is a brief, but paid sexual interlude. The bar becomes, in Homi Bhaba's words, the "Third space," where the dualisms are challenged and worked out, where the real and the imagined converge. Throughout the film, we are made conscious of the economic, social, and cultural disparities that these strippers experience, but also the resistance they display to traditional Indian cultural values and familial and sexual normativity. They negotiate sex, culture, the market, and family partly through the politics of desire—a desire to make money, a desire to perform, a desire to challenge the artificial chasm that separates wives from whores and clients from respectable family men.

India Cabaret provides me with a trajectory into the contemporary debates around the legal regulation of the sex worker in a post-colonial context. This post-colonial sexual subaltern subject has the possibility of exercising a choice, negotiating commercial transactions, or even articulating a politics of desire, countering the dominant representation of the postcolonial sexual subject. Speaking from the location of the sex worker in the post-colonial world invariably conjures up a subject who increasingly services the market, a human cash crop to be exported for national development and international trade. It is this construction of the sex worker, as a prostitute or sexual slave, that has come to dominate policy and legal responses at both the international and domestic level. Yet there is also a counter to this image, which contests the abject representation of the sexual subaltern subject, especially in the Third World, as illiterate, economically exploited, abused, and victimized, emerging from within post-colonial India, which is the voice of the sex worker.

I use the term sexual subaltern for two reasons: the term subaltern has historically been associated with post-colonial theory and is relevant to the location of the subject with whom I am engaged, quite specifically one category of the Indian sex worker. Secondly, the term sexual subaltern draws attention to the subjects' location of marginality when addressed with reference to normative sexuality.

In this article, I analyze the ubiquitous journey of the sex worker in the context of India in the contemporary moment. How has the casting of this subject in the domestic and the international arena intensified the moral surveillance of women's lives and reinforced stereotyped representations of Third World women? I focus on three issues. In the first section, I unpack the assumptions about the "sex worker" that have come to inform feminist legal strategies in post-colonial India, and how these, in turn, have informed State policy. I examine how the casting of the sex worker as a victim-subject and a cultural contaminant invites repressive
legal and non-legal responses at the domestic level and how these responses are symptomatic of post-coloniality in the current moment. In the second section, I discuss how the representation of the exploited sex worker in the Third World has been taken up by feminist legal politics in the international human rights arena and has reinforced an imperialist gaze toward the "native" subject. I also look at how this representation has informed imperialist interventions and justified conservative policies, as highlighted in the recent spurt of anti-trafficking legislation at the regional and international levels. I discuss, in particular, the anti-trafficking legislation currently pending before the United States Senate.

In the final section, I examine how the post-colonial sexual subaltern in India challenges the intersection of contemporary imperialism, exemplified through anti-trafficking discourse and the historical effects of colonialism, where the integrity of the nation is based on the purity of its women. I discuss how the sex worker in post-colonial India contests assumptions about the sexual subaltern subject that inform legal strategies in the domestic and the international contexts as well as representations of the Third World sexual subject as an abject, exploited, and thoroughly disempowered victim. I emphasize the marginal location of the sexual subaltern and how she is not just a repressed subject. She is also a resistive and desiring subject.

I attempt to demonstrate, through the dance of the Indian Cabaret performer, that the location of the sex worker cannot be constructed purely in terms of economic disempowerment, victimization, and abuse. Rather, we witness the dynamic interplay between repression and resistance from this location. Through the marginal location of the sex worker in a postcolonial context, I seek to disrupt the "boxed in" essentialist mold in which the sexual subject, sexuality, and culture in the developing world are cast by a multiple range of actors in the domestic and international arena.

I. Presenting the Post-colonial Sexual Subject

In using the term "sex worker," I refer to a category which is neither fixed nor static, neither clearly defined nor hermetically sealed. Indeed, the term "sex worker" conjures up representations in our respective imaginations that are as diverse as the celluloid images of commercial sex workers, ranging from Julia Roberts's portrayal of Vivian Ward, in Pretty Woman, n3 or the more exoticised representation of Umrao Jaan by Rekha in Muzaffar Ali's Story of a Lucknow Courtesan. n4

Nevertheless, when it comes to legal strategies within the context of India, as well as in the international human rights arena, a more homogenous, victimized, and linear subject appears to override our imaginations and has embedded itself in legal discourse. Although, in the context of sex work, this image of the abject victim subject is common to both the First World and the Third World, the image of the starving, exploited sex worker in the Third World has come to represent the more authentic victim subject.

How has this victim-subject come to inform legal strategies within post-colonial India? Some kinds of feminist politics in India contribute to the creation of the sex worker exclusively as a victim. This perspective treats the sex worker as a woman who is victimized and forced into sex [*858] work primarily because of economic need. In other words, she has no other option open to her, and her desperate circumstances lead her into this occupation. At the same time, the economic needs argument is cast in cultural terms in order to distinguish the situation of the Indian sex workers from the situation of women in the so-called West, in particular, from the very articulate and organized sex workers rights movement in this part of the world.

The specific ways in which the economic needs argument plays out in cultural terms in the context of sex work has been represented in the work of some feminists in India. Jean D' Cunha states that even assuming that, in the North, prostitution should be a woman's occupational choice, it cannot be considered so in the socio-cultural milieu of Asia where it is at best a "survival strategy" for the large majority of women. Choice can exist only when a certain amount of freedom or option is available in decision making. This conspicuously is absent in most cases at least in India where either physical force or socioeconomic coercion lead women to a life in prostitution. n5

This position is supported by a large number of women's groups in India and South Asia. Donna Fernandes argues that legalization would "legitimize man's utter contempt for women" and accept as normal the worst form of gender discrimination. n6 She states that in the West, the individual constructs social relations, the market determines morality, and caring is institutionalized. In contrast, in Asia, the community is the main reference point despite liberalization and the establishment of a consumer society. "Hence, for Western women who may opt for prostitution as an occupational choice, legalization is a plausible policy option. On the other hand, most Asian women are compelled into prostitution by poverty and deception
Fernandes' critique is located on an East/West binary. First, the critique assumes that although choice is possible in the West, economic oppression in Asia is so all-encompassing that the very possibility of choice or agency is negated. Secondly, the critique is also based on certain false assumptions about culture. The culture of Asia is said to be more communitarian, as opposed to the culture of the West, which is more individualistic. Additionally, Asian women are set up in opposition to Western women; the Asian woman is cast as chaste and vulnerable to exploitation, in contrast to the promiscuous Western woman who is ruled by the (im)morality of the market. The discourse of these feminists in the context of the legal regulation of sex work is embedded in a tension over culture and the construction of the sex worker as either a victim of the Western male and market or a cultural contaminant. n8

These arguments, which emphasize the victim status of the sex worker and spin them in cultural terms, are broader symptoms of post-coloniality in two ways. The first argument is that Indian feminists have felt discomfort with being cast as foreign, western, and hence, anti-national. The struggle for women's rights in India emerged simultaneously with the struggle for nationalism. This feminism has had a tenuous relationship with nationalism and has, at times, been cast as western and imperialist at different historical moments. For this very reason, feminists have often had to project themselves as nationalists to counter this attack. Indian feminism has operated, within the discourse of nationalism, as anti-western and has had to position itself as anti-western to establish its legitimacy. It has adamantly denied allegations of being western and sought to establish a distinctively Indian feminism that is the authentic Indian feminist subject. This distinct subject has been constructed on essentialist notions of "the West" and "Western feminism." n9

The second argument is the colonial backdrop against which the contemporary debates on sexuality have taken place, which have been taken up and reinforced by the Hindu Right. n10 In the late 19th century, Hindu nationalists and revivalists reconstituted the home as a "pure" space of Indian culture, uncontaminated by the colonial encounter. The idea that Indian women's chastity and sexual purity were to be protected from the incursions of colonial rule constituted part of a broader move to defend Indian culture from colonial corruption and contamination. [860] The fear of contagion or threat of impurity is a common theme of the Empire, which was constructed on the edifice of Victorian morality, in particular, Victorian sexual morality. The sexual mores of the Victorian period came to inform the legal framework of the colonies, encasing the chaotic and exotic "other" in a tomb of conservative and disciplinary morality. At the same time, the nationalists used this rhetoric to defend the home from the incursions of a contaminating Imperial enterprise, which sought to recast the image of the colonial subject within its own mold or to expel the native from the privilege of universality for his backwardness and civilizational underdevelopment. n11

Partha Chatterjee has argued that, as there were no public spaces or institutions available to nationalists for constructing a national culture, the modern nation was fashioned in the autonomous private domain of culture. n12 The "official" culture of Indian middle-class nationalism was elaborated in the private domain, the home, which had important implications for the role of sexuality in nationalist discourse. The home as the repository of national identity had to be protected from colonial intrusions by women, through their virtues of "chastity, self-sacrifice, submission, devotion, kindness, patience, and the labors of love." n13 But a nation entrenched in a respectable sexuality was not just the product of official Indian nationalism. As Tanika Sarkar has argued, the reconstitution of the norms of elite sexuality in India was also a product of the dynamics of orthodox and traditional social forces in the consolidation of elite hegemony in India. n14

Women's sexual purity, confined to and safeguarded within the home, representing in turn the purity of Indian culture, was a constituting moment in the emergence of the Indian nation. Yet, paradoxically, just as the emerging Indian nationalist bore the mark of Western conceptions of nationalism, so too did the reconstituted space of Indian sexuality bear more than a slight resemblance to Victorian sexuality. The idea of sex and sexuality as a dangerous corrupting force, to be carefully contained at all costs within the family and marriage was as Victorian as it was Indian. Indeed one of the critiques of Chatterjee's work, in particular, is that he is referring to a very small and elite section of people, namely male writers in Bengal, who resisted the idea that the home had already been exposed to the colonial encounter. The effort of these reformers may have in part been resistant to women's sexual agency, in particular, that was being exposed to an emerging modernity. n15

The home was not an "uncontaminated" space. It was as much a product of the colonial encounter as the
public sphere. But, within the emerging fantasy of the nation, the chastity, passivity, and purity of Indian women, wherein this dangerous and contaminating force was controlled, came to represent not only the purity of Indian culture but also its superiority to the culture of the Empire. The underpinnings of these assumptions about Indian women's sexuality are as Victorian as they are Indian. They are absorbed through the colonial encounter into a litany of laws regulating sexual conduct, n16 and refracted through the gaze of the colonial subject, in particular, the Indian nationalist, to construct a puritanical image of Indian women's sexuality.

The suturing of sexuality and culture, combined with the impulse of Indian feminists to articulate a distinct Indian subject, have inadvertently served to reinforce the contemporary agenda of the Hindu Right. n17 The Hindu Right has been all too willing to intensify the regulation of sex workers and, more generally, sexuality. n18 The State's current interest in [*862] the sex worker and issues of prostitution resides not in facilitating the rights of the sex worker, but once again in the fear of contagion, as well as in protecting the moral and cultural purity of "Indian" values. n19 This interest is evident from its initial legislative response to the AIDS pandemic. In 1989, the proposed bill provided health authorities with invasive policing powers in the form of forcible testing and isolation of so-called high-risk groups without any accountability. The Bill reflected the State's interest in finding ways to solicit more sex workers into the open and subject them to HIV testing. It was a way of controlling the western contaminant, isolating the purveyors of this contaminant, and saving Indian civilization from further threat of erosion, n20 according to the cultural affairs minister, to repel the attack on Indian culture by sexual permissiveness. n21 The Bill was withdrawn when it was pointed out that the provisions explicitly discriminated against large sections of society, in particular, prostitutes and gay men, and was patently unconstitutional.

Recent legislative proposals indicate that there is little interest in addressing the human rights of sex workers, and the government is proposing even more repressive measures to deal with the issue. These measures continue to be concerned with the metastasizing of HIV and also with the "weakening of the family structure, [and the] changing social and family scenario." n22 These changes are in part linked to the "structural adjustment policies in developing countries which have, in many cases, led to sic growing number of female headed households and the feminization of poverty." n23 The recommendations are largely punitive and also directed at strengthening the surveillance powers of the police, immigration officers, and border authorities. n24 They recommend a strengthening of the existing laws governing sex work, and encourage [*863] raids on "red light areas," cabaret shows and live band performances as an effective method for deterring "exploiters" of women and children. n25

The AIDS crisis, and its rupturing of the cultural script of the purity of Indian sexuality, has lead to a heightened concern and surveillance of so-called "at risk populations," including sex workers. The language of this surveillance is deeply imbued with assumptions about AIDS as a Western disease that has been imported into India through promiscuous Western lifestyles. The State's interest in sex work is impelled by international concern over the spread of the AIDS virus through the sub-continent. At the same time, the more conservative ideological component of the Hindu Right seeks to counter the impression that India is a nation of "rampant promiscuity," perpetuating the myth that AIDS is associated with promiscuous lifestyles. A recent report in The Organizer, the mouth piece of the Hindu Right, states that "many foreign based companies along with a number of NGOs have in the name of social service literally turned on an AIDS scare to earn thousands of dollars. Huge grants allotted for AIDS and the lure for this money has spawned many a sic aficionado of the anti-AIDS campaign." n26 In addition, certain NGOs, foreign development agencies, syringe and condom manufacturers wants sic to paint India as a country of promiscuous sinners, while just the opposite is true. This is done by independent NGOs with dollar aid by various means including conducting spurious surveys that 'show' increased sexual activity among unmarried women in India. n27

Although the State is motivated by public health concerns to promote an AIDS awareness campaign, it simultaneously places sex workers under strict surveillance and reinforces their status as communicators of the virus. The State protects the nation's image of "cultural purity" by casting the virus as a western contaminant and a capitalist ploy.

Government interventions and assertions of cultural purity are producing contradictory results for women. While sex workers are blamed for the spread of the disease, the stigma against them is reinforced, and in legal terms, nothing has been done to endow them with rights to help in fighting the disease and securing access to health services that are responsive to their needs. At the same time, AIDS intervention strategies have intensified mobilization among sex workers to lobby for their basic human rights, as well as to articulate their concerns in related areas. [*864] such
as the rights of their children, support in their old age, and better working conditions. n28

Ironically, some women's groups in India are accusing the government of promoting prostitution through its commitment to address the problem of AIDS in the country. n29 In a letter to Prime Minister Atal Bihari Vajpayee, over fifty women's groups alleged that the government had violated constitutional and legal norms by directing World Bank money and other bilateral aid to intervene in the behavior of "high risk groups" and promote condom use. The letter states that we write to communicate our anguish and horror at recent State-led developments. Instead of strong measures to remedy age-old malpractices and curb trends derogatory to the dignity of women, we are witnessing in this, the 51st year of our Independence--State acquiescence to the gross violation of the Constitution and the laws of the land aimed at prevention of Immoral Traffic... There is now the beginning of State co-operation for a permissive environment within which there is acceptance of the woman's body as a commodity for sale together with abdication of State responsibility to rescue and rehabilitate the poor women caught in a vicious vice trap as nonfeasible/not-cost effective! This will perpetuate sexual abuse and exploitation; and, constitutes degradation of the dignity and human rights of Indian womanhood itself. n30 [emphasis added]

The victim status conferred on the sex worker is essential to the survival and the purity of the nation and the preservation of Indian womanhood. This statement is at some level even more restricting of the rights of sex workers as it seeks to deny them information on how to practice safe sex. The signatories seek "culturally sound" and "legally correct efforts" to address the problem, including a stringent application of existing laws.

The existing legislation treats the sex worker both as a victim in need of rescue and rehabilitation, as well as a sexually assertive women who must be penalized for such conduct, removed from the public arena, and incarcerated so she no longer threatens the public interest, the Indian family, or Indian culture. n31 The first part of the text penalizes solicitation and streetwalking in certain public places, while the second half of the text sets out rescue and rehabilitation provisions for "reforming" the sex worker. n32 Neither construction assists women in sex work to counter the violence and exploitation they may experience in the course of their work, to challenge the denial of parental rights, or to counter the harassment they experience in their everyday lives, where stigma justifies abuse. I question the emancipatory potential of the victim-subject in the law, more specifically, the victim-sex worker. The law reinforces a patronizing and protectionist position of the State towards women, as well as a punitive response to the sex worker in particular, who is regarded as a cultural contaminant. This punitive response takes the form of either incarcerating women under morality laws or criminalizing the external manifestations of her work, such as soliciting. The feminist demand for better enforcement of the existing laws harms the most important participant in the sex work debates--the sex worker. If they cannot be reformed through rehabilitation, then they must be removed through incarceration. These strategies echo nineteenth century notions about the purity of the nation being contingent on the purity of its women and intersect with contemporary imperialist representations of the Third World woman.

II. Evaluating Legal Interventions

In this section, I critique some of the regional and international legal proposals and responses towards sex work. I argue that such initiatives not only place in the foreground women's victimization, they inhibit rather than facilitate women's movement and increase their vulnerability to violence. These initiatives are informed by an array of concerns that have little to do with women's rights. Some interventions proposed by feminists and other non-state actors are highly protectionist and, at times, reminiscent of imperialist assumptions about the native subject's inability to exercise agency or to consent, reinforcing the notion of rescuing her from a "backward" culture. The regional responses in South Asia evoke concerns about cultural contamination and the purity of the nation. [866]

And some initiatives on the part of industrialized states are partly informed by the fear of the specter of the other--that is, the immigrant.

A. Feminist Interventions and Rescuing the Native

The focus of the international women's rights movement has been on violence against women and their victimization. n33 Although violence against women is extremely important to address, it is a focus that reinforces the victim position of the subject. The focus on violence against women is indeed extremely important. But my concern is that the victim-subject position does not sum up "the female subject." It is not that the articulation of the victim-subject position is not important, only that the focus on this position seems to displace other articulations.

There are at least two consequences of focusing on the victim subject. First, it has set up the "Third World" woman in some kinds of feminist legal politics in the
West as perpetually underprivileged and marginalised. n34 The image we are left with is that of a truncated Third World woman, who is sexually constrained, tradition bound, incarcerated in the home, illiterate, and poor. It is an image that is strikingly reminiscent of the colonial construction of the "Eastern" woman. Kathleen Barry's work on trafficking, which has been extremely influential, recreates this colonial imagery. n35 Barry argues that prostitution is violence against women and that it reduces all women to sex. There can ["867] be no such thing as "voluntary" prostitution given that prostitution is an act of violence against women and part of the sexual exploitation of women. She argues that prostitution is a violation of women's human rights per se. And any woman who migrates for prostitution, or to work in the sex trade, is also purely and simply a victim of human rights violations.

Barry situates the trafficking of women in pre-industrial and feudal societies where women are excluded from the public sphere on one end of the scale, while at the other end of the scale are the post-industrial, developed societies, where women have become economically independent and prostitution is normalized. n36 The consequence of this kind of hierarchy is that women in the Third World and non-western world are represented as ignorant, poor, uneducated, tradition bound, domestic, and victimized. As Kempadoo sums up in her analysis of Barry's position, the Third World woman is represented as "not yet a 'whole or developed' person, but instead resembles a minor needing guidance, assistance and help." n37 In contrast, the western woman comes across as having "control over her income, her body, and her sexuality: [she is the] emancipated, independent, post-modern woman." n38

Barry's analysis is structured along the contours of colonial thinking, the assumption being that women in the Third World are infantile, civilizationally backward, and incapable of self-representation or autonomy. These assumptions justified colonial incursions into the lives of the "native" and the colony, operating with the logic that the vehicle of Empire would assist in the development of the civilization until it reached a point capable of self-determination. n39 Infantilizing women in the Third World reproduces the colonialist rational for intervening in the lives of the "native" subject. John Locke was able to provide the logic for the exclusion of the colonial subject from the enjoyment of rights, on the grounds that they were incapable of consent. Consent entailed the capacity to reason, and if the subject lacked the capacity to reason, she lacked the capacity for consent. Therefore, she could be excluded from the political constituency. A similar result is produced by the contemporary movement that infantalizes women in the Third World, and thus provides ["868] the justification for acting on their behalf and without their consent. And this exclusion also justifies the rescue and rehabilitation strategies advocated by Barry and others of her ilk as a strategy for saving those incapable of self-determination.

Even pro-sex work groups in the First World at times perpetuate this representation of the Third World sex worker as dependent and incapable of making choices. The debate on voluntary prostitution and coerced prostitution is frequently displaced on to a First World and Third World divide, where the sex workers in the latter are deemed to be the primary targets of coercion while those in the First World are deemed to have some rights as well as choices. This dichotomy denies women in the Third World the right to self-determination.

As Kamala Kempadoo argues, the struggle for sex workers rights in the post-colonial world is not essentially western. Sex workers have historically struggled for rights and against discrimination in the post-colonial world, and they have been involved in insurgent activities outside of their own needs and demands. Veena Oldenburg's work on the Lucknow Courtesans provides an important example of how they occupied multiple spaces of resistance and power simultaneously. n40 In 1976, Oldenburg was examining the civic tax ledgers of 1857-77 and related records in the Municipal Corporation office in Lucknow, a large city in Northern India. Much to her surprise, she discovered in these ledgers the presence of the Lucknow Courtesan, the famous dancing and singing girls of the city who also performed sexual services. She was not only surprised to find them present in the tax records, but they were in the highest tax bracket, with the largest individual incomes of any in the city. Their names were also on lists of property confiscated by the British from these women for their involvement with the rebellion against the British in 1857. Apparently, they were penalized for instigating, as well as providing, pecuniary assistance to the rebels. Their struggle was anti-colonial as much as it was procourtesans' rights. As Kempadoo states, "sex workers' struggles are thus neither a creation of a western prostitutes' rights movement or sic the privilege of the past three decades." n41

The discourse of women in the Third World as being in a state of perpetual victimization partly informs the artificial divide and assumption that the struggle for rights and self-determination is a First World phenomenon. This divide and the assumptions on which it is based are in part due to the fact that anti-trafficking has operated along a forced ["869] versus voluntary nexus. n42 And one way in which force is
understood is through its association with poverty. The idea that women in the Third World, who have no options available to them given their grinding experience of poverty, are "forced" to go into prostitution is a pervasive one. By equating choice with wealth, and coercion with poverty, no space remains to recognize and validate the choices that women make when confronted with limited economic opportunities.

The consequence of this approach has been that international actors and state and non-state actors condemn forced prostitution in the name of promoting women's human rights. Simultaneously, these actors do nothing about promoting the human rights of sex workers. The focus on forced prostitution as a violation of human rights leaves voluntary prostitution, or the rights of those who exist and continue to exist in prostitution, unaddressed. There is a greater possibility of securing support for the victims of trafficking than for influencing structures to respond to the human rights of sex workers. n43 This dichotomy has reinforced the representations of sex work in the Third World as purely exploitative and of the women as abused and victimized. As Doezema states, the "concern for rights loses out to hysteria over victims." n44 [*870]

Contemporary international feminist politics has reproduced the victimized subject of colonial discourse in its articulation of the exploited sex worker in the Third World. The victimized subject is based on the assumptions of the "other" as incapable of self-determination, justifying rescue and rehabilitation operations, which are strikingly reminiscent of the British justification for colonization and the establishment of Empire. The victimized subject completely ignores the lived reality of the lives of sex workers in these other parts of the world. As Kempadoo points out, African and Caribbean countries "where one can speak of a continuum of sexual relations from monogamy to multiple sexual partners, and where sex may be considered as a valuable asset for woman to trade," are completely ignored in this analysis "in favor of specific western ideologies and moralities regarding sexual relations." n45 And the victimized subject has consequences on the legal strategies being formulated in the international arena and First World countries that have little to do with the rights of "victims."

B. Unpacking Anti-Trafficking Initiatives at the Regional and International Level

The consequence of a victim focused analysis affects legal strategies profoundly. Victim focused analysis produces a subject enthusiastically embraced by nation-states. These nation-states justify their legislative interventions against trafficking in the name of the victim-subject, in particular the exploited and abused victim-subject of the Third World. A significant development is taking place in the international arena, as well as in First World countries, to draft anti-trafficking legislation as a response to the "problem" of trafficking in women and children from the developing world.

Trafficking is being articulated as a criminal act and a human rights violation for which strict penalties are being proposed. n46 Trafficking simultaneously justifies the moves on the part of European and other First World countries to strengthen their immigration laws (which of course has implications beyond controlling the trafficking in women), and South Asian governments to increase border controls and intensify surveillance of women's lives. [*871]

Assumptions about women's lack of agency and prostitution as violence per se have been reinforced at the regional and international levels in and through anti-trafficking initiatives. Recently, the South Asian Association for Regional Co-operation (SAARC) proposed a draft Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, which aims at criminalizing the activities of persons engaged in the sale and procurement of women for the purposes of prostitution. n47 The Convention focuses on the purpose for which women are sold or procured, rather than on the use of force, fraud, violence, or deception. Where the purpose does not qualify as illegal, such as in the case of domestic labor, then the way in which the procurement occurs, no matter how violent, would not fall under these provisions. The underlying assumption of the SAARC document is that "prostitution" is an immoral practice, in which women and children are exclusively victims, forced into prostitution by "traffickers" and others. The SAARC governments' solution to this problem is to curtail, restrict, or deny the rights of the women involved, including their rights to mobility, consensual migration, and freedom of association, equality, and life.

The Convention does not improve upon the already ineffective domestic laws that exist in most of the countries in South Asia. The Convention does not account for the demands of sex workers who have become increasingly visible and vocal. The Convention ignores the issue of consent, or at least considers consent legally irrelevant. n48 Excluding the relevance of consent in the definition of the offence of trafficking reinforces the construction of women who enter into sex work as victims. She is denied any recognition of her agency.
The Council of Europe also recently adopted a resolution urging member states to take action against trafficking in human beings for the purpose of sexual exploitation. The Council emphasizes the role of criminal law, the strategy of rescue, rehabilitation and reintegration of the victim-subject, and the strengthening of penal and legal sanctions against those who engage in trafficking. n52 Absolute priority is given to assisting the victims of trafficking through rehabilitation programs and to protecting them from traffickers. Rehabilitation has become an accepted and unexamined "treatment" strategy for those who are the victims of trafficking. Yet, the term itself is used primarily to communicate the need to reform those who are deviant, or undesirable, as in the context of the drug addicts. When used in connection with women who have been associated with the commercial sex industry, through trafficking or any other means, rehabilitation acquires a moralistic undertone. Rehabilitation also denies a woman agency and her right to actively direct and participate in the process of leaving sex work.

The Council has also recommended that sex tourism be stopped and that trafficking in human beings for the purposes of sexual exploitation be treated as falling within the scope of international organized crime. The Council emphasizes setting up mechanisms for victims to return to their countries of origin and establishing a system of financing their return and contributing towards their reintegration through bilateral agreements.

In the United States, the Trafficking Victims Protection Act of 2000 n50 was passed by the United States House of Representatives to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." n51 I examine the provisions of this resolution in some detail to reveal some of the assumptions about sex work, the Third World woman, and the "outsider" on which it is based.

The main text of the resolution focuses on "trafficking" generally as a major problem in the contemporary context. The resolution states that trafficking in persons is a "growing transnational crime" and a "migration, economics, labor, public health, and human rights problem" that is significant on most continents. n52 This provision links the concern of trafficking to much broader issues of migration, health, and labor. The term "trafficking" is not defined in the resolution. The only definitions that appear in the resolution relate to "sex trafficking" and "severe forms of trafficking in persons." n53 Most of the provisions deal with combating severe forms of trafficking in persons, especially into the sex trade, slavery, and slavery-like conditions. The resolution is replete with the language of "luring" victims and "false promises" ostensibly made by traffickers to "innocent" victims for a better, more prosperous life elsewhere. This language reinforces the division between those who deliberately transgress sexual norms and those "duped" into it. n54 As Jo Doezema argues, such a dichotomy obscures the reactionary and often moralistic assumptions that underlie these concerns, and results in "advocating a rigid sexual morality under the guise of protecting women." n55

The resolution further establishes a task force, which includes among others, the Administrator of the United States Agency for International Development and the Director of the Central Intelligence Agency. The resolution authorizes the task force to develop measures to combat the "sex tourism" industry, facilitate strengthening of the local and regional capacities to prevent trafficking, prosecute traffickers, and assist trafficking victims partly by reintegration of them into their place of origin. n56 The resolution also provides assistance to victims of "severe" trafficking who have not attained the age of 15 or who are willing to provide reasonable assistance with the prosecution of traffickers and investigation into trafficking. n57

Victims are entitled to a temporary visa or "T" visa, but there is an annual cap of 5,000 such visas, even though the resolution itself states that over 50,000 women and children are trafficked into the U.S. each year. n58 And such visas are granted only if the victim can credibly establish "victim" credentials. Such proof includes the person being a victim of a severe form of trafficking, not having attained the age of 15, or being induced to participate in the sex trade or slavery-like practices by force, coercion, fraud, or deception. No evidence should exist of voluntary agreement to any arrangement, including participation in the sex trade, and the victim should agree to provide reasonable assistance in the investigation or prosecution of trafficking acts. In addition, the "victim" must prove that she has a well-founded fear of retribution involving the infliction of "severe" harm, or suffer extreme hardship in connection with the trafficking, if she is removed from the U.S.

Thus, eligibility for a "T" visa is extremely strict. A woman who consents to being transported across borders for the purpose of engaging in commercial sex, is not entitled to the "T" visa, regardless of the abuse or violence she may have suffered during the course of the transport or while participating in a commercial sex act. Those entitled to a "T" visa primarily cover persons who have been literally dragged or forced into
crossing borders, deceived into crossing borders and forced to engage in a commercial sex act, or subjected to involuntary servitude or slavery-like practices through force, coercion, fraud, or deception. If a woman has been subjected to all of these conditions, but has been exposed as a sex worker, she is not entitled to a "T" visa. Any demonstration of agency or choice, such as the payment or receipt of money, at any point of her journey could render the subject ineligible for a "T" visa. The Attorney General is authorized to convert the "T" visa into a permanent resident status provided the victim has resided in the U.S. for three years, has been a person of good moral character during that period, has continued to assist in the investigation or prosecution of trafficking acts, and would be harmed if she were to be sent home. The overriding assumption of these provisions is that the victim must be able to demonstrate that she is not responsible for her condition. The resolution entitles the victim to benefits and limited rights if she is not a "willing" sex worker.

Countries must demonstrate that they have fulfilled certain minimum standards for eliminating trafficking otherwise they will be subjected to sanctions. These include enacting laws that deal seriously with trafficking and provide harsh punishment for such crimes. The U.S. is to provide assistance to foreign countries to meet the minimum criteria, such as drafting legislation to prohibit and punish acts of trafficking, investigating and prosecuting traffickers, and creating facilities, programs, and activities for the protection of victims. Specific criteria for determining if a country has tried to eliminate trafficking are also laid down in the resolution, including official monitoring of emigration and immigration patterns for evidence of severe forms of trafficking.

These provisions leave little space for addressing the issue of sex work from the perspective of human rights. The entire effort is primarily directed towards restricting the movement of people across U.S. borders. Trafficking becomes a guise for not only keeping people out, but also casting suspicion on those who go to the U.S. to work as nannies, domestic labor, dancers, factory workers or restaurant workers. The resolution places an onus on countries of origin to undertake effective measures to deal with the problem of trafficking, that is, to contain people within their own borders.

If a government does not comply with the minimum standards for eliminating trafficking, it will be subjected to punitive sanctions, such as withholding or denying non-humanitarian assistance. If the country accused of failing to comply with the dictates of the new legislation does not receive non-humanitarian assistance from the U.S., the U.S. can deny funding for educational and cultural exchanges between the two countries. The President of the U.S. will also instruct the directors of multilateral banks and the International Monetary Fund to vote against any loan or other funds to the erring government until it complies with the minimum standards.

The extra-territorial reach of this legislation through the threat of sanctions is directed primarily at countries that receive economic assistance and other forms of non-humanitarian aid from the U.S. The resolution is not concerned with the rights of sex workers, who may also be subjected to slavery-like conditions or debt-bondage, but it is concerned with the considerable increase in the traffic across borders, especially from developing countries into the U.S. that needs to be stopped. The paranoid approach to this "problem" is demonstrated by the extreme measures to be imposed on those countries that fail to curtail the stream of migration and exit from their countries. Little distinction is being drawn between migration and trafficking. And the fact that every border crossing can be rendered suspect, given the broad assumption that a whole host of actors are characterized as being victims of trafficking, will render the crossing of borders more difficult.

Although the resolution ostensibly prioritizes concern for the victims, women who cross borders to work in the sex industry and are harmed or experience violence during their travels, or are exploited in the course of their work, are not a concern. Access to benefits thus becomes partly conditional on a woman's chastity, purity, and innocence. The Global Alliance Against the Trafficking in Women (GAATW) and the Dutch Foundation Against Trafficking in Women (STV) conducted a research project based on questionnaires circulated to groups working directly with "victims" of trafficking. Their research reveals that a large majority of the trafficking cases involve women who are in or know that they will be going into the sex industry, but are not accurately informed about the conditions of work or the amount of money they will receive.

The resolution demonstrates how trafficking is being used to justify highly restrictive and punitive policies. There is an implicit assumption that traffickers exist in the rest of the world and that the U.S. will cleanse the world through punitive economic responses and the denial of non-humanitarian aid. Economic punishments have been proven to harm more people than they help and do almost nothing to curtail the practice. Instead, such punishments push trafficking further underground and invariably render the subjects
of trafficking even more vulnerable and dependent on non-state agents.

The response of governments at the regional and international levels is at best paternalistic and at worst reactionary. As Doezema argues, a number of the measures that ostensibly deal with the issue of sex work are morality measures dressed up under the guise of protecting women. The result is to perpetuate both racist and classist imagery of the sex worker in the post-colonial world. As Doezema states:

This is particularly the case when campaigners actually succeed in getting governments to do something about "trafficking" for then the focus shifts from women's rights to a hysterical and paranoid reaction to women's increasing sexual autonomy, the 'breakdown of the family' and migration. Often, 'trafficking' is used by states to initiate and justify restrictive policies. There are still many governments with moral objections to prostitution. At the international level, however most are politically savvy enough to cloak moral indignation in terms of "victimization of women." n65

Even the Special Rapporteur on Violence Against Women in her very recent report has been critical of the way in which most governments have responded to the issues of trafficking in women. She states that while governments have sought ways and means to combat trafficking, they (particularly governments of northern countries) simultaneously have fortified their external borders against the perceived threat of unfettered immigration. n66

These punitive responses to trafficking are not limited to State actors. Some human rights groups are also responsible for reinforcing these divisions and feeding into the moralistic and patronizing responses of governments to the issue of sex work. Human Rights Watch has recommended that the South Asian Association for Regional Cooperation should cooperate with Interpol to stem the increase in trafficking in women between India and Nepal. n67 Many of the recommendations in the report are directed towards the curtailment and restriction of rights rather than their facilitation. For example, the report criticizes the open border policy, which permits people to pass freely between the two countries without a passport, visa, or residential permit. Instead of contextualizing the strengths and limits of an open border policy in a region closed and isolated from its neighbors, Human Rights Watch states that the policy "makes it extremely difficult for border police to check illegal activity. Traffickers and their victims move easily across the border and the onus is on individual police officers to stop and question suspicious-looking travelers." n68 The report thus recommends that Nepal and India should establish a system for strictly monitoring the border to "guard against the trafficking in women and girls, including the inspection of vehicles." The suggestion to tighten borders as a way to control trafficking has been enthusiastically adopted by many governments around the world, especially First World governments that fear the specter of the immigrant. n69

In a similar report on cross-border trafficking between Burma and Thailand, Human Rights Watch recommends that donors to ensure that loans for the construction of roads and other infrastructure projects near the border take into consideration the effect of such a project on the trafficking in women. n70 The extraordinary assumption implicit in this recommendation is that withholding assistance for the construction of basic infrastructure will help stop cross-border traffic. Indeed, it will curtail, if not entirely stop, border crossings, both legal and illegal.

The intersections between imperialist interventions constructed along a representation of the Third World victim/subject and nationalist articulations about the purity of the nation are brought into sharp relief through an analysis of the antitrafficking strategies proposed at the regional and international level. These strategies combine with the rhetoric and recommendations of interventions by some international feminist politics, which serve to represent and re-produce the sex worker in the Third World as incapable of choice or decision making, whether crossing borders or choosing her work. These strategies ignore a key player in contemporary concerns about commercial sex work and the movement of the post-colonial sexual subaltern subject, which I address in the next section.

III. The Post-Colonial Sexual Subaltern Subject Can Speak

The construction of the sex worker in legal discourse at the national and international levels has continued to operate along very clear binaries, including the First World/Third World divide, the victim/agent dichotomy, choice and coercion, and the poverty versus promiscuity divide. The image of the innocent native woman being lured into the sex trade by evil traffickers under circumstances that are violent and brutal from which escape is impossible informs the rhetoric and conversations at the national and international levels. The sex worker in post-colonial India disrupts some of these binaries, as well as the economic, sexual and cultural assumptions on which they are based. The sex worker in post-colonial India has inserted herself into this script, challenging these
comfortable binaries and creating the possibility of revisioning the sex worker as a complex subject who is simultaneously exploited by normative arrangements and is disruptive of these arrangements.

In 1995, a national committee consisting of sex workers was formed in India to represent their interests and launch a rights campaign. The committee organized the First National Conference of Sex Workers in 1995, which issued a statement asserting that sex is primarily for pleasure and intimacy. The statement also challenged dominant sexual ideology, which allows "for sexual expression only between men and women within the strict boundaries of marital relations within the institution of family." n71 One of the groups represented in the national committee issued a similar statement asserting that

we believe that a woman's sexuality is an integral part of her as a woman, as varied as her mothering, domestic and such other skills. We do not believe that sex has a sacred space and women who have sex for reasons other than its reproductive importance are violating this space. Or if they chose to make money from the transaction they are immoral or debauched. n72

More recently, a National Forum for Advocacy and Support of Sex Workers was established. n73 Sex workers, among others, called for the decriminalization of sex work as well as the establishment of selfregulatory systems which would address issues of rights, their working conditions, and health concerns.

These emergent voices pose significant challenges and make significant claims. First, the sexual subaltern in a post-colonial context challenges the focus on the victim-subject, which has come to dominate the strategies and features of sex work in the international human rights arena and domestic agendas. Second, she claims the right to move between the First World and the Third World. Third, she claims the right to be a market actor through her assertion of sex work as labor. Finally, she challenges what has become over the years a naturalized and universalized set of ideas about sex.

The sex worker challenges imperialist constructions of the sexual subject in the Third World as an abject subject, impoverished and victimized. The emergence of the sex worker as an articulate subject laying claim to her rights challenges the international and certain feminist representations of the Third World female subject, as perpetually impoverished, victimized by a brutal culture and thoroughly disempowered. She disrupts the script representing her as the perpetual victim in need of rescue and rehabilitation or the vilified criminal who destroys families and needs to be constrained and incarcerated. n74 She challenges a feminist agenda which represents the sex worker as a subject who is a reflex of male sexual need or a victim of economic need. She situates herself as a resistive subject, challenging "patriarchal" control within the family and marriage as well as a subject who exercises economic choices and social mobility. n75 She is claiming her human rights by organizing and demanding that her interests be accommodated on her terms. n76

This "speaking" and "animated" subject also creates space for recognizing that the sex worker can and does make choices for economic empowerment, which includes migration. As Doezema's study reveals, sex workers do chose to cross borders. n77 Thus, the sex worker challenges the anti-trafficking regime being advocated as the new international regulatory mechanism for ostensibly protecting the human rights of women. My discussion reveals that the effect of this new regime curtails mobility and economic opportunities for women and other migrants, and intensify the moral surveillance of women's sexual conduct. The anti-trafficking legal regime being established at the international and national level is not necessarily restricting the number of women who are moving or migrating. It is simply making it more dangerous for women to cross borders. It is not directed towards protecting the human rights of women who are in the sex industry or who migrate, albeit illegally, for purposes other than sex work.

The Third World sex worker, as a traveling subject who can move from the Third World to the First World, challenges the static and stationery assumptions about this subject and the assumption that cosmopolitans are the only traveling subjects. The sex worker as a traveling subject brings about several disruptions. First of all, migrating to cities or abroad produces an unbounded subject who exists outside the supervision of the family. This intensifies concerns about the threat to the family as well as to the purity of the nation. As Doezema states, "The perceived sexual threat to women traveling abroad is linked to women's roles as bearers of their families', and the nation's, honour." n79 The movement of the sex worker outside national boundaries, where moral panics have been erupting with increasing frequency during the ascendancy of the Hindu Right, n80 is leading to repressive measures that contain women within national boundaries, as highlighted in the discussion about the SAARC convention. n81

She also disrupts notions of travel based on clear imperialist distinctions between points of return and departure, between "the idealized upper-class traveler and the proper native," with the native being
assumedly stationery and immobile. n82 Women are migrating, including for sex work, in search of increased autonomy and economic independence. n83 Yet the current discourse represents women from the Third World as fleeing from intolerable conditions, a representation that denies the subject any agency or ability to make affirmative choices. It simultaneously represents the "fear of the racial/cultural 'other'" expressed through anti-trafficking laws and policies. n84

Today, in Western Europe and in the United States, there is a growing feeling that "the community" is under threat by the importation of new cultural norms through immigration. The worsening economic situation for many countries, and the growing polarity between rich and poor countries, has led inhabitants of rich countries to feel that they are under threat from hordes of "economic migrants" out to grab what they can. n85

The fear of the "native" on the move, who is not a cosmopolitan subject, has lead to repressive measures to stop this movement through anti-trafficking legislation, such as limiting the number of visas issued to "victims," as demonstrated in the U.S. resolution and the intensified policing of borders. n86

The idea that the post-colonial sexual subaltern subject can consent to sex work, and that she may consent to move or enter into a consensual arrangement with someone who trafficks or arranges her transport from one port to another, free from coercion or violence, is also challenging at a normative level. Women from the Third World can and do consent to commercial sex, and thus challenge sexual and cultural normativity, as well as the imperialist representations of women in the Third World that have come to inform the international women's rights agenda as well as the policies of First World governments. Women from the Third World move to the First World to engage in sex work and other practices, such as domestic labor, thus challenging the dominant assumptions that inform both the contemporary international legal regime as well as feminist legal politics which assumes that she is dragged, beaten, forced, kidnapped, or abducted into this work. Women can and do choose to move and work in the sex industry, and even find illegal means by which to enter into another country searching for economic opportunities if legal ones are not open to them.

This subject is capable of consenting to commercial sex work and earning a living through sex. She is a market actor who understands the economic and other opportunities available to her in other parts of the world. As a market actor, she challenges the over simplistic and patronizing assumption that women in the Third World enter the sex trade because of conditions of poverty, which belies the question why all poor women do not opt for prostitution. They can choose to cross borders in search of better economic opportunities as do, for example, educated middle class graduates from the Third World. n87 As Jamie Chuang has argued, the focus on the normative question:

Of whether a woman should be able to consent to trafficking and prostitution overlooks the empirical fact that women actually do consent to these practices, and moreover, risks neglecting important descriptive facts regarding the quality of a woman's consent to these practices. . . . In the case of a woman forced into prostitution who was deceived by a trafficker's lure of an attractive waitressing job abroad, or a woman who intended to engage in self-regulated prostitution and found herself in a debt-bondage situation, the source of exploitation might be misinformation or debt-bondage, respectively. Deeming consent irrelevant to the women's victimization also risks portraying women as perennial victims of false consciousness, incapable of making autonomous choices regarding their means of migration and employment. n88

The fact that women cross borders, and ought to be able to cross borders, has been conflated with the purpose of their journey, rather than with the conditions under which they cross borders. Recent literature in the area of international human rights continues to invoke the trope of poor, Third World, women's bodies, that is, the body of the Third World subject exclusively as a victim, reinforcing arguments against prostitution or sex work per se as inherently exploitative, rather than supporting the right of these women to move. Little attention is being given to the coercive and abusive practices that women may be subjected to in the course of movement, including a lack of interrogation of the racist, sexist, and "neo-colonial" antitrafficking laws being advocated by First world governments, (and reproduced in some feminist literature). These initiatives that harm more women than they help and reinforce stereotypes of the Third World as barbaric in the treatment of its women. n89

The post-colonial sexual subaltern subject provides a mechanism for understanding that a distinction must be made between taking a normative position against consensual sex work and addressing the question of whether a woman has consented to the conditions under which she engages in sex work. It also refocuses attention on the abusive and exploitative working conditions of those engaged or transported for non-sexual labor as well as sexual labor. This subject is
displacing dominant sexual norms, not only by consenting to commercial sex work, but also by articulating sexual labor as labor, and advocating for rights with which to challenge the exploitative and abusive conditions of her work.

The sex worker emerging from the post-colonial world is a complex subject, whose identity and politics is being transformed through the market, either in terms of the different class hierarchies that are now being established within (and, of course, outside) the sex industry, as well as creating a vessel for mass movement across borders. In accessing new markets, the sex worker is now a transnational phenomenon who cannot be treated exclusively as a victim forced to move and work in exploitative conditions.

Perhaps the most radical aspect of the sex workers rights movement emerging from post-colonial India (and other Third World contexts) is in creating space for a politics of desire, a politics that contests at an ideological level sexual negativity, which perpetually addresses sex and sexuality, especially in the Third World in the language of pain, anguish, abuse and exploitation. And this politics is being articulated through a range of spaces, including the strip performance in the bar space, the song and dance sequences of the modern heroine in Indian commercial cinema, as well as through the increasingly visible and vocal presence of the sex worker in the Indian cultural context. These spaces pose an explicit challenge to the idea that sex is a negative, contaminating, and corrupting force that is alien to Indian cultural values.

The sex worker emerging from a post-colonial condition creates the space for the politics of desire, rather than exclusively of pain and victimization. Her emergence exposes the limitations of a victim focused analysis and how this focus reinforces the idea of women as the pure, unstained upholders of Indian culture and national virtue. Such an analysis also recreates the "native" mannequins erected in the domestic and international legal arena around which imperialist interventions have been formulated.

The sexual subaltern subject creates the possibility of crossing sexual, cultural, and geographical boundaries. But her agency is not free and unfettered. She is constantly negotiating the experiences of violence, racism, and marginality, negotiating hegemonic feminist constructions of sisterhood and the imperialist maneuvers that deny her subjectivity. Yet, by focusing on the marginal location of the postcolonial sex worker, the third space, we come to understand the disruptive potential of this subject, through her agency, her mobility and the pursuit of her desires.

FOOTNOTE-1:

n1 India Cabaret (Mira Nair, dir. 1985).
n2 See generally Ratna Kapur, Post-colonial Erotic Disruptions: Legal Narratives on Culture, Sex and Nation in India, 10 Colum. J. Gender & L. 333 (2000).

n3 Pretty Woman (Touchstone Pictures 1990). Pretty Woman is the story of a corporate raider, played by actor Richard Gere, who hires a hooker, Julia Roberts, to pose as his girlfriend for a week, and pays her. During the course of the week he falls in love with her. She wonders if the life with him might turn out to be a dream come true.

n4 STORY OF A LUCKNOW COURTESAN (Muzaffar Ali, dir.). Umrao Jaan, played by Rekha, the darling of Indian movie going audiences, tells the story of a woman who performs as a dancer and singer at the "Kota" of Khanum Jan, the madam, and develops a number of liaisons with the nobles of Lucknow, a major city in Northern India. Her exquisite
singing and dancing skills, as well as her talent in composing Urdu poetry, attracts the attention of the Royal Court of Avadh. She develops a relationship with one nobleman, and the story of their affair is set against the backdrop of the 1857 "Indian Mutiny."


n7 Id.


n10 See Brenda Cossman & Ratna Kapur, Secularism's Last Sigh? Hindutva and the (Mis)Rule of Law 7 (1999). The Hindu Right is a contemporary political movement in India informed by the ideology of Hindutva, which seeks to establish a Hindu State. It currently consists of the Bharatiya Janata Party (BJP), which currently leads the coalition in power at the Centre, The Rashtra Swayamsevak Sangh (RSS), the main ideological component of the Hindu Right, and the Vishva Hindu Parishad, (VHP), the religious and cultural wing of the Hindu Right. Collectively this triumvirate is known as the Sangh Parivar. The more militant associates of the Sangh include the virulently anti-Muslim Shiv Sena Party and the Bajarang Dal. For a discussion of the discursive strategies of the Hindu Right and how it is effectively pursuing its agenda through liberal rights discourse, see id.

n11 See Uday Singh Mehta, Liberalism and Empire 46 (1999). Mehta examines the relationship between eighteenth and nineteenth century liberal theory and liberal practice, and how this theory operated in relation to colonialism, or rather how it could justify colonialism - what he calls the "inclusionary pretensions of liberal theory and the exclusionary effects of liberal practices." Id. at 46. He discusses the work of nineteenth century British liberal thinkers, including J.S. Mill and James Mill whose works make clear that political institutions such as representative democracy depended on a society having a certain state of development or maturation. The mechanism of Empire operating through colonialism was one way in which to rectify the deficiencies of the past - what has frequently been described as the civilizing mission of Empire, in societies that have been stunted by history. Civilizational achievement was a necessary pre-condition for realizing progress, and the stage of civilization was the marker for determining if progressive possibilities are in reach of a given community at any point of time. This rationale provided the justification for Empire. "The empire, . . . is an engine that tows societies stalled in their past into contemporary time and history." Id. at 82.


n13 Id. at 247. Chatterjee links this transformation of the woman through nationalist ideology with the disappearance of social reform in the late nineteenth century. The nationalists of that period were completely opposed to social reform, as it would open the door to the colonial power to act in the domain where the nationalists regarded themselves as sovereign. He argues that the issue of female emancipation disappeared in the late nineteenth century precisely because of the refusal on the part of nationalists to
allow any political negotiation of the women's question with the colonial power. The lives of women during this period had already changed rapidly, but in a manner that was consistent with the terms of nationalist ideology. Id. at 249-50.

n14 See Tanika Sarkar, Colonial Lawmaking and Lives/Deaths of India Women: Different Readings of Law and Community, in FEMINIST TERRAINS IN LEGAL DOMAINS: INTERDISCIPLINARY ESSAYS ON WOMAN AND LAW 210 (Ratna Kapur ed., 1996). Sarkar argues in contrast to Chatterjee, that the home was a highly contested space, and women were not simply the preservers of cultural identity. The age of consent controversies gave rise to a plethora of medical and administrative literature, which revealed the extent of violence experienced, in particular, by girls married off at the age of puberty.


n18 See generally Kapur, supra note 2.

n19 See Menon, supra note 5, at 43 ("The control of HIV/AIDS infection which is sexually transmitted in prostitution is also possible if criminality in the activity is removed and more openness is provided on organizational matters.").

n20 For a detailed critique of the draft bill, see Bhedbhav Virodhi Andolan, Women and AIDS (1990).


n23 Id.

n24 The following excerpts are illustrative. "Strict instructions would be issued to immigration officers, border police authorities and local police in the transit areas for the purpose of keeping a vigil on the entry of young girls under suspicious or unexplained circumstances into the country from neighbouring countries." Id. at 16. To check internal trafficking, the committee proposes that "police, railway police and transport authorities would ensure surprise checking and inspection of persons taking young girls and women under suspicious circumstances for the purposes of trafficking in buses and trains and in bus and railway stations." Id.

n25 Id. at 23-24.


n27 Id. at 52.

n28 See Societal Violence on Women and Children in Prostitution: A Report by the National Commission for Women, 1995-96, at 30. Sex workers have spoken about the discrimination that they have experienced at government run hospitals when it comes to HIV testing. The National Commission for Women has documented how some doctors have refused to treat sex workers out of fear that the women maybe HIV infected and pose a risk to the doctors and staff. "In many centers doctors make the peons and attendants do physical examination sic and treat us." Id.

n29 The Report of the Committee on Prostitution, Child Prostitutes and Children of Prostitutes recommends the provision of health care services and counseling near red light areas. Report of the Committee on Prostitution, supra note 22, at 18-19. However, the report does not make any recommendations to doctors and staff of
government hospitals who reinforce the discrimination and stigma that women in sex work experience when trying to access their rights to health care.

n30 Letter from the Joint Action Forum to the Prime Minister of India (Nov. 11, 2000) (on file with author).

n31 The Report of the Committee on Prostitution, Child Prostitutes and the Children of Prostitutes has recommended that even coercive methods can be deployed to remove children above the age of six from their mothers and placed in institutional care. See D’Souza, supra note 21.

n32 These provisions are primarily directed against the sex worker, in particular, the provisions dealing with solicitation, living off the earnings of prostitution (which could include any family member of the sex worker who depends on her income), and the seizure of her children as there is an assumption that children found present in the home of a woman engaged in prostitution are also being peddled into prostitution. Suppression of Immoral Traffic in Woman and Girls Act, 1956 § 4, 6, 15-16. Any demonstration of agency is effectively penalized through the provision against solicitation, which is the most frequently applied provision in the Indian law. Id. at § 7-8.

n33 The international movement for the recognition of women's human rights culminated at the Vienna World Conference on Human Rights, 1993, where States acknowledged that women, too, were entitled to enjoy their fundamental rights. These included the recognition that it should be a priority of governments to ensure that women were provided the full and equal participation in political, civil, economic, social, and cultural life at the national, regional, and international level. The enjoyment of the full range of internationally recognized human rights were to be accorded to women. In addition, the movement brought about a significant change in human rights law by extracting recognition of women's human rights in the private sphere. Since Vienna, however, the women's human rights movement at the international and regional level, as well as official recognition of women's human rights, have focused primarily on the issue of violence against women. In 1993, the General Assembly adopted the Declaration on Violence Against Women. It recognized that states were obliged to fight violence against women and exercise diligence to prevent, investigate, and punish acts of violence against women. Thereafter, in 1994, the U.N. appointed a Special Rapporteur on Violence against Women whose task it was to focus on gender-based aspects of violence against women. The very fine reports of this Rapporteur have highlighted abuses of women that have hitherto not received state recognition or attention. Even recommendation 19 of the Convention on the Elimination of All forms of Discrimination Against Women, which deals with violence against women, has been given a visibility that it had not received prior to the Human Rights World Conference, and which the commitments to equality under the Convention as a whole have not received. Although the focus on violence against women is indeed extremely important and valuable, one concern is that the women's human rights movement may end up being nothing more than about violence against women. See Human Rights Watch, 1995 Global Report on Women's Human Rights (1995).

n34 See Narayan, supra note 9, at 90.

n35 See Kathleen Barry, Female Sexual Slavery 3 (1979). Barry is one of the co-founders of the Coalition Against Trafficking in Women (CATW) which exerts considerable influence on the strategies against trafficking being developed at the international level. However, a number of groups have emerged to counter the position on prostitution of CATW, one of the most significant being the Global Alliance Against the Trafficking in Women. See Marjan Wijers & Lin Lap-Chew, Trafficking in Women, Forced Labour and Slavery-Like Practices in Marriage, Domestic Labour and Prostitution (1996). For a review of the literature that constructs "prostitution" per se as a violation of women's human rights see Laura Reanda, Prostitution as a Human Rights Question: Problems and Prospects.


n37 Id. at 11.

n38 Id.

n39 See Mehta, supra note 11, at 82.


n41 Kempadoo, supra note 36, at 21.

n42 See Jo Doezema, Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy, in Global Sex Workers: Rights, Resistance, and Redefinition 34 (Kamala Kempadoo & Jo Doezema eds. 1998). The recognition of the human rights of sex workers would entail the recognition of voluntary prostitution, and there is a discomfort in taking a position on voluntary prostitution which neither governments nor many feminists are prepared to accept. Once again as Doezema observes, "It is not only governments who prefer saving innocent women to giving rights to guilty ones. Most feminist discourse on trafficking limits itself to the fight against 'forced prostitution,' the 'voluntary' prostitute is condemned - she is ignored." Id. at 45. The abuse that sex workers experience at the hands of law enforcement authorities or even in the context of rehabilitation homes or in protective care, remains unaddressed. Those who are already in prostitution, regardless of how they got there, are endowed with an agency and choice that remains stigmatized. If she continues to choose to remain in prostitution, then she deserves what she gets. It is frighteningly reminiscent of the requirement in rape laws, where the victim must prove her chaste history in order to retain her credibility. The division created between forced and voluntary prostitution is further displaced onto the representation of women in the First World and Third World.

n43 See id. at 42. I argue that the distinction between forced and voluntary prostitution should be replaced with a paradigm shift. We need to examine how women move into sex work, their living and working conditions during the time they are in sex work or actors in the sex industry, and their exit from or relinquishment of such work from a human rights perspective. The rights denied or violated at each of these different locations will require distinct legal and non-legal responses. The situation of women who engage in sex work, regardless of how they entered into this work, remains completely unaddressed by a politics that simply states that they should not be there, or that they should not do such work and if they do choose to remain, regardless of the reasons, they deserve to be abused and violated and denied their basic human rights. Endowing the sex worker with rights provides her with the tools to fight the abuse, exploitation, violence, and stigma. For a more elaborate discussion, see Memorandum from the Centre for Feminist Legal Research, Reform of Laws Relating to Prostitution in India (Jan. 1999) (on file with author).

n44 Doezema, supra note 42, at 42.

n45 Kempadoo, supra note 36, at 12.

n47 SAARC Convention on Preventing and Combating Trafficking in Woman and Children for Prostitution, 1998, South Asian Association for Regional Cooperation.

n48 Article 1(3) of the draft Convention defines trafficking to include the "moving, selling or buying of women and children [for prostitution] within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking."


Bearing in mind that Europe has recently experienced a considerable growth of activities connected with trafficking in human beings for the purpose of sexual exploitation, which is often linked to organized crime in as much as such lucrative practices are used by organised criminal groups as a basis for financing and expanding their other activities, such as drugs and arms trafficking and money laundering; considering that trafficking in human beings for the purpose of sexual exploitation extends well beyond national borders, and that it is therefore necessary to establish a pan-European strategy to combat this phenomenon and protect its victims, while ensuring that the relevant legislation of the Council of Europe's member states is harmonised and uniformly and effectively applied.

Id.


n51 H.R. 3244 § 102(a).

n52 H.R. 3244 § 102(b)(3).

n53 See H.R. 3244 § 103(9) (defining sex trafficking as "the recruitment, harboring, transportation, transfer or receipt of a person for the purpose of a commercial sex act."); Further, H.R. 3244 § 103(2) defines "severe forms of trafficking in persons" as:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained the age of 18 years of age; or

(B) the recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt, bondage, or slavery.

n54 See H.R. 3244 § 102(4) (stating that "Traffickers lure women and girls into their networks through false promises of good working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models.")

n55 Doezema, supra note 42, at 45.

n56 See H.R. 3244 § 105(d).

n57 H.R. 3244 § 107. Such benefits include the provision of shelter, medical care, food, legal, and other assistance, including protection if the victim is at risk of harm or danger from the trafficker.

n58 See H.R. 3244 § 102(b)(1). The source of these statistics remains unclear and unreliable. The Global Alliance Against the Trafficking in Women, which undertook a study on behalf of the U.N. Special Rapporteur on Violence Against Women, stated that it was extremely difficult to find reliable statistics on the extent of trafficking that was taking place because there had been no systematic research on this subject. It was also not possible to determine such statistics because of the imprecise nature of the definition of the term "trafficking in women" and, finally, because so much of this activity had been pushed underground because of the illegal or criminal nature of prostitution and trafficking. See Wijers & Lap-Chew, supra note 35, at 15. Statistics are sometimes arbitrarily cited without any back up research to substantiate these findings. IMADR recently prepared a report for the UN Working group on Contemporary Forms of Slavery stating
that over two million women and children were trafficked each year, without citing any research or source of their statistics. The Human Rights Watch Report on Trafficking between Nepal and India states that, "At least hundreds of thousands, and probably more than a million women and children are employed in Indian brothels." Similarly, their report on trafficking between Burma and Thailand states that there are an estimated 800,000 to 2,000,000 prostitutes currently working in Thailand, yet the source of these statistics is not provided. See id. at 1. Kamala Kempadoo has stated that there are often extreme variations in the estimates of the number of women prostitutes in Asia, and that even within Bombay, figures cited range from between "100,000 to 600,000." See Kempadoo, supra note 36, at 15. She goes on to question the veracity of such figures stating that, "to any conscientious social scientist, such discrepancies should be a cause for extreme suspicion of the reliability of the research, yet when it comes to sex work and prostitution, few eyebrows are raised and the figures are easily bandied about without question," Id. n59 See H.R. 3244, § § 108, 110.

n60 See H.R. 3244 § 108(a).

n61 H.R. 3244 § 108(b).

n62 See H.R. 3244 § 102(4).

n63 H.R. 3244 § 110(a)(1).

n64 See Wijers & Lap-Chew, supra note 35.

n65 Doezema, supra note 42, at 45.


n67 See Human Rights Watch Asia, Rape For Profit: Trafficking of Nepali Girls and Women to India's Brothels 90 (1995). Although Human Rights Watch claims not to take a stand on prostitution in the report, it favors the criminalization and punishment of owners of brothels, pimps, and traffickers. Id. at 86. This position is advocated by anti-sex work groups in India and opposed by those who support sex work, as well as the rights of sex workers. The latter argue that a sex worker will not provide testimony against those who sustain her and her work and that the most effective way for her to resist the violence and exploitation she may experience in her work is to grant her the same basic human rights, which are granted to all other women regardless of the nature of their work. In a subsequent compilation, Human Rights Watch once again states that it takes no position on prostitution per se. Human Rights Watch Women's Rights Project, Trafficking in Women and Girls, in The Human Rights Watch Global Report on Women's Human Rights 196 (1995). "However, we strongly condemn laws and official policies and practices that fail to distinguish between prostitutes and victims of forced trafficking, treating the latter as criminals rather than as person who deserve 'temporary care and maintenance' in accordance with international human rights standards. We also oppose laws and policies that punish women who engage in prostitution but not the men who operate and profit from prostitution rings and who patronize prostitutes: such policies are discriminatory on the basis of sex." Id. at 198. This statement once again demonstrates a concern for the human rights of victims of forced trafficking, and refuses to advocate in favor of the human rights of those engaged in prostitution. In making a distinction between the two categories of women, Human Rights Watch is taking a stand. The statement by
Human Rights Watch makes human rights contingent on the subject’s victim status.

n68 Human Rights Watch Asia, supra note 67, at 12.


n71 Sex Worker’s Manifesto, Presented to the First National Conference of Sex Workers at Yuba Bharati Kriangan (Salt Lake Stadium), Calcutta, India (Nov. 14-16, 1997) (available on file with the author).

n72 A Statement of Women in Prostitution from Veshya AIDS Muquabla Parishad (VAMP) and SANGRAM, Sangli at 2 (available on file with author).


n75 Anne McClintock, Imperial Leather: Race, Gender and Sexuality in the Colonial Contest 288 (1995).

n76 Chandra Mohanty highlights the problem of a "victim" oriented analysis in relation to the studies of the exploitation of third world women working in multinational corporations.

While there are a number of studies which provide information on the mobilization of racist and (hetero) sexist stereotypes in recruiting third world women into this labour force, relatively few studies address questions of the social agency of women who are subjected to a number of levels of capitalist discipline. In other words, few studies have focused on women workers as subjects—as agents who make choices, have a critical perspective on their own situations, and think and organize collectively against their oppressors.

Mohanty, supra note 74, at 29.

n77 See Doezema, supra note 43.

n78 "Nearly half of the migrants worldwide are women." Kempadoo, supra note 36, at 44. This trend is also discussed by the International Organization for Migration in its report on trafficking to the European Union. "One factor is the changing nature of female labour migration. Traditionally female migrants have tended to emigrate with their families or after the male head of the family has emigrated. Today, however, given the rise in single parent families, women increasingly have the sole responsibility for their families and have a stronger incentive to emigrate in order to send back remittances to their children." International Organization for Migration, Trafficking of Women to Countries of the European Union: Characteristics, Trends and Policy Issues 6 (1996).


n81 See proposed legislation on trafficking and sex work discussed above.

n82 Inderpal Grewal, Home and Harem: Nation, Gender, Empire, and the Cultures of Travel 6 (1996).

n83 Kempadoo, supra note 36 at 43-44.

n84 Doezema, supra note 79, at 25.

n85 Id. at 24.
n86 Id. at 22.

n87 The Global Alliance Against the Trafficking in Women has not included "economic need" in its definition of coercion. See Wijers & Lap-Chew, supra note 35.


n89 See Susan Feanne Toepfer & Bryan Stuart Wells, Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regulating Trafficking in Women, 2 Mich. J. Gender & L. 83 (1994). The article asserts that there is little difference between coerced and "voluntary" prostitution, and that in any case, very few women choose to go into prostitution. The authors constantly draw on examples of exploitation in "Asian" countries, oblivious to the racist and cultural stereotypes they are simultaneously perpetuating as well as the complete erasure of the Third World subject as anything other than a spectacle or a completely disempowered subject to be rescued by their proposed strategies. For example, the authors state that "in many Asian countries, pimps prefer young girls, especially virgins, because customers fear that older women carry HIV. Because of the fear of AIDS, girls are often prostituted once and then, if they are lucky, discarded--penniless, often addicted to drugs, and too humiliated to return to their families." The reference they supply is to a Panel Presentation at the Michigan Journal of Gender & Law Symposium, Prostitution: From Academia to Activism (Oct. 31, 1992), without any further citation to substantiate such a deterministic, stereotyped, and culturally homogenizing representation.
It has become axiomatic for post-modernist thinkers to condemn the nation and its corollary terms, "nationalism" and "nation-state," as the classic evils of modern industrial society. The nation-state, its reality if not its concept, has become a kind of malignant paradox, if not a sinister conundrum. It is often linked to violence and the terror of "ethnic cleansing." Despite this, the United Nations and the interstate system still function as seemingly viable institutions of everyday life. How do we explain this development?

Let us review the inventory of charges made against the nation-state. Typically described in normative terms as a vital necessity of modern life, the nation-state has employed violence to accomplish questionable ends. Its disciplinary apparatus is indicted for committing unprecedented barbarism. Examples of disasters brought about by the nation-state are the extermination of indigenous peoples in colonized territories by "civilizing" nations, the Nazi genocidal "holocaust" of Jews, and most recently the "ethnic cleansing" in the former Yugoslavia, Rwanda, East Timor, and so on. Following Elie Kedourie, Partha Chatterjee, and others, including Alfred Cobban, I believe that the Eurocentric theory of nationalism has proved one of the most potent agencies of destruction in the modern world. In certain cases, nationalism mobilized by states competing against other states has become synonymous with totalitarianism and fascism. Charles Tilly, Michael Howard, and other historians concur in the opinion that war and the military machine are principal determinants in the shaping of nation states. In The Nation-State and Violence, Anthony Giddens defines nationalism as "the cultural sensibility of sovereignty" (note the fusion of culture and politics) that unleashes administrative power within a clearly demarcated territory, "the bounded nation-state." Although it is allegedly becoming obsolete under the pressure of globalization, the nation-state is considered by "legal modernists" as the prime source of violence against citizens and entire peoples. Post-modernist critiques of the nation (often sutured with the colonialist/imperialist state) locate the evil in its ideological nature. This primarily concerns the nation as the source of identity for modern individuals via citizenship or national belonging, converting natal filiation (kinship) into political affiliation. Identity implies definition by negation, inclusion based on exclusion written by a positivist logic of representation. But these critiques seem to forget that the nation is a creation of the modern capitalist state, that is, a historical artifact or invention.

It is a truism that nation, and its corollary problematic, nationalism, presupposes the imperative of hierarchization and asymmetry of power in a political economy of commodity exchange. Founded on socially constructed myths or traditions, the nation is posited by its proponents as a normal state of affairs used to legitimate the control and domination of one group over others. Such ideology has to be deconstructed and exposed as contingent on the changing grid of social relations. Post-colonial theory claims to expose the artificial and arbitrary nature of the nation: "This myth of nationhood, masked by ideology, perpetuates nationalism, in which specific identifiers are employed to create exclusive and homogeneous conceptions of national traditions." Such signifiers of homogeneity not only fail to represent the diversity of the actual "nation" but also serve to impose the interests of a section of the community as the general interest. But this is not all. In the effort to make this universalizing intent prevail, the instrumentalities of state power--the military and police, religious and educational institutions, judiciary and legal apparatuses--are deployed. Hence, from this orthodox post-colonial perspective, the nation-state and its ideology of nationalism are alleged to have become the chief source of violence and conflict since the French Revolution.

Mainstream social science regards violence as a species of force, which violates, breaks, or destroys a normative state of affairs. It is coercion tout court. Violence is often used to designate power devoid of legitimacy or legally sanctioned authority. Should violence as an expression of physical force always be...
justified by political reason in order to be meaningful and therefore acceptable? If such a force is used by a state, an inherited political organ legitimized by "the people" or "the nation," should we not distinguish between state-defined purposes and in what specific way nationalism or nation-making identity is involved in those state actions? State violence and assertion of national identity need not be automatically conflated so as to implicate nationalism in all class/state actions in every historical period. Such a move would be an absolutist censure of violence bereft of intentionality. In order words, violence would be construed as merely physical force akin to tidal waves, earthquakes, volcanic eruptions, and so on.

Violence, in my view, signifies a political force that demands dialectical triangulation in order to grasp how nation and state are implicated in it. A historical-materialist historicization of this phenomenon is needed to determine the complicity of individual states and nations in specific outbreaks of violence. But post-colonialists like Homi Bhabha resort to a questionable use of the discursive performativity of language to ascribe a semiotic indeterminacy to the nation, reducing it to a formula of hybridity and liminality of the multifarious narratives of nations/peoples. n9 History is reduced to the ambiguities of culture and the play of textualities, ruling out critique and political intervention.

In this light, what makes the post-colonialist argument flawed becomes clear in the fallacies of its non-sequitur reasoning. It is perhaps easy to expose the contingent nature of the nation once its historical condition of possibility is pointed out. But it is more difficult to contend that once its socially contrived scaffolding is revealed, the nation-state and its capacity to mobilize and apply the means of violence can be restricted if not curtailed.

We can pose this question at this point: Can one seriously claim that once the British state is shown to rest on the myth of the Magna Carta or the United States government on the covenant of the Founding Fathers to uphold the interests of every citizen, except of course African slaves and other non-white peoples, one has undermined the power of the British or American nationstate? Not that this is an otiose and naive task. Debunking has been the classic move of American nationstate? Not that this is an otiose and reciprocal facilitation. n11

The question of the violence of the nation-state thus hinges on the linkage between the two categories, "nation" and "state." A prior distinction perhaps needs to be made between "nation" and "society." While the former "may be ordered, the latter orders itself." n12 Most historical accounts remind us that the modern nation-state has a beginning, and consequently, it is often forgotten, an ending. But the analytic and structural distinction between the referents of nation (local groups, community, domicile or belonging) and state (governance, machinery of sanctioning laws, disciplinary codes, military) is often elided because the force of nationalism is often conflated with the violence of the state apparatuses, an error compounded by ignoring the social classes involved in each sphere. This is the lesson of Marx and Lenin's necessary discrimination between oppressor and oppressed nations--a nation that oppresses another cannot really claim to be free. Often the symptom of this fundamental error is indexed by the formula of counter-pointing the state to civil society, obfuscating the symbiosis and synergy between them. This error may be traced partly to the Hobbesian conflation of state and society in order to regulate the anarchy of the market and of brutish individualism violating civil contracts. n13

It may be useful to recall the metaphysics of the origin of the nation elaborated in Ernest Renan's 1882 lecture, "What is a nation?" n14 This may be considered one of the originary locus of nationalism conceived as a primitivist revolt against the centralized authority of modernizing industrial states. While Renan emphasized a community founded on acts of sacrifice and their memorialization, this focus does not abolish the fact that the rise of the merchant bourgeoisie marked the start of the entrenchment of national boundaries first drawn in the age of monarchical absolutism. n15 The establishment of the market coincided with the introduction of taxation, customs, tariffs, etc., underlined by the assertion of linguistic distinctions among the inhabitants of Europe. Karl Polanyi's thesis of The Great Transformation urges us to attend to the complexities in the evolution of the nation-state in the world system of commodity exchange. n16 We also need to attend to Ernest Gellner's argument that cultural and linguistic
homogeneity has served from the outset as a functional imperative for states administering a commodity-centered economy and its class-determining division of social labor. n17

Post-colonialists subscribe to a post-structuralist hermeneutic of nationalism as a primordial destabilizing force devoid of rationality. While the formation of the nation-state in the centuries of profound social upheavals did not follow an undisturbed linear trajectory, we have only to remember the untypical origins of the German and Italian nation-states, not to speak of the national formations of Greece, Turkey, and the colonized peoples; however, that is not enough reason to ascribe an intrinsic instability and belligerency to the nation as such. States may rise and fall, as the absolute monarchs and dynasties did, but sentiments and practices constituting the nation follow another rhythm or temporality not easily dissolved into the vicissitudes of the modern expansive state. Nor does this mean that nations, whether in the North or the South, exert a stabilizing and conservative influence on social movements working for radical changes in the distribution of power and resources.

In pursuing a historical analysis of violence, we need to avoid collapsing the distinction between the concept of the "nation-state" and "nationalism." Whence originates the will to exclude, the will to dominate? According to Anthony Giddens, "what makes the 'nation' integral to the nation-state . . . is not the existence of sentiments of nationalism but the unification of an administrative apparatus over precisely defined territorial boundaries in a complex of other nation-states." n18 That is why the rise of nation-states coincided with wars and the establishment of the military bureaucratic machine. In this construal, the state refers to the political institution with centralized authority and monopoly of coercive agencies coeval with the rise of global capitalism, while nationalism denotes the diverse configuration of peoples based on the commonality of symbols, beliefs, traditions, and so on.

In addition, we need to guard against confusing historical periods and categories. Imagining the nation unified on the basis of secular citizenship and self-representation, as Benedict Anderson has shown, was only possible when print capitalism arose in conjunction with the expansive state. n19 But that in turn was possible when the trading bourgeoisie developed the means of communication under pressure of competition and hegemonic exigencies. Moreover, the dissemination of the Bible in different vernaculars did not translate into a monopoly of violence by the national churches. It is obvious that the sense of national belonging, whether based on clan or tribal customs, language, religion, etc., certainly has a historical origin and localizing motivation different from the emergence of the capitalist state as an agency to rally the populace to serve the needs of the commercial class and the goal of accumulation.

Given the rejection of a materialist analysis of the contradictions in any social formation, post-colonial critics in particular find themselves utterly at a loss in making coherent sense when dealing with nationalism. Representations of the historicity of the nation in the modern period give way to a Nietzschean will to invent reality as polysemic discourse, a product of enunciatory and performative acts. Post-colonialism resorts to a pluralist if not equivocating stance. It sees nationalism as "an extremely contentious site" in which notions of selfdetermination and identity collide with notions of domination and exclusion. n20 Such oppositions, however, prove unmanageable indeed if a mechanical idealist perspective is employed. Such a view in fact leads to an irresolvable muddle in which nationstates as instruments for the extraction of surplus value (profit) and "free" exchange of commodities also become violent agencies preventing "free" action in a global marketplace that crosses national boundaries. Averse to empirical grounding, postcolonialism regards nationalist ideology as the cause of individual and state competition for goods and resources in the "free market," with this market conceived as a creation of ideology. I cite one post-colonial authority that attributes violence to the nation-state on one hand and liberal disposition to the nation on the other:

The complex and powerful operation of the idea of a nation can be seen also in the great twentieth-century phenomenon of global capitalism, where the "free market" between nations, epitomized in the emergence of multinational companies, maintains a complex, problematic relationship with the idea of nations as natural and immutable formations based on shared collective values. Modern nations such as the United States, with their multi-ethnic composition, require the acceptance of an overarching national ideology (E pluribus unum). But global capitalism also requires that the individual be free to act in an economic realm that crosses and nullifies these boundaries and identities. n21

It is misleading and foolish then to label the slogan "one in many" as the U.S. national ideology. Officially, the consensual ideology of the U.S. is neoliberal pluralism, or possessive individualism with a pragmatic orientation. Utilitarian doctrine underwrites an acquisitive, entrepreneurial individualism that fits perfectly with mass consumerism and the gospel of the unregulated market. It is within this framework that we
can comprehend how the ruling bourgeoisie of each sovereign state [*893] utilizes nationalist sentiment and the violence of the state apparatuses to impose their will. Consequently, the belief that the nation-state simultaneously prohibits economic freedom and promotes multinational companies actually occludes the source of political and juridical violence—for example, the war against Serbia by the NATO (an expedient coalition of nation-states led by the United States), or the stigmatization of rogue and "terrorist" states (North Korea, Iran, Iraq, Afghanistan) by the normative standards of hegemonic capitalism. The source of political violence, and I am speaking of that kind where collective energy and intentionality are involved, is the competitive drive for accumulation in the world market system where the propertied class is the key actor mobilizing its symbolic capital made up of ethnic loyalties and nationalist imaginaries.

We have now moved from the formalistic definition of the nation as a historic construct to the nation as a character in the narrative of capitalist development and colonialism. What role this protagonist has played and will play is now the topic of controversy. It is not enough to simply ascribe to the trading or commercial class the shaping of a new political form, the nation, to replace city-states, leagues, municipal kingdoms, and oligarchic republics. Why such "imagined communities" should serve as a more efficacious political instrument for the hegemonic bloc of property-owners, is the question.

One approach to this question is to apply dialectical analysis to the materialist anatomy of the nation sketched thus far. Historians have described the crafting of state power for the new bourgeois nations in Enlightenment philosophy. Earlier, Jean Bodin and Hugo Grotius theorized the sovereignty of the nation as the pivot of centralized authority and coercive power. n22 The French Revolution posited the "people," the universal rights of man, as the foundation of legitimacy for the state; the people as nation, a historical act of constituting the polity, gradually acquires libidinal investment enough to inspire movements of anti-colonial liberation across national boundaries. Its influence on the U.S. Constitution as well as on personalities like Sun YatSen, Jose Rizal, and other "third world" radical democrats has given the principle of popular sovereignty a "transnational" if not universal status. n23 Within the system of nation-states, for Marxists, "recognition of national rights is an essential condition for international solidarity," in the worldwide fight for socialism and communism.

n24 [*894]

Now this universal principle of people's rights is generally considered to be the basis of state power for the modern nation, "the empowerment, through this bureaucracy, of the interests of the state conceived as an abstraction rather than as a personal fiefdom." n25 A serious mistake occurs when the nation and its legitimating principle of popular sovereignty becomes confused with the state bureaucracy construed either as an organ transcending the interest of any single class, or as the "executive committee" of the bourgeoisie. A mechanical, not dialectical, method underlies this failure to connect the ideology, politics, and economics of the bourgeois revolution. This quasi-Hegelian interpretation posits the popular will of the post-Renaissance nation-states as the motor of world expansion, of 19th-century colonialism. Instead of the substance of the "civilizing mission" being informed by the gospel of universal human rights, according to post-colonial orthodoxy, it is the ideology of national glory tied to "the unifying signifiers of language and race" that now impels the colonial enterprise.

So nationalism, the need to superimpose the unifying myths of the imperial nation-state, is not only generated by the bourgeois agenda of controlling and regulating the space of its market, but also by the imperative of seizing markets and resources outside territories and peoples. Nationalism is then interpreted by post-colonial theorists as equivalent to colonialism; the nation is an instrument of imperialist aggrandizement, so that if newly liberated ex-colonies employ nationalist discourse and principles, they will only be replicating the European model whose myths, sentiments, and traditions justified the violent suppression of "internal heterogeneities and differences." n26 The decolonizing nation is thus an oxymoron, a rhetorical if not actual impossibility.

Lacking any historical anchorage, the argument of postcolonial theory generates inconsistencies due to an exorbitant culturalism. Because they disregard the historical genealogy of the nation-state discussed by Anderson, Gellner, and Smith among others, post-colonial critics uphold the sphere of culture as the decisive force in configuring social formations. n27 It is not that culture is irrelevant in explaining political antagonisms; rather, it is erroneous when such antagonisms are translated into nothing but the tensions of cultural differences. The dogma of cultural difference (for Charles Taylor, the need and demand for recognition in a modern politics of identity) becomes then the key to explaining colonialism, [*895] racism, and post-colonial society. n28 Ambivalence, hybridity, and interstitial or liminal space become privileged signifiers over against homogenizing symbols and icons whose "authority of cultural synthesis" is the target of attack. Ideology and discursive performances serve as the primary field of
analysis over and against "localized materialism" and vulgar Marxism.

Violence in post-colonial discourse is thus located in ideas and cultural forces that unify, synthesize, or generalize a range of experiences; such forces suppress difference or negate multiple "others" not subsumed within totalities such as nation, class, gender, etc. While some culturalist critics allow for different versions of the historic form of the nation, the reductive dualism of their thinking manifests a distinct bias for a liberal framework of analysis: the choice is either a nation based on an exclusionary myth of national unity centered on abstractions such as race, religion, or ethnic singularity; or a nation upholding plurality and multiculturalism (for example, Canada or the United States). This fashionable vogue of pluralism and culturalism has already been in tune in confronting inequalities of class, gender, and "race." Moreover, it cannot explain the appeal of nationalism as a means of reconciling the antagonistic needs for order and for autonomy in the face of mechanistic bureaucratism and the anarchic market of atomized consumers. n29

The most flagrant evidence of the constrained parameters of this culturalist diagnosis of nation/nationalism may be found in its construal of racist ideology as "the construction and naturalization of an unequal form of intercultural relations." n30 If racism occurs only or chiefly on the level of "intercultural relations," from this constricted optic, the other parts of a given social formation (political or economic) become superfluous and marginal. Politics is then reduced to an epiphenomenal manifestation of discourse and language-games.

A virtuoso application of culturalist contextualism is illustrated by the legal scholar Rosemary Coombe who defends the right of the Canadian First Nations to claim "ownership" rights to certain cultural property. n31 Coombe correctly rejects the standard procedure of universalizing the Lockean concept of property and its rationale, possessive individualism, which underlies the Western idea of authorship and authentic artefacts. n32 She writes: "By representing cultures in the image of the undivided possessive individual, we obscure people's historical agency [*896] and transformations, their internal differences, the productivity of intercultural contact, and the ability of peoples to culturally express their position in a wider world." n33 Although Coombe calls attention to structures of power and the systemic legacies of exclusion, the call remains abstract and consequently trivializing. n34 Above all, it obscures the reality and effect of material inequities. The post-modernist leitmotif of domination and exclusion mystifies the operations of corporate capitalism and its current political suppression of the indigenous struggles for self-determination. Coombe ignores precisely those "internal differences" and their contradictory motion that give concrete specificity to the experiences of embattled groups such as the First Nations. n35 Here, ironically, the post-modernist inflection of the nation evokes the strategy of bourgeois nationalism to erase class, gender, and other differences ostensibly in the name of contextual nuances and refined distinctions.

Notwithstanding her partisanship for the oppressed, Coombe condemns "cultural nationalism" as an expression of possessive individualism and its idealist metaphysics. n36 But her method of empiricist contextualism contradicts any emancipatory move by the First Nations at self-determination. It hides the global asymmetry of power, the dynamics of exploitative production relations, and the hierarchy of states in the geopolitical struggle for world hegemony. We have not transcended identity politics and the injustice of cultural appropriation because the strategy of contextualism reproduces the condition by refusing to attack the causes of class exploitation and racial violence. Despite gestures of repudiating domination and exclusion, post-modernist contextualism mimics the moralizing rhetoric of United Nations humanitarianism that cannot, for the present, move beyond reformism since it continues to operate within the framework of the transnational corporate globalized market. Such a framework is never subjected to critical interrogation.

In the fashionable discourse of post-modernists, nation and nationalism are made complicit with the conduct of Western colonialism and imperialism. They become anathema to deconstructionists hostile to any revolutionary project in the "third world" inspired by emancipatory goals. This is the reason why post-colonial critics have a difficult time dealing with Fanon and his engagement with decolonizing violence as a strategic response of subjugated peoples to the inhumane violence of colonial racism and imperial subjugation. Fanon's conceptualization of a national culture is the direct antithesis to any culturalist syndrome, in fact an antidote to it, because he emphasizes the organic integration of cultural action with a systematic program of subverting colonialism: "A [*897] national culture is the whole body of efforts made by a people in the sphere of thought to describe, justify and praise the action through which that people has created itself and keeps itself in existence." n37 Discourse and power are articulated by Fanon in the dialectics of practice inscribed in the specific historical conditions of their effectivity. n38 Fanon's universalist-critical theory of national liberation proves itself a true "concrete universal" in
that it incorporates via a dialectical sublation the richness of the particulars embodied in the Algerian revolution. n39

Given his historicizing method, Fanon refuses any demarcation of culture from politics and economics. n40 Liberation is always tied to the question of property relations, the social division of labor, and the process of social reproduction. All of these questions are transvaluated by the imperative of the revolutionary transformation of colonial relations. Opposed to Fanon's denunciation of "abstract populism," Edward Said and Homi Bhabha fetishize an abstract "people" on liminal, borderline spaces. n41 Such recuperation of colonial hegemony via a "third space" or contrapuntal passage of negotiation reveals the comprador character of post-colonial theories of translation and cultural exchange. Transcultural syncretism devised to abolish the nation substitutes for anti-imperialist revolution a pragmatic modus vivendi of opportunist compromises.

An analogous charge can be leveled at Edward Said's reading of Fanon's "liberationist" critique. Said locates violence in nationalist movements (unless it is "critical") since they deny the heterogeneity of pre-colonial societies by romanticizing the past. n42 For Said, liberationist populism is preferable to nativism and the fanatical cult of "minor differences." n43 Said presents us a hypothetical dilemma: "Fanon's notion was that unless national consciousness at its moment of success was somehow changed into social consciousness, the future would not hold liberation but an extension of imperialism." n44 Said thus posits a spurious antithesis between the project of national self-determination and a vague notion of social liberation. For Said, nationalism is always a tool of the hegemonic oppressor and holds no socially emancipatory potential. n45 Said's answer evacuates Fanon's popular-democratic nationalism of all social content, postulating an entirely abstract divide between a nationalist program and a socially radical one. n46 For Said, the violence of anti-colonial movements becomes symptomatic of a profound colonial malaise. n47

National liberation and social justice via class struggle are interdependent. As Leopoldo Marmora observes, "While classes, in order to become predominant, have to constitute themselves as national classes, the nation arises from class struggle." n48 The popular-democratic aspiration for self-determination contains both national and social dimensions. In On Violence, Fanon invoked the ideal of decolonizing freedom as the legitimizing rationale of mass popular revolution. It is force deployed to accomplish the political agenda of overthrowing colonial domination and bourgeois property relations. n49 Violence here becomes intelligible as an expression of subaltern agency and its creative potential. n50 Its meaning is crystallized in the will of the collective agent, in the movement of seizing the historical moment to realize the human potential. n51 If rights are violated and the violence of the violator (for example, the state) held responsible, can the concept of rights be associated with peoples and their national identities? Or is the authority of the state to exercise violence derived from the nation/people? Here we need to ascertain the distinction between the state as an instrument of class interest and the nation/people as the matrix of sovereignty. The authority of the state as regulative juridical organ and administrative apparatus with a monopoly of coercive force derives from its historical origin in enforcing bourgeois rights of freedom and equality against the absolutist monarchy. National identity is used by the state to legitimize its actions within a delimited territory and to insure mobilization and coordination of policy. n52 Formally structured as a Rechtstaat, the bourgeois nation-state functions to insure the self-reproduction of capital through market forces and the continuous commodification of labor power. n53 Fanon understands that national liberation challenges the global conditions guaranteeing valorization and realization of capital, conditions in which the internationalization and nationalization of the circuits of capital are enforced by hegemonic nation-states. n54

We are thus faced with the notion of structural violence attached to the bourgeois state as opposed to the intentionalist mode of violence as an expression of subject/agency such as the collectivity of the people. Violence is thus inscribed in the dialectic of identity and "Otherness," with the bourgeois state's coherence depending on the subordination (if not consent) of workers and other subalterns.

We can resolve the initial paradox of the nation, a Janusfaced phenomenon, by considering the following historical background. n55 The idea of state-initiated violence (as opposed to communal ethnic-motivated violence) performs a heuristic role in the task of historicizing any existing state authority and questioning the peaceful normalcy of the status quo. The prevailing social order is then exposed as artificial and contingent; what is deemed normal or natural reveals itself as an instrument of partial interests. But the relative permanence of certain institutional bodies and their effects need to be acknowledged in calculating political strategies. The long duration of collective and individual memories exerts its influence through the mediation of what Pierre Bourdieu calls "habitus." n56 We begin to understand that the state's hierarchical structure is made possible because of the institutionalized violence that privileges the hegemony
Based on their historical investigations, Marx and Engels understood the role of violence as the midwife in the birth of a new social order within the old framework of the nation-state. In his later years, Engels speculated that with the changes in the ideological situation of the classes in any national territory, "a real victory of an insurrection over the military in street fighting is one of the rarest exceptions." n63 In an unusual historic conjuncture, however, the Bolshevik revolution mobilized mass strikes and thus disproved Engels. Nevertheless, Marx's "analytical universality," to use John Dunn's phrase, remains valid in deploying the concept of totality to comprehend the nexus of state, class and nation. n64 We can rehearse here the issues that need to be examined from the viewpoint of totality: Was Lenin's "dictatorship of the proletariat" an imposition of state violence, or the coercive rule of the people against the class enemy? If it is an instrumental means of the new proletarian state, did it implicate the nation? Is violence here both structured into the state system of apparatuses and inscribed in the collective agency of the working masses cognized as the nation? Is the political authority invoked by the proletarian state embodied in the class interest of all those exploited by capital (in both periphery and center) ascendant over all? Marxists who are critical of the Leninist interpretation denounce the use of state violence as an anarchist deviation, an arbitrary application of force. n65 They affirm instead the law-governed historical process that will inevitably transform capitalism into socialism, whatever the subjective intentions of the political protagonists involved. n66 Such fatalism, however, rules out the intervention of a class-for-itself freed from ideological blinders and uniting all the oppressed with its moral-intellectual leadership, the cardinal axiom of socialist revolution.

Rationalist thinkers for their part reject violence as an end in itself while accepting the force of the market as normal and natural. This is epitomized by legal thinkers who contend that primordial nationalist claims should be regulated by autonomous international law, "the domain of the metajuridique." n67 By identifying nationalism as a primitive elemental force outside the jurisdiction of positive law, the modernist legal scholar is alleged to be receptive to its experimental creativity so that new legal techniques are devised to regulate the destabilization of Europe--and for that matter, its colonial empires--by "separatist nationalisms." The aim is to pacify the subalterns and oppressed classes by juridical and culturalist prophylactic.

As I have noted above in dealing with Fanon's work, the nature of violence in the process of decolonization cannot be grasped by such dualistic metaphysics...
considers the use of violence as a means for establishing governance. n71 Law is opposed to divine
violence grasped as fate and the providential reign of justice. Bound up with violence, law is
cognized as power, a power considered as a means of establishing order within a national boundary. The abolition of state
power is the aim of revolutionary violence, which operates beyond the reach of law-making force, an
aspiration for justice that would spell the end of class society. Proletarian revolution resolves the means-ends
instrumentalism of bourgeois politics. Violence becomes problematic when fate/justice, once deemed
providential, eludes our grasp with the Babel of differences blocking communication and also
aggrandizing particularisms found below the level of the nation-form and its international, not to say
cosmopolitan, possibilities.

Violence is only physical force divorced from its juridical potency. Benjamin's thesis may be more
unequivocal than the academically fashionable Foucauldian view of subsuming violence in power
relations. It takes a more scrupulous appraisal of the sectarian limitations as well as empowering
possibilities of violence in the context of class antagonisms. While the issue of nationalist violence is
not explicitly addressed in his essay, Benjamin seeks to explore the function of violence as a creator and
preserver of law, a factor intricately involved in the substance of normative processes. Benjamin writes:
"Lawmaking is power making, and, to that extent, an immediate manifestation of violence. Justice is the
principle of all divine end making, power the principle of all mythical lawmaking." n72 Lawmaking mythical
violence can be contested only by divine power, which today, according to Benjamin, is manifested in,
"educative power, which in its perfected form stands outside the law." n73 Benjamin is not entirely clear
about this "educative power," but I think it can only designate the influence of the family and other
agencies in civil society not regulated by the traditional state apparatuses. In another sense, Benjamin alludes
to "the proper sphere of understanding, language," which makes possible the peaceful resolution of
conflicts. n74 Since language is intimately linked with the national community, national consciousness
contradicts the disruptive effects of violence in its capacity to resolve antagonisms.

Benjamin goes on to investigate violence embodied in the state (as contradistinguished from the national
community) through a process of demystification. n75 His critique begins by disclosing the idea of its
development and its trajectory of ruptures and mutations, which in turn expose the fact that all social
contracts depend on a lie, or on fiction. n76 "Justice, the criterion of ends," supersedes legality, "the
criterion of means." n77 Justice is the reign of communication, which, because it excludes lying,
excludes violence. In effect, violence is the mediation that enables state power to prevail. Violence cannot be eliminated by counter-violence that simply inverts it. Only the educative power of language, communication associated with the national collectivity, can do away with the need to lie. But since the social contract displaces justice as the end of life with legality connected with the state, and law is required as an instrument to enforce the contract, violence continues to be a recurrent phenomenon in a commodity-centered society.

Benjamin is silent about the nation and the efficacy of popular sovereignty in this text. His realism seeks to clarify the historic collusion between law, violence, and the state. n78 He wants to resolve the philosophical [\[*904\]] dualism of means and ends that has bedeviled liberal rationalism and its inheritors; pragmatism and assorted post-modernist nominalisms. His realism strives to subordinate the instrumentality of violence to law, but eventually he dismisses law as incapable of realizing justice. n79 But we may ask: how can justice--the quest for identity without exclusion/inclusion, without alterity--be achieved in history if it becomes some kind of intervention by a transcendent power into the secular domain of class struggle? How can justice be attained as an ideal effect of communication? Perhaps justice can be attained through language as mediated in the nation-form, in the web of discourse configuring the nation as a community of speakers, or as the performance of groups unified under the aegis of struggle against oppression and exploitation? n80

Benjamin's speculation on the reconciling charisma of language seems utopian in the pejorative sense. Peoples speaking the same language (e.g., Northern Ireland, Colombia, North and South Korea) continue to be locked in internecine conflict. If violence is inescapable in the present milieu of reification and commodity-fetishism, how can we use it to promote dialogue and enhance the resources of the oppressed for liberation? In a seminal essay entitled Nationalism and Modernity, Charles Taylor underscores the modernity of nationalism in opposition to those who condemn it as atavistic tribalism or a regression to primordial barbarism. n81 In the context of modernization, Taylor resituates violence in the framework of the struggle for recognition--nationalism "as a call to difference . . . lived in the register of threatened dignity, and constructing a new, categorical identity as the bearer of that dignity." n82

The philosophical underpinning of the struggle for recognition and recovery of dignity needs to be stressed. This struggle clearly invokes the Hegelian paradigm of the relation between lord and bondsman in the Phenomenology of Mind. n83 In this struggle, the possibility of violence mediates the individual's discovery of his finite and limited existence, his vulnerability, and his need for community. Piotr Hoffman's gloss underlines the Hegelian motif of freedom as risk: "Violence . . . is the necessary condition of my emergence as a universal, communal being . . . for I can find common ground with the other only insofar as both of us can endure the mortal danger of the struggle and can thus think [\[*905\]] independently of a blind attachment to our particular selves." n84 Since the nation evokes sacrifice (the warrior's death on the battlefield, honor, selftranscendence, destiny) the capitalist state seeks to mobilize such nation-centered feelings and emotions to legitimize itself as a wider, more inclusive, and less artificial reality to attain its own accumulative goals. Weber reminds us: "For the state is the highest power organization on earth, it has power over life and death . . . A mistake comes in, however, when one speaks of the state alone and not of the nation." n85

The nationalist struggle for recognition and the violence of anti-colonial revolutions thus acquire a substantial complexity in the context of modernity, the fact of uneven development, and the vicissitudes of capitalist crisis. In any case, whatever the moral puzzle entailed by the plural genealogies of the nationstate, it is clear that a dogmatic pacifism is no answer to an effective comprehension of the real world and purposeful intervention in it. Given the continued existence of nation-states amidst the increasing power of transnational corporations in a geopolitical arena of sharpening rivalry, can we choose between a "just" and an "unjust" war when nuclear weapons that can destroy the whole planet are involved? Violence on such a scale obviously requires the dialectical transcendence of the system of nation-states in the interest of planetary justice and survival.

Overall, the question of violence cannot be answered within the framework of the Realpolitik of the past, but only within the framework of nation-states living in mutual reciprocity. Causality, however, has to be ascertained and responsibility assigned even if the nation is construed as "an interpretive construct." n86 My view is that the hegemonic bloc of classes using the capitalist state machinery is the crux of the problem. If nations have been manipulated by states dominated by possessive/acquisitive classes that have undertaken and continue to undertake colonial and imperial conquests, then the future of humanity and all living organisms on earth can be insured only by eliminating those classes that are the origin of state violence. The nation-form can then be reconstituted and transcended to insure that it will not generate reasons or opportunities for classbased state-violence.
to recur. That will be the challenge for future revolutionaries.

FOOTNOTE-1:

n1 E. San Juan, Jr. is a fellow of the Center for the Humanities, Wesleyan University, and visiting professor, Department of English, Wesleyan University, Middletown, CT. He was recently chair of the Department of Comparative American Cultures, Washington State University, and professor of Ethnic Studies, Bowling Green State University, Ohio.


n6 See generally Nathaniel Berman, Modernism, Nationalism and Rhetoric of Reconstruction, in After Identity: a reader in law and culture (Dan Danielson & Karen Engle eds. 1995).


n9 See Homi Bhabha, The Location of Culture (1994).

n10 See Karl Marx, Critique of Hegel's Philosophy of Right 137 (Annette Jolin & Joseph O'Malley trans., 1970) "The weapon of criticism certainly cannot replace the criticism of weapons; material force must be overthrown by material force; but theory, too, becomes a material force once it seizes the masses."

n11 See Berman, supra note 6, at 238.

n12 See generally Michael Brown, The Production of Society (1986).


n14 Ernest Renan, "Qu'est-ce qu'une nation?" in Nationalism (John Hutchinson and Anthony D. Smith eds., 1994).

n15 Id. at 17-18.


n18 See Giddens, supra note 4, at 172.


n20 Ashcroft et al., supra note 8 at 151.

n21 Id.

n22 See generally John Bowle, Western Political Thought: An Historical Introduction from the Origins to Rousseau (1947).

n23 See E. San Juan, After Post colonialism: Remapping the Philippines - United States Confrontations 104110 (2000) (discussing Filipino nationalism); J. Blaut, Nationalism as an Autonomous Force, Science and Society XLVI 1-22 (Spring 1982).


n25 Ashcroft, et al., supra note 8 at 153.


n29 Anthony Smith, Theories of Nationalism (1971).

n30 Ashcroft et al., supra note 8 at 46 (1998).

n32 Id.

n33 Id. at 264.

n34 Id.

n35 Id.

n36 Id.

n37 Frantz Fanon, The Wretched of the Earth 155 (1965).

n38 Id.

n39 Id.

n40 Id.

n41 See generally Edward Said, Culture and Imperialism (1993); Homi Bhabha, Postcolonial Criticism, in Redrawing the Boundaries 433-65 (Stephen Greenblatt & Giles Gunn eds., 1992).

n42 Id.

n43 Id.

n44 Id. at 273.

n45 Id.

n46 Id.

n47 Id.

n48 Leopolodo Marmora, Is There a Marxist Theory of Nation, in Rethinking Marx 108-14 (Sakari Hanninen & Leena Paldan, eds. 1984).

n49 See generally Frantz Fanon, On Violence, in The Wretched of the Earth (1965).

n50 Id.


n54 Frantz Fanon, supra note 37.

n55 See generally Tom Narin, The Break-up of Britain (1977).


n57 See generally Lawrence Krader, Formation of the State (1968).

n58 See generally Georges Sorel, Reflections on Violence (1906).

n59 Id.

n60 Id.


n63 Friedrich Engels, Principles of Communism (1847).

n64 John Dunn, Western Political Theory in the Face of the Future 78 (1979).


n66 This mechanistic or historicist tendency may be discerned in Jack Woddis, New Theories of Revolution (1972); M. Rosenthal & P. Yudin eds., A Dictionary of Philosophy 391 (1967).

n67 See generally Berman, supra note 6.

n68 See V. Lenin, Left-Wing Communism-an Infantile Disorder, in Selected Works of Lenin (1971); Rosa Luxemburg, The Mass Strike, the Political Party, and the Trade Unions (1906).

n69 See V. Lenin, materialism and Empirio-Criticism (1972); Rosa Luxemburg, The National Question (1976).

n71 Id.
n72 Id. at 295.
n73 Id. at 277-300.
n74 Id.
n75 Id.
n76 Id.
n77 Id.
n78 See Id.

n79 See Id.

n80 E. San Juan, Bakhtin: Uttering the "(Into)nation of the Nation/People, in Bakhtin and The Nation (Donald Wesling et al. eds., 2000).


n82 Id. at 240.


On April 12, 1900, the Congress of the United States enacted the Foraker Act of 1900, n1 which replaced the governing military regime in Puerto Rico with a civil form of governance. n2 Section VII of this act created a Puerto Rican citizenship for the residents of the island. n3 This citizenship was reaffirmed by the United States Supreme Court in 1904 by its ruling in Gonzales v. Williams. n4 The Puerto Rican citizenship was again reaffirmed on November 18, 1997, by the Puerto Rican Supreme Court through its ruling in Miriam J. Ramirez de Ferrer v. Juan Mari Bras. n5 Mari Bras, however, through his renouncing of U.S. Citizenship, sought to redefine Section VII as a source of law that recognized a Puerto Rican nationality separate from that of the United States. n6

Rogers M. Smith contends that U.S. "justices were apparently willing for Puerto Ricans, like other peoples of color, to be designated 'American' so long as what that meant in terms of citizenship status remained unclear." n7 Smith's argument suggests that the Puerto Rican citizenship is a direct result of the racist ideologies of the moment. In this paper I would like to analyze this argument by arguing that the Puerto Rican citizenship is directly linked to a status of space that was in turn created by racist ideologies. In other words, while it is evident that there is a relationship between the Puerto Rican citizenship and the racial ideologies of the progressive era, this relationship is mediated by a spatial configuration.

The Puerto Rican spatial configuration that I am alluding to can be understood as a liminal condition. This notion of a liminal condition is informed by a reading of Michel Foucault's notion of the liminal, which he uses to explain the status of the madman at the dawn of the [*908] Renaissance. n8 Explaining how madmen were generally placed on ships and ferried away from the city, Foucault argues that the madman's voyage is at once a rigorous division and an absolute Passage. In one sense, it simply develops, across a half-real, half-imaginary geography, the madman's liminal position on the horizon of medieval concern - a position symbolized and made real at the same time by the madman's privilege of being confined within the city gates: his exclusion must enclose him; if he cannot and must not have another prison than the threshold itself, he is kept at the point of passage. He is put in the interior of the exterior, and inversely. A highly symbolic position, which will doubtless remain his until our own day, if we are willing to admit that what was formerly a visible fortress of order has now become the castle of our conscience. n9

In the context of Puerto Rico, this argument would suggest that the Puerto Rican space is located on the horizon or the juridical line separating the foreign from the domestic. The political expression of this juridical status could suggest that Puerto Rico is somewhere in between colonial and territorial status. My contention in this paper is that this ambiguous condition facilitated the creation of a Puerto Rican citizenship that could be distinguished from an Anglo-American citizenship and an alien status. Moreover, this ambiguous condition served as a prison for the Puerto Rican citizen, preventing him from becoming either an Anglo-American citizen or a citizen of a sovereign nation-state. It also resulted in a status that was not entitled to the constitutional protections and civil liberties guaranteed to the U.S. citizen and the alien.

I. Antecedents

Smith contends that citizenship during the Progressive Era could be understood within a four-tiered hierarchical structure, which included the following:

First, the excluded status of people denied entry to and subject to the expulsion from the U.S., generally owing to their ethnic or ideological traits; second, colonial
subjectship, reserved chiefly for territorial inhabitants declared racially ineligible for citizenship; third, second class citizenship, usually understood as required by impartial grants of formal citizenship to races not capable of exercising it, and as the proper status for women; and fourth full citizenship, including voting rights. n10

In principle, the Puerto Rican citizenship could be located somewhere between the second and third tiers. This argument, however, does not [*909] account for the juridical creation of the Puerto Rican citizenship. In addition, it is unclear whether Smith's conception of citizenship can exist independent of a national imagining. Smith's notion of the relationship of the citizen to the nation does not account for a liminal spatial status, with liminal citizens, within the nation. n11

In my opinion, there are at least two constitutional precedents that could be used to explain the Puerto Rican citizenship paradigm. The first can be traced to the early founding of the U.S. and located in the debates regarding the Federalist enactment of the Alien and Sedition Acts of 1798. n12 Under the climate of these laws, it is possible to locate two juridical conceptions of citizenship, namely a State and a Federal citizenship. Certainly the Supreme Court's early rulings on its jurisdiction over cases arising between "citizens of different states" under article III n13 suggests some possible parallels to the question at hand. n14 The problem, however, is that in these early cases states continued to claim a level of sovereignty that threatened the possibility of a federal government. In the case of Puerto Rico, the territory posed no threat to the Union, and because of its territorial condition, it could not make a claim to share in power with other states. Moreover, it would seem that the 14th Amendment created a national conception of citizenship that would have precluded a Puerto Rican citizenship. n15

A second possible precedent could be located in the experience of indigenous peoples in the United States. Certainly the notion of the Domestic Dependent Nation n16 and/or the juridical concept of the "alien nation" n17 are quite similar to the subsequent unincorporated status of Puerto Rico. Moreover, indigenous people were construed as an alien race living under the tutelage of the federal government. n18 The problem with establishing a direct parallel with the indigenous experience is that Puerto Rico was treated as a territory, albeit unincorporated, whereas Indian territories were considered domestic dependent nations. In other words, while Puerto Rico could eventually become a state of the Union, domestic dependent nations were precluded from becoming anything more than [*910] an occupied territory. In addition, it is evident that lawmakers recognized the existing Spanish civil law tradition in Puerto Rico as a "civilized" form of law. n19

A. Treaty of Paris of 1898

The Spanish-Cuban-American War of 1898 marked a paradigmatic shift in U.S. territorial policy. To be sure, Scott B. Cook summarizes the forces shaping this historical moment as follows:

By the 1890s continental expansion had reached its limit, dramatized by the occupation of the immense area bordered by Canada, Mexico, and the Pacific Ocean and cemented by the final elimination of American resistance at Wounded Knee (1890). In 1893 the historian Frederick Jackson Turner pronounced the American frontier closed. It had, he claimed, defined the American experience but it would no longer do so. With British Canada and independent Mexico unobtainable without a costly war and international censure, some Americans turned an anxious and hopeful gaze on overseas territories as the next beneficiaries of America's great democratic and capitalist experiment. n20

With the conquest of Puerto Rico, the Philippines, and Cuba, the U.S. moved from an "expansionist" territorial policy to an "imperialist" foreign policy. n21 Puerto Rico was formally conquered and ceded to the United States on July 25, 1898, under the tenets of the Treaty of Paris of 1898. n22 Although the validity of this treaty is questionable, the Treaty of Paris has been recognized as the first juridical text to establish the hegemonic relationship of the United States over Puerto Rico. n23

For the purpose of this paper, I will focus my discussion on Article IX of this treaty, which addressed the questions of citizenship, space, and civil rights on the island. Article IX can be divided into three provisions. The first provision outlines the rights of the Spanish subjects in Puerto Rico and reads as follows:

Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom (sic), retaining in either event all their rights of property, including the rights to sell or dispose of such property or of its proceeds; and they shall have the [*911] right to carry on their industry, commerce, and professions being subject in respect thereof to such laws as are applicable to other foreigners. n24

This provision recognizes a distinction between the Spanish peninsular (born on the Spanish peninsula) and the Spanish Creole (born on the island). n25 This
distinction is critical. First, from a historical point of view, we should note that the Spanish concept of race was generally associated with the individual's birthplace and his or her Casta. n26 Presumably, Spanish Creoles born in Puerto Rico were inferior to the Spanish Peninsulars with regard to the Spanish social hierarchy. Secondly, by recognizing a birthright distinction in this treaty, the Spanish clearly established that Puerto Ricans were not equals, thus undermining the 1897 Charter of Autonomy. n27

The second provision directly addresses the allegiance and nationality of the residents of Puerto Rico. n28 Under this provision, Spanish subjects not born in the peninsula could retain allegiance to Spain by declaring their loyalty in a local court. Otherwise, they would become nationals of Puerto Rico. n29 The creation of a Puerto Rican nationality enabled the U.S. to eventually justify not naturalizing the island residents because they possessed a separate national identity. This policy led to the creation of an ambiguous status somewhere between an alien and a national owing allegiance to the United States. Jose Lopez Baralt contends that this is a departure from a previous policy of extending citizenship rights to the residents of newly acquired territories. n30 He suggests that this departure can be attributed to the lack of desire of the U.S. to naturalize Filipinos, as well as "the numerous uncivilized tribes" and Chinese inhabiting the archipelago. n31

The concluding portion of Article IX stated that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." n32 Congress, however, neglected to pass any legislation until 1900. n33 Thus, between 1898 and 1900, Puerto Rico was governed by a succession of military governors under the direct authority of the President of the United States. Lopez Baralt suggests that in the absence of any Congressional legislation the President could retain the power to decide how to govern the island as Commander-in-Chief, assuming of course that he was engaged in restoring peace and order. n34

More importantly, this provision transferred authority to the Congress, including the power to establish local courts of law on the island. Eventually, the Puerto Rican legal system was redeveloped by Congress with the advice of these military governors. n35 The goal was to create a legal system that was consistent with an Anglo-Saxon legal tradition.

In sum, the Treaty of Paris of 1898 became the foundation of the jurisprudence that would define the contours of the subsequent juridical relationship between the United States and Puerto Rico, and a key document in the creation of a Puerto Rican citizenship. First, the cession of the island created an ambiguous tutelary status subject to U.S. Congressional governance. Second, the cession established a Puerto Rican national subject that was distinct from the Spanish or the AngloAmerican citizen. This latter power enabled lawmakers to create an ambiguous juridical/political status for Puerto Rico, clearly outside of the confines of traditional territorial policies.

B. The Military Regime and General Davis

After the signing of the Treaty of Paris, President McKinley placed a succession of military governors on the island whose main goal was "to keep order, protect life and property, and get things ready for the establishment of a civil government in substitution of itself." n36 The legal source of their power was outlined in the General Order 101. n37 More importantly, the military governors were further charged with establishing a legal regime and making recommendations to the federal government through special reports. n38 These, in turn, informed lawmakers in their policy-making initiatives. As one might suspect, these reports captured the racial prejudices that the generals used to understand the Puerto Rican demography.

Trias Monge contends that Brigadier General George W. Davis was instrumental in the development of a Puerto Rican legal system that could be integrated to the U.S. Anglo-Saxon legal system. n39 While Davis thought that the existing legal system in Puerto Rico was "un-American and strange," he was confident that this "strangeness" would disappear one by one and "ultimately a much more complete harmony of the Puerto Rican with the American system of procedure will come into being." n40 This recognition of the civil code, albeit strange, eventually enabled lawmakers to make a general distinction between Puerto Rico and other territories, ascribing to the island an unprecedented level of judicial sovereignty.

In addition to grappling with the island's legal system, Davis finds himself trying to figure out how to "racialize" the Puerto Rican. Ultimately, Davis constructs a sort of Puerto Rican racial alterity. n41 The famous "Indian hunter" described the population of the island in the following manner:

The last census, that of 1897, showed that the pure-blood negroes have numbered but 73,824 out of 899,394, while of the same total there were 242,000 mulattoes. Combining the full and mixed bloods, and designating them as colored (the term by which they are known in the States), it would appear that the pure white are in a considerable majority; and comparing both totals with the statistics of the year 1847 it would seem that in that decennial period the numbers of these
denominated above as colored are not increasing in numbers, but instead have actually decreased. n42

As this statement suggests, the Puerto Rican did not fit Davis' imagining of an internal Other (black American), an external Other (Spaniard), nor the Self (White Anglo-Saxon). This was further evidenced in his melancholic complaint that "between the negro and the peon there is no visible difference. It is hard to believe that the pale, sallow, and often emaciated beings are the descendants of the conquistadores who carried the flag of Spain to nearly all of South America, and to one-third of North America." n43

Thus at this early moment of conquest we can further discern the racialization of a Puerto Rican race in an ambiguous way, and to a certain extent, in a status of alterity. In attempting to racialize the Puerto Rican, Davis finds a white Puerto Rican that does not have the status of the Anglo-Saxon, and a black/peon Puerto Rican that is not like the American Negro. What is clear, however, is that while the White/Caucasian Puerto Rican acquires an alterity status more akin to the Anglo-Saxon, but never an equal, the black and the "peon" are represented in marginalized ways akin to the American Negro. Together with the description of the existing legal system, these descriptions enable Congressional lawmakers to legitimize the creation of a distinct Puerto Rican juridical space and its distinct Puerto Rican citizen.

C. The Foraker Act of 1900

The Foraker Act effectively ended the military regime's governance and created a civil government for the island in 1900 under the direct hegemony of the United States. Lopez Baralt notes that the Foraker Act lays out three distinct political provisions, namely "the creation of a Puerto Rican citizenship, the proffer of American protection for the island's citizenry, and the constitution of a body politic by these citizens." n44 He further notes that this creation of a special body politic, and the creation by express declaration of citizenship of the territory, were departures from the former territorial practice of Congress. One is tempted to ask what was the objective of Congress in making these provisions. We do not know of any need that they fulfilled. On the contrary, it would seem that they are misleading. Generally speaking, in public law, citizenship and sovereignty are reciprocal and inseparable. The inhabitants of the Islands were made citizens, - but of what? Of a body politic therein created which undoubtedly was not sovereign in any international sense. n45

Citing Senator Foraker, Bothwell contends that the objective of the Foraker Act was to annex Puerto Rico and place it in a tutorial condition geared towards eventual statehood. n46 This, however, resulted in the creation of an ambiguous liminal status that was tempered by both a colonial condition and a territorial tradition. In fact, Puerto Rico acquired both colonial attributes as well as territorial entitlements. Puerto Rico acquired a foreign character for domestic purposes, yet it was located at the margins of a U.S. imperial border.

The Puerto Rican citizenship gave material expression to this ambiguous status. Section VII of the General Provisions created a Puerto Rican citizenship that required national loyalty while simultaneously denying its bearer the basic protections of the U.S. Bill of Rights. n47 The language of the text is clear:

That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have been elected to preserve their allegiance to the Crown of Spain. n48

Thus, the Puerto Rican citizen acquired the responsibilities of U.S. citizenship with no protections or entitlements. Senator Foraker would later argue that Puerto Ricans were "in a worse situation than aliens, for aliens may become naturalized citizens of the United States and Puerto Ricans cannot." n49 To be sure, Bothwell notes that under the immigration laws of the period, one had to renounce his or her foreign citizenship in order to acquire a U.S. citizenship. Puerto Ricans, however, were unable to renounce their citizenship because it was not a foreign citizenship. Thus, Puerto Ricans were unable to become U.S. citizens, and the Puerto Rican citizenship in turn lacked any type of international recognition on account of its domestic nature. n50 Puerto Ricans became juridical prisoners at the gates of the empire.

II. Insular Cases

As I suggested earlier, my argument is further institutionalized by the Supreme Court in a series of rulings beginning in 1901 known as the Insular Cases. n51 Constitutional historian David P. Currie has described the rulings rendered in 1901 as the "most interesting and controversial decisions about the Bill of Rights during the Fuller era . . ." n52 John W. Burgess in turn once described these as "the most momentous, next to that of domestic slavery." n53 These decisions have defined both the status of Puerto Rico and its subsequent relationship to the United States. For the purposes of this paper, I will only focus on a
discussion of three issues that can help contextualize my overall argument, namely the doctrine of un-incorporation, the distinction between belonging and being a part of the United States, and the reaffirmation of a Puerto Rican citizenship. In my opinion, the contours of the resulting U.S.-Puerto Rico relationship were contingent upon a conceptualization of an inferior Puerto Rican race.

Seven of the nine Insular Cases decided in 1901 addressed legal questions regarding the status of Puerto Rico. In De Lima, the Court's first ruling, the justices addressed the question of whether D.A. De Lima and Co. could recover duties exacted by the Customs Office in New York from certain importations of sugar emanating out of Puerto Rico during 1899. In this case, the petitioner argued that the exactations made under the Tariff Act of 1897 did not apply to Puerto Rico because the island had ceased to be a foreign country, as defined by the Act, after the signing of the Treaty of Paris of 1898. Petitioners further argued that Puerto Rico had become a territory of the United States and therefore any imposition of taxes and excises on the island, not applicable to other parts of the Union, would constitute a violation of the Uniformity Clause of the Constitution. The U.S. Attorney General countered that the Uniformity Clause applied to States and not to territories. Moreover, as Efren Rivera Ramos succinctly notes, the Solicitor General further contended that

(a) the act of cession did not make the territory, ipso facto, a part of the United States, but merely a possession; (b) newly acquired territory becomes a part of the United States only if Congress so determines; (c) the power of Congress over those territories that have not become a part of the United States is "plenary," "absolute," "full and complete," subject only to fundamental limitations imposed by the Constitution, as defined by the Courts. The majority rejected the theory that presupposed that a territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that insurrections may be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet the territory may still remain a foreign country.

However, the Court did acknowledge that "nonaction sic of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words." The Court concluded, "Porto Rico was not a foreign country within the meaning of the tariff laws, but a territory of the United States, that duties were illegally exacted, and that the plaintiffs are entitled to recover them back." The dissent, however, sought to locate the Puerto Rican in the same juridical status as the "uncivilized" Indian. By rethinking the Puerto Rican case within the context of an uncivilized and savage paradigm, the justices could situate Puerto Rico somewhere in between a foreign and domestic status.

By the time that the Court rendered its opinion in the fifth Insular Case, Puerto Rico had acquired a new status and a new doctrine was born. In Downes, the Court ruled on the validity of a tariff tax imposed on imports from Puerto Rico after the passage of the Foraker Act in 1900. Justice Brown concluded that 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. We are therefore of the opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States . . . .

As this citation suggests, Puerto Rico and the "alien race" that inhabited the island had now become a possession belonging to, but not a part of, the Anglo-Saxon empire.

In a concurring opinion, Justice White introduced a new doctrine of "un-incorporation" that created a new status akin to the domestic dependent nation. The Court concluded that neither the Treaty of Paris nor the Foraker Act had incorporated Puerto Rico into the Union; therefore, the island could be treated in a different manner than that in which States, territories, and possessions were treated. This status, in turn, provided the justices with an excuse for treating the "alien race" residing in the island differently than other U.S. citizens, especially since the island's inhabitants were not entitled to the protection of the Bill of Rights. Surely, the Court reasoned, the responsibilities of the Bill of Rights could not be entrusted upon an uncivilized people. To be sure, incorporation, argued White, would require that Puerto Ricans become U.S. citizens, and Congress had not drafted a bill supporting the collective naturalization of the islanders. Thus, if Congress wished to incorporate Puerto Rico and its inhabitants into the
The Court's subsequent reaffirmation of the Foraker citizenship is further illustrative of the law's creation of an anomalous category informed by a racial paradigm. Take for example the ruling in Gonzalez, which addressed the detention of Isabela Gonzalez on August 24, 1902 upon her arrival to New York. She was detained by the Immigration Commissioner and was prevented from entering the country because she was an "alien immigrant." The Commissioner sought to bar her entry into the U.S. under the provisions of the Alien Immigration Act of 1891. In a unanimous decision, the Court concluded that since Gonzalez was a native resident of Puerto Rico during the passage of the Treaty of Paris she was not considered an alien immigrant within the meaning of the act in question. Moreover, the Gonzalez ruling suggests, that the Court could continue to regulate the movement of bodies, namely Chinese, and "certain classes of aliens or alien immigrants," into and out of the nation. To be sure, the Court argued that We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof; and that citizens of Porto Rico, whose permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic laws of whose domicile was enacted by the United States, and is enforced through officials sworn to support the Constitution of the United States, are not 'aliens,' and upon their arrival by water at the ports of our mainland are not 'alien immigrants,' within the intent and meaning of the act of 1891.

The decision established a new juridical status located between a U.S. citizenship and a foreign national. Puerto Ricans, although not aliens in the sense of the "Chinese laborers" were not AngloSaxons either, and thus not able to become citizens. The result was a separate and unequal status that would be in place until World War I and in particular, until the passage of the Jones Act of 1917 which provided for the collective naturalization of the Puerto Rican people.

Concluding Remarks

By way of conclusion, I suggest that the Puerto Rican citizenship is not necessarily a direct result of racist law making. At present, it is unclear to me whether racist policy makers could have justified the creation of a separate and distinct Puerto Rican citizenship, using race as a determinative criteria. This is not to say that race is not a factor in the invention and subsequent institutionalization of a Puerto Rican citizenship. Rather my contention is that lawmakers had to construct a distinct juridical space in which to locate the Puerto Rican citizenship. In this sense, Anglo-Saxon racist ideologies informed the invention of a liminal juridical space, which in turn could legitimize a corresponding Puerto Rican citizenship. In other words, the status of the Puerto Rican space became a precondition of the construction of a Puerto Rican citizenship.

FOOTNOTE-1:

n1 31 Stat. 77 (1900).
n2 Id.
n3 Id. at § VII.
n4 192 U.S. 1, 7 (1904).
n5 Supreme Court of Puerto Rico, No. CT-96-14 (November 18, 1997).
n6 Id.
n8 See Michel Foucault, Madness and Civilization: A History of Insanity in the Age of Reason 11 (1965).
n9 Id.
n10 Smith, supra note 7, at 429.
n11 It is interesting to note that even after Puerto Ricans became citizens of the United States, the Supreme Court decided that the Bill of Rights applied differently to citizens residing on the island, but once they became residents of the continental U.S., their entitlements would be restored. See Balzac v. Porto Rico, 258 U.S. 298, 306-07 (1922).
n13 U.S. Const. art. III, § 2, cl. 1.
n14 See, e.g., Turner v. Bank of North America, 4 U.S. 8, 10 (1799); Mossman v. Higginson, 4 U.S. 12, 14 (1800).
n16 Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).


n19 See O'Brien, supra note 12, at 46.


n22 30 Stat. 1754, 1755, Art. II (1898).

n23 See id. at 1754. This is an issue subject to significant jurisprudential debate given that the Carta Autonomica of 1897 required that Puerto Ricans participate in any decisionmaking process that impacted the island on an international level. Puerto Ricans were not part of the discussions surrounding Spain's cession of the island to the U.S.

n24 30 Stat. 1754, 1759, Art. IX (1898).


n26 The etymological meanings of the concept of Casta refer to social class, lineage, and animal breed. It is a classification system that was instituted in Spain during the "ReConquest" and the fifteenth century Inquisition.


n28 See id.

n29 30 Stat. 1754, 1759, Art. IX (1898).


n31 Id.

n32 30 Stat. 1754, 1759 Art. IX (1898).

n33 See Lopez Baralt, supra note 30, at 192-93.

n34 See id. at 194.


n36 Lopez Baralt, supra note 30, at 189.


n38 Id.

n39 See Trias Monge, supra note 35, at 50-53.


n42 Davis Report, supra note 40, at 16.

n43 Id. at 18.

n44 Lopez Baralt, supra note 30, at 208.

n45 Id.

n46 Bothwell, supra note 27, at 42.

n47 31 Stat. § 7 (1901).

n48 Id.

n49 36 Cong. Rec. 2894 (1903), cited in Cabranes, supra note 25, at 57 n. 243.

n50 Bothwell, supra note 27, at 55.


n54 See 182 U.S. at 44.

n55 See id. at 45.

n56 See id. at 46.

n57 See id. at 47.

n58 Rivera Ramos, supra note 51, at 243.

n59 De Lima, 182 U.S. at 198.

n60 Id.

n61 Id. at 199.

n62 See id. at 219.

n63 See id. at 249-50.

n64 Downes, 182 U.S. at 287.

n65 See id. at 314.

n66 Id., at 315.

n67 See Gonzalez, 192 U.S. at 7.

n68 Id.

n69 See id.

n70 Id. at 12.

n71 Id. at 13.

n72 Id.
The period from 1896 to 1900, the period prior to, during, and immediately following the Spanish American War, which became known to Americans as the "splendid little war," n1 was a momentous time. An in-depth study of this five-year period--the events leading to the Spanish American War, the War itself and its aftermath--yields a rich and deep understanding of themes at the core of LatCrit theory. This is a key turning point in racial formation of Latino/as, n2 American foreign policy, n3 and n4 American democracy. n5 The U.S. abandoned its isolationist stance, and awkwardly embraced its "duty and obligation" as a "benevolent" world power. n6 Thus, the United States became an equal among European imperialist countries like Great Britain, Germany and France, which were already carving up Africa, Asia, and the Pacific and subjecting these peoples to the colonialist experience. n6 Some would argue that the Spanish American War is the pivotal historical event for LatCrit theory.

Part I provides a historical brief of the Spanish American War, and describes the many ways that the Spanish American War is just not dead history, but continues to impact Puerto Rico and Guam, native Hawaiians, the Philippines, Cuba, and Latin America. Part II discusses just how important the Spanish American War is to the issues that concern the LatCrit enterprise. Part III generally discusses the importance of historical analysis to the understanding of the construction of race. Part IV sets forth how LatCrit can contribute to the historiography of the Spanish American War, and in turn, Part V looks at what the project of studying the Spanish American War can contribute to LatCrit. This enterprise offers the possibility that LatCrit could build better interracial and interethnic coalitions because such historical work could lead to better intellectual empathy for other Latino/a subgroups. But as well, Spanish American War historiography can offer a centering axis to this project of LatCrit.

Finally Part IV applies the same critical lens to LatCrit that the prior parts of this article applied to American historiography. LatCrit and Critical Race Theory (CRT), as well, can be said to take a disciplinary perspective overly preoccupied with race. A balance can be struck if LatCrit theorists have greater awareness of the perspectives inherent to the race theoretic efforts and the analysis of American historians.

I. A Brief History of the Spanish American War

The Spanish American War was the last war of the Nineteenth Century, and augured the Twentieth Century, which historians call the American Century. n7 On April 15, 1898, Congress enacted a resolution...
declaring it necessary for the United States to intervene in Cuba's second war of independence against Spain, n8 which had broken three years earlier. n9 Cuba, along with Puerto Rico, were the only colonies remaining of the old Spanish empire in Latin America. n10 From 1808 to 1826, the old Spanish empire declined as Latin America's desire for nationhood and self-determination gave rise to the Latin American notions stretching from Mexico to Chile. n11 Spain, determined not to lose what was left of its empire, instituted repressive measures. The Spanish military recognized that the Cuban revolutionary war was in effect a guerilla war. n12 The revolutionaries hid in the hills and engaged the Spanish only in skirmishes. n13 It was also a class war waged mostly by the middle class criollo leaders and destitute sugar cane and field workers. n14 The Spanish military determined that the best way to fight the revolutionary force's guerilla tactics was to "re-concentrate" Spanish farmers and sugar cane field workers, deemed sympathetic to the guerillas, in garrisons located in major Cuban cities. n15 This "reconcentrado" program was repressive and cruel, even by standards of the day, and resulted in rampant starvation and disease. It is estimated that anywhere from 200,000 to onehalf million Cubans died as a result. n16

Americans were appalled at the Spanish measures. n17 In addition, the Cuban revolutionaries had waged an effective campaign for their cause in the press and Congress. n18 Accordingly, there was great sympathy for their fight for independence. Cuban revolutionary forces stretched thin after centuries of defending an empire that spanned the globe. n19 From the beginning of the reconcentrado program, U.S. Congressional war hawks attempted to muster the majority necessary to declare war. But President William McKinley, having lived through the Civil War, n20 from the moment of his inauguration, was committed to a diplomatic resolution. n21 McKinley applied himself assiduously to preventing war, using his diplomatic skills, experience and knowledge of Congress to maneuver a compromise. n22

However, events overtook McKinley's appeals for temperance. First, the U.S. press, then with a strong jingoistic bias, n23 reported verbatim the indiscreet and disdainful comments of the principal Spanish diplomat negotiating with McKinley, Dupuy de Lome. n24 He ridiculed McKinley and bragged that the Spanish would eventually get the better of him. Americans were enraged, McKinley was embarrassed, and de Lome was recalled during a crucial time in the negotiations. n25 Then, riots broke out in Havana and American citizens residing there asked the U.S. embassy for protection from what was depicted as rampant lawlessness. n26 With the consent of Spain, McKinley sent the U.S.S Maine to Havana. n27 This ship mysteriously was sunk barely a few days after arriving, and it gave the war its motto, "Remember the Maine." n28

If the Spanish American War had been limited to these events, this war would be only an interesting interlude in United States history. It would exemplify two things. First, as described above, how events can overtake players committed to a peaceful resolution of conflict. Second, how a once-powerful nation, Spain, permitted itself to be drawn into an armed conflict knowing that it might well be "el gran desastre" (the great disaster). n29 Spain was in no position to fight this War, yet pride, the desire to hold onto the glory of the past, and civic unrest at home drove Spain into this effort. n30 Spain's military arsenal was antiquated, its military forces stretched thin after centuries of defending an empire that spanned the globe. n31 By contrast, the United States, in spite of being at the beginning of the recovery of the Nation's second worst depression, the 1893 bust, had recently expanded and modernized its Navy. n32

Rather, this War is significant because of its consequences. The Treaty of Paris of 1898 best crystallizes this. The Treaty signed by Spain and the United States on December 10, 1898, and approved by the U.S. Senate in March 17, 1899, n33 took one month longer to negotiate than the War took to fight. n34 The approval of the Treaty was tenaciously fought in the United States by a coalition of anti-imperialists, Republican traditionalists and Democrats. n35 The victory in the Senate was in doubt even on the date of the roll call. The Treaty passed by only two votes cast by Senators who changed their mind that very day--thanks to McKinley's arm-twisting. n36

The Treaty was many things at once. First, it was a document ending the war. As such, it outlined the spoils the United States would claim as indemnity. From the beginning of the negotiation, the United States declared Puerto Rico its own as a "war indemnity." n37 Cuba was not available since the United States had committed itself to Cuba's independence. n38

Second, the Treaty was a document of expansion. Under the Treaty, the United States would become sovereign over territories spanning half the globe. Spain ceded the Philippines, Guam, and Puerto Rico and transferred "occupation" of Cuba to the United States. n39

Third, this was a political document. McKinley calculated just how far he could go in breaking with traditional U.S. isolationism, as he and the US peace commission negotiated the Treaty. n40 The peace
commissioners were a political coalition, reflecting the conflicting views of the Senate, and included moderates, isolationists and expansionists. n41 The process of negotiation, which included feedback from the commissioners, internal Cabinet discussions, negotiations with Congressional leaders, and the citizen feedback McKinley received from his fall speaking tour in the Midwest influenced his stance on expansionism. n42 Towards the [^929] end of the negotiations, McKinley had determined to aggressively seek U.S. possession of the Philippines, as well as the smaller Pacific Islands and Puerto Rico. n43

Most importantly, the Treaty redefined the democratic polity and de jure U.S. citizenship in racial and cultural terms. While the United States desired to hold on to lands spanning half the globe, no political leader--neither annexionist nor the antiimperialist--envisioned that the racially and culturally foreign peoples who inhabited the ceded nations, Filipinos, Guamanians, and Puerto Ricans, would one day join the American body politic as full and equal citizens. At best, some saw a long period of tutelage at the end of which these peoples would be ready for democratic self-governance. n44 This was a radical departure from earlier expansionist ventures. In the earlier Treaty of Guadalupe Hidalgo, executed at the conclusion of the U.S.-Mexico War of 1848, Mexican citizens, who had resided in the ceded territories--now the American Southwest, California, and Colorado--could elect to become American citizens. The Treaty of Guadalupe Hidalgo guaranteed that Mexicans who remained on ceded lands would have full de jure citizenship rights as Americans. n45 By contrast, the Treaty of Paris makes no such provision. Instead, the Treaty of Paris provided that the Spanish citizens of the ceded territories who elected to remain in the territories following the cession to the United States would have only such civil rights as Congress would determine. n46

This was a purposeful departure from earlier treaty commitments, n47 and it can be understood as the United States' first step to colonialism [^930] and empire. While in the case of the Treaty of Guadalupe Hidalgo, LatCrit theorists and American historians have shown that subsequent interpretations of this treaty's citizenship provisions and its implementing legislation vastly undermined the rights of ex-Mexican citizens, n48 in the Treaty of Paris, there was no pretense that the United States would grant citizenship rights and privileges to these foreign peoples equivalent to those then held by white men.

The choices were well understood by politicians and the public. There were three possibilities that were proposed and debated. First, as proposed by the anti-imperialists, the United States could forego annexation. n49 Second, as proposed by various senators, as well as William Jennings Bryan, McKinley's presidential opponent in the elections of 1896 and 1900, the United States could annex these nations, and pre-commit to their independence. n50 Third, as provided by the Treaty of Paris, the United States could annex these nations, and expand its borders. n51 However, this path would mean that these foreign peoples were to be [^931] relegated to outsider status--neither part of the U.S. polity, nor free to follow their own national destiny.

Only the first option would have been consistent with the Americans' civic democratic traditions and their civic principles. The second option would not have expressly broken with America's civic commitment to consent of the governed or departed from its anti-colonial traditions. The United States chose the third option, which broke de jure and expressly with its prior democratic precedents and civic rhetoric in the Declaration of Independence that all men possessed an "inalienable right" to self-rule. n52

During the key period of 1899 to 1900, no clear consensus arose on what path would be appropriate. The United States, nonetheless, embarked on a colonialist path, choosing to annex lands and rule over peoples that had not consented to its rule. Filipinos had clearly expressed their desire for nationhood, and took up arms against the United States on the eve of the vote on the Treaty of Paris when it became clear that the United States had no intent of honoring Filipino independence. n53 As for Puerto Ricans, no plebiscite was ever conducted as to whether Puerto Rico consented to be governed by the United States. Instead, the United States relied on Puerto Ricans' acclamation and support of General Miles's invasion army. n54 That support was precipitated by Miles's promise to bring to Puerto Ricans "protection, not only to yourselves but to your property, . . . prosperity, and . . . the immunities and blessings of the [^932] liberal institution of our government." n55 The revolutionary movement was split over the wisdom of aligning Puerto Rico's nationalist's ambitions with the United States. n56 Some desired to remain part of Spain under the Autonomous Charter of 1898, which gave Puerto Rico greater rights of self determination and representation. n57 While others, like journalist Luis Munoz Rivera, who would eventually create the party supporting the current Commonwealth status, saw the path to eventual independence in an association with the United States. n58

The Spanish American War also triggered the annexation of Hawaii. In July 1898, as the War was being fought, the United States annexed the newly
formed Republic of Hawaii, n59 a state formed by the coup d'etat of White planters against the traditional monarchy of the Hawaiian Kingdom. n60 Only five years earlier, President Grover Cleveland had withdrawn [*933] a treaty of annexation because he believed that "the overthrow," "revolt" and other "remarkable features of the transaction" should be strongly condemned. n61 Nevertheless, McKinley's Republican platform called for annexation, but the treaty stalled in the Senate. n62 With the Spanish American War, McKinley lobbied for annexation as necessary for the war effort.

As a result of these events, the United States became master of half the globe, acquiring sovereignty over the Philippines, Guam, Hawaii, Puerto Rico, and Cuba and subjecting to its control more than nine million dark skinned peoples of other cultures and races--Malays, Hawaiians, Puerto Ricans, and Cubans. n63 In addition, the United States ousted the last significant European presence from the American hemisphere three quarters of a century after the declaration of the Monroe doctrine.

II. Spanish American War Lives On

The repercussions of this "Splendid Little War" continue to influence the development of countries which were and are ruled under American style colonialism, and U.S. foreign relations with Latin American and Pacific countries, have been forever altered due to the influence of this war.

A. Puerto Rico and Guam.

Currently, Puerto Rico and Guam continue to be de jure US territories, existing civically outside the U.S. body politic as "unincorporated territories." This term, which seems to be an oxymoron, was invented by the U.S. Supreme Court in a series of opinions known as the Insular [*934] Cases, n64 the first decided three years following the Spanish American War. In the Insular Cases, the Court attempted to define the status of the insular territories as political jurisdictions co-existing within the federal union. To be an "unincorporated territory," the Court declared, was to be "subject to U.S. sovereignty," but at the same time, be "foreign in a domestic sense." n65

The repercussions of this ruling are great. n66 As prominent Puerto Rican jurists and LatCrit theorists, Ediberto Roman, Efren Rivera Ramos, Pedro Malavet, and Carlos Venator Santiago have argued, this de jure location outside the polity accounts for these citizens' second-class, "subordinated" citizenship. n67 From the perspective of representative democracy, de jure standing as outsiders means that Puerto Ricans, Samoans, and Guamanians are not entitled to representation in Congress. n68 [*935] Neither do they vote in the election of the President. n69 Rather, as "unincorporated territories," the insular territories are subject to the plenary power of Congress, as well as exempt from the protections of the Uniformity Clause which requires that all states be treated the same. n70 This has two repercussions. First, U.S. citizens residing in Puerto Rico and Guam are entitled to only those social benefits that Congress deems adequate, which may be less or more than benefits given to citizens of other states. n71 Thus, citizens of Puerto Rico, Guam, and Samoa always have received less in food stamps, welfare, and social security, and the protections of the Federal minimum wage have also been restricted. n72 Also, because the Uniformity Clause does not apply, these territories have been subject to special customs and tariff treatment. n73 With few exceptions this singular treatment has reflected the interests of the states, which are represented in Congress, rather than those of the insular territories. n74 [*936]

Second, U.S. citizenship of those born in the territories is something less than the citizenship of those born in the states. A 1997 House Report took the novel, but reasoned, position that the U.S. citizenship of those born in unincorporated territories can be revoked by Congress at any time because it is a "statutory citizenship" and subject to the will of Congress. n75 Supreme Court case law has been highly deferential to Congressional exercises of plenary power under the territorial clause. n76 Thus, the position taken by the House Report, although at present no other branch of government has followed it, could very well become the official view of the U.S. government in the future.

Finally, under the Insular Cases, the constitutional protections of residents of Puerto Rico, Guam and Samoa are subject to ad hoc constructions by the judiciary. Under the Insular Cases, the U.S. Constitution applies to unincorporated territories; however, insular citizens are entitled to only those rights that U.S. courts deem to be "fundamental." n77 Although the Court in modern times has determined that these "fundamental" rights are largely coterminous with constitutional rights under the Fifth and Fourteenth Amendments, n78 this doctrine supports potential carve outs of basic constitutional rights on the basis of insular territorial residence anytime a majority of the Court would so determine.

B. Hawaii.

The annexation of Hawaii denied native Hawaiians their right to self-determination. As Rice v. Cayetano n79 illustrates, the United States constitutional system, as interpreted by the Rehnquist Court, does not accommodate group rights of peoples whose country
was effectively "stolen." [*937] Consequently, native Hawaiians, Hawaiians, and Congress are struggling to fit this "square peg" (native Hawaiian self-determination) into a round hole (the Federal system). Making complete restitution to native Hawaiians would turn modern Hawaii upside down. New economics would rule. Property rights to the most expensive and desirable resort properties would revert back to native Hawaiians. New laws, particularly land use rules, would have to be reconceived. Yet for most Hawaiians, the continuing disenfranchisement and neglect of native Hawaiians should be resolved. n80

C. The Philippines.

Filipinos' aspirations towards self-government would not be honored either by the Treaty of Paris or the United States' subsequent colonial administration of the Philippines. n81 The U.S.-Filipino war, which broke out on the eve of the approval of the Treaty of Paris, was bloody and cruel and would eventually be recorded as among the most brutal and ruthless wars that the United States has ever waged. n82

The American colonial rule would extend past World War II. n83 Filipinos were never U.S. citizens but instead were U.S. "nationals," clearly existing outside the polity in a state of tutelage towards their independence. n84 However, U.S. tutelage failed to result in a self-sustaining economy and healthy civic governance. Instead, U.S. colonial administration formed the foundation for hierarchical local governance. Anglo-assimilated elites and American expatriates ruled in colonial governance, and economic decision making tended to benefit American companies' interests, not the lower classes who needed to rely on a strong local economy. n85 For some, this legacy accounts for the Marcos dictatorship, today's ongoing guerrilla warfare, and the diaspora of Filipino workers who emigrate to find adequate work. n86 [*938]

D. Cuba.

As established by the Treaty of Paris, from 1898 until 1934, Cuba was under U.S. "tutelage"--neither independent nor a colony, but in transition towards independence. Under U.S. tutelage, instead of leading to a robust democratic tradition and a self-sustaining economy, Cuba became what some have called a "dependent nation." n87 As in the case of the Philippines, American tutelage and American style capitalism fostered lopsided distributions of wealth, creating a millionaire class who owned sugar plantations and rum manufacturing, while a worker class suffered under the back breaking work of sugar cultivation. n88 Today, economically, Cuba continues to be a single crop economy, and its current economic woes can be traced to this dependency. n89 Civically, Cuba became a dependent nation under the Platt Amendment, n90 which conditioned Cuban independence because the U.S. reserved to itself the right of intervention if contrary to U.S. interest. n91 But U.S. influence in Cuba's internal affairs has been more far reaching than anything the Platt Amendment could have wrought. After Cuban independence, the U.S. supported the Batista dictatorship, reasoning that his governance was stable and not contrary to U.S. interests which included U.S. capital, mainly U.S. sugar. n92 Many argue that the Spanish American War, since it led to U.S. foreign policy that supported the excesses of the Batista regime, including his neglect of Cuban workers' welfare, was the necessary precursor to the Castro revolution. n93 [*939]

E. U.S. Foreign Relations in Latin America.

In addition, Robert Beisner, David Healy, and Michael Hunt have argued that the United States foreign policy in Latin America has been heavily influenced by the U.S.-Spanish War. n94 It has encouraged the United States to look at Latin American sovereignty as subject to what the United States deems to be in its best interests. Thus, the United States has intervened, sometimes recklessly, in the internal democratic governance of these countries. n95

III. History and LatCrit Enterprise

Clearly, the Spanish American War is highly relevant to the LatCrit enterprise. This relevance is not simply limited to current effects described in Part I, but as well the detailed study of history can yield important insights into how race operates in society and law.

A LatCrit and CRT theorist has at her disposal an analytical arsenal that includes how race operates as a psychological framework (cognitive), n96 how privileged knowledges and the practices of institutions can marginalize minorities' ways of knowing and being (structural and poststructural), n97 how ideology "normalizes" racial attitudes (sociology and cultural studies), n98 and how race becomes a mode of class stratification and class conflict (Marxist or Neo-Marxist analysis). n99 As the [*940] contributions to this LatCrit Symposium demonstrate, in LatCrit, as is true of CRT, no single theoretical framework dominates or preempts. Rather, the many approaches that theorists apply to analyze race co-exist and complement each other.

The analysis of history is another valuable approach to the study of race. As the recent Race and Races casebook by Professors Juan Perea, Richard Delgado, Angela Harris, and Stephanie Wildman explains, history can be "essential in understanding the situations faced by minority groups today." n100 As
this and other projects show, n101 history describes the evolution of a racial group's standing in American society today--how it came to be that a particular group did not successfully "melt" into the melting pot that is American culture today and remained distinctly a racial other.

As well, history is an important tool in retrieving, critiquing, and understanding law. Law is a backward looking discipline because legal rules are anchored to precedent. The legal process disciplines lawyers by demanding that they justify any departures from past rules. n102 By looking at history, lawyers can better understand the origin of rules and determine whether precedent should continue to be followed. Rules can lose their "common sense;" their origins may be long forgotten and reflect values and attitudes that are very different from those which are part of the present. n103 Archival recovery of legal rules' origins is important to CRT and LatCrit theorists, because much of this critique is centered in uncovering the racial origins of precedent, and making present day arguments as to why these rules should be changed.

n104 [*941]

For example, former Chief Justice of the Puerto Rico Supreme Court, Jose Trias Monge, as well as Circuit Judges Juan Torruella and Jose Cabranes have forcefully critiqued the doctrines that construct Puerto Rico's de jure second-class citizenship. n105 Professor Efren Rivera Ramos adds to the literature by carefully tracing the influence of ideology of expansionism and Anglocentrism in the development of the Insular Cases. n106 Professor Ediberto Roman's work links the second class citizenship status of Puerto Rico over the last one hundred years to racial and Anglocentric views. n107 He attributes "Congress's nativist and xenophobic fears" and "historical obsession with remaining Anglo and with social Darwinism" as central to the development, through legislation and case law, of Puerto Rico's present de jure second class status. n108 Professor Juan Perea argues that racial views toward dark skinned, non Anglo Saxon races were a key component in the "racial conquest" of the Southwest under the US-Mexico War of 1848 and the Spanish American War. n109 Professor Perea helps the reader focus on how racial ideas have had a key role in America's geographical expansion and how law and legal instruments, such as the Treaty of Paris and the Insular Cases, legitimized this "racial conquest." n110

These works make important contributions because they establish how racial attitudes impacted upon past precedent and how they continue to affect current policies and laws. Subsequent formalist applications of precedent create as, Efren Rivera Ramos notes, a socio-historical reality that legitimizes, reifies and sustains Puerto Rico's outsider status. n111 Associate [*942] Dean Kevin Johnson notes that work focusing on Puerto Rican's racialization experiences, both current and historical, is a much needed component of the LatCrit enterprise. n112

IV. What LatCrit Can Contribute to Historiography of the Spanish American War

LatCrit's overall project of taking a "stance against subordination" n113 contains a historical component. For postcolonial theorist Gayatri Spivak, a commitment to anti-subordination involves recovering "silenced" historical narratives, "not to recover a lost consciousness, but to see . . . our view of history which is a very different view. . . . We see the way in which narratives compete with each other, which one rises, which one falls, who is silent, and the itinerary of the silencing rather than the retrieval." n114

As discussed in Part II, the Spanish-American War continues to have a great impact on the peoples of the Philippines, Guam, Hawaii, Puerto Rico and Cuba. Yet, American historiography has not paid enough attention to how the Spanish American War altered the nationalist trajectory of Puerto Ricans, native Hawaiians, Guamanians, and Filipinos and instead, recast them into subordinated civic positions. LatCrit's predisposition to look at historical events from an anti-subordination lens means that LatCrit scholars intuitively bring to this enterprise skepticism and an outsider's perspective. LatCrit theorists' initial instinct is to ask those very questions that American historians have not asked with sufficient frequency and to look at those sources, for example, the archives of the "losers," that American historians may not have sufficiently used.

A LatCrit theorist would ask the hard questions that probe into how the dynamics of race and subordination affected the established events of the Spanish American War. Why did the United States not recognize the Cuban and Filipino revolutionary governments from the inception of the Spanish American War--a war fought purportedly to support democracy in Cuba? How did the McKinley administration get away with this politically, when prior to the War, the Cuban independence movement had enjoyed wide support in Congress? Why did the U.S. forces invade Puerto Rico at a moment when the Spanish American War was practically won and when the Congressional declaration of war clearly stated that the U.S. was intervening on behalf of Cuban independence fighters? Why did the Treaty of Paris--a document negotiated for a longer period than the war was fought--not provide for full citizenship rights of the people of the conquered territories? Such questions examine the Spanish American War with a latter day
LatCrit theorists have begun to answer these questions. For example, Carlos Venator Santiago analyzes the construction of Puerto Rican "race" through the civic de jure regimes imposed by the United States in the early stages of colonial administration, as well as under Puerto Rico's local legislative acts. He asks how did the Foraker Act, Jones Act, and local legislative enactments from 1900 to 1917 construct race for Puerto Ricans, and how, in turn, did these concepts of race affect de jure constructions of citizenship. In the longer work on which this essay is based, my co-author and I assess to what extent racial attitudes impact the key decisions made during the Spanish American War and attempt to answer some of the questions posed above. We also focus on legal actions and the role that these played in fixing a de jure second class racial citizenship in what had been a closely disputed and deeply divisive civic debate.

Work such as this revisits historical events and reinterprets historical documents. Some might argue that this work is repetitive, echoing Louis Perez's historiographical critique. However, LatCrit work examines the historical evidence from a different interpretive pose, focusing on the historical development of racial formation and racial and cultural subordination. This is a new effort, which is being paralleled within American historical research and by Puerto Rican jurists and researchers. This traces the development of and transitions in national identity, culture, and race. Although work has begun, much remains to be done. Thus, LatCrit theorists could contribute "a great deal" to this effect.

V. What the Study of the Spanish American War Can Contribute to LatCrit

The process of research is not a one-way relationship; rather, it is a mutual relationship. The researcher changes as she begins to understand her own history, or she may find empathy as she begins to understand the narrative of what had previously been an "other." Accordingly, the study of the Spanish American War can contribute to the LatCrit project, as discussed below in Part V.A, by helping to build a solid base for coalitions within different LatCrit communities, and in Part V.B, by developing a better understanding of the ideological and racial subordination that impacts upon LatCrit communities.

A. Spanish American War Historiography and Interracial Coalition Building

LatCrit theorists, like other Americans, have absorbed traditional retellings of American history. However, in order to understand those at the "bottom of the well," LatCrit theorists must transcend the "American" part of their hyphenated identities. To understand this period is to know why this period remains traumatic and part of the present for Cubans, Cuban Americans, Puerto Ricans, Filipinos, Guamanians, and native Hawaiians and haunts Latin American sovereignty. For these peoples, the Spanish American War is not a footnote but remains a crucial turning point in their national histories. As LatCrit scholars, we need to understand the emotion and continuing impact that the cry of Jose Marti, "Patria o Muerte" (Country or Death), Cuba's nationalist poet and revolutionary martyr, continues to bring to the breast of Cubans and Cuban Americans, and why native Hawaiians continue to chant the prayer of Queen Lili'uokalani, the last reigning monarch of the Kingdom of Hawaii.

Psychologists have begun to understand that knowledge is both affective and intellectual. In studying the many single events that make up this key period, LatCrit scholars can begin to know "subordination" with a kind of personal knowledge that transcends the intellectual and emotional, can true interracial alliances be formed.

B. The Spanish American War as a Centering Axis for LatCrit Analyses

Latin American post-colonial theorist, Walter Mignolo makes the strongest case possible for the significance of the Spanish American War when he asserts that this war is the lynchpin to understanding the racialization of Latinos/as in the United States, and U.S. relations with Latin America. The Anglocentric, Protestant framework that McKinley and other politicians developed to justify and rationalize the Spanish American War reconfigured the "world imaginary," according to Walter Mignolo. What were Hispanic and Catholic went from being powerful and quintessentially modern to being powerless, backward, and the colonized.
McKinley's Protestant "civilizing mission" towards the people of the Caribbean and the Pacific, which required teaching them the rubrics of democratic self-governance and, to a great extent, Protestantism. n129 displaced the Sixteenth Century's Spanish Catholic Kings' encomienda to Catholocize the New World. n130 Mignolo argues that this ideology produced by the Spanish American War now shapes the "historicostructural dependency" of "coloniality of power," which continues to influence events in the United States, Latin America and the world. n131 "Coloniality of power" in today's world implies the hegemony of Anglocentrism in which new "dominated populations, in their assigned identities, are subjected to Anglocentric hegemony as a way of knowing." n132 This Anglocentric historicostructural legacy organizes the modern versus [*946] the colonial. n133 This binary implies that an Anglocentric way of knowing distinguishes between what is modern and colonial, what needs to be modernized and what has already reached this plateau of development, and what is valuable and what is not. This logic of modernity influences modern global economic organization. n134

Historians generally agree that the Spanish American War provided a new value system for a more modern United States, one that progressed from parochial interests to a global power. n135 The Spanish American War, if one has not yet grown tired of the term, marks an internal paradigmatic shift as well. n136 As cultural historians and the longer work on which this essay is based argue, the Spanish American War reconstituted the collective self as powerful, superior, and virtuous. n137 Pride in being American translated into notions of superiority over a badly defeated Spain; McKinley's appeal to "duty and obligation" meant providing "help" to the new tropical peoples only available through American largesse and genius. n138 In The War with Spain, Henry Cabot Lodge, the paradigmatic Anglo Saxonist, sums up a new sense of self and nationhood: "Then the war note rang through the land, and, with dazzled eyes at first, and then with ever clearer and steadier gaze, they saw that in the years of isolation and self-absorption they had built up a great world power..." n139

Suddenly the awakening to the great fact that they had founded an empire..." n139

Furthermore, this evolution of superior self-identity took place at a time when racial constructs were in flux and Whiteness was under pressure. In post-reconstruction, Black Americans failed to find racial equality. Rather, Whites had tired of the difficult task of eliminating caste, and they acquiesced, albeit sometimes uncomfortably, to new modes of class and racial subordination and stratification, which were particularly severe in the South. n140 Cultural ideas about race increasingly crept into how Whiteness was constructed. The backlash against massive immigration of European ethnics played into White Anglo Saxonist prejudices, which were now framed against a White relational other-European ethnic immigrants. n141 Those who were firmly White and American were those who could claim old English and Anglo Saxon stock. The White ethnic others were the Irish, racialized as ape-like, drunken and unruly, n142 the Jews with racial traits of "vulgar ostentation," n143 and the Slavs, half-Asian and half-Caucasian, who were the dupes of unscrupulous labor contracts that undermined American wages. n144 Yet, in relation to Blacks and Indians, these ethnic groups were White enough. n145

Not surprisingly, the new national self-identity and world order constructed after the Spanish America War came to be measured against the "tropical peoples" of the new insular territories, another racial "other." As the United States wrestled with the significance of annexing so large [*948] a geographical territory filled with nine million foreign peoples, new racial thinking began to take shape, made more palatable and transparent by President McKinley's presidential rhetoric. McKinley argued that retaining control of the Philippines was a duty, and only this alternative would avoid a bloody civil war. n146 "Obligations" to a "higher and nobler civilization" n147 made it necessary for the United States to annex the Philippines and Puerto Rico, in spite of these country's nationalist ambitions, and maintain them under tutelage until they had sufficiently learned the ways of American democracy. n148 Under McKinley's rendition of the "White Man's Burden," n149 the Nation, civically privileged and responsible for ensuring the triumph of "civilized" (Anglocentric) norms, was following the mandates of Providence n150 and obeying Christian-like obligations to the civilized world. This rhetoric made it possible to argue that this imperialist experiment was not in the pursuit of commercial ambitions n151 or a response to racial attitudes towards those widely regarded as "barbarians." n152 Nonetheless, McKinley's "benevolent assimilation" imports [*949] racial attitudes, because only if these "wards" were racially and culturally lesser peoples would it be logical for the United States to tutor the theretofore unknown, but racially different.

As literary critic Eric Cheyfitz observes, the colonizer writes the script in non-racial terms, n153 and, in this case, "the civilized teach the non-civilized." Nonetheless, this script carries racial effects, "White Anglo Saxons teach the dark skinned barbarians." The racial script is unstated; nevertheless, the spoken text is loaded with racial subtext. The public rhetorical
Part VI.A posits that the LatCrit enterprise is culturally and racially positioned in much the same way that Part IV argued that American historiography on the Spanish American War is culturally and racially positioned. Part VI.B addresses the question of how LatCrit theorists should address the problem of the positioned analyst. [*951]

A. The LatCrit Analyst as a "Positioned" Researcher

The LatCrit analyst, like the traditionally minded historian, is a positioned subject in the manner that Rosaldo and Geertz describe, because, first, she is positioned within the field as a race theorist, and second, the approach of her discipline, the law, also influences her analysis of historical events.

1. Field Positionality: LatCrit is Culturally and Racially Positioned

LatCrit, as well as Critical Race Theory, is "positioned" n163 within the legal field. These jurisprudential approaches analyze legal issues by focusing on how racial dynamics function in legal contexts. n164 For example, in the study of the Spanish American War, LatCrit analyst could be said to choose a theory of racial formation as the theoretical framework that she believes best explains these historical events. n165 Historical facts are then interpreted through a "race" lens. These culled historical facts are used to "prove" the initial premise that some form of racial framework shaped the subsequent events related to the Spanish American War. The analyst links seemingly unrelated events, and this linking shows the systemic existence of the racial formation framework. As justified in Race and Races, by organizing "seemingly unrelated law" and historical events around a racial premise, they "come together." n166 The results of such analysis are linear, continuous, and coherent.

This exercise can be said to be circular, because the analyst, as anthropologist Renato Rosaldo describes, comes to the subject with her own cultural perspective, through which she filters what she observes and evaluates. n167 The work of sociologist Pierre Bourdieu, a cultural sociologist, also emphasizes that the researcher can distort social scientific work because the researcher may project either "animosity" or "enchantment" to her understandings of how a discipline functions. n168 [*952]

Sometimes the interest of the researcher manifests itself by selective presentation of historical facts and events in a way that best "proves" a thesis. History then becomes straightforward. Such critique could be leveled at an interpretation, such as that of Professor Juan Perea, that racial attitudes toward dark skinned others underlie the "racial conquest" of the U.S.-
Mexico War and the Spanish American War. n169 Similarly, it could also be said, to apply Professor Roman's emphasis on Anglocentrism as the central motivation in a century of doctrinal development and legislative enactments that have led to Puerto Rico's present de jure second-class status. n170 As well, Professor Rivera Ramos' explanation that the "ideology of expansion" was the primary influence in the Insular Cases n171 could be said to focus on only one of the many ongoing dynamics changing American attitudes towards the rest of the world.

Such work is very much what LatCrit encourages and builds upon, because LatCrit, like CRT, endeavors to reveal how seemingly neutral laws and political acts embody racial bias. n172 For readers who cannot see racial privilege because it operates in transparent ways or do not believe that racism exists because it is located in the past, such an approach can make it possible "to make ... connections among race, history, and legal doctrine." n173 This is because American culture is itself "positioned," as anthropologists Rosaldo and Geertz emphasize. n174 In particular, American culture contains a quality that analysts capture under the rubric of cultural ideology. n175 This dynamic permits those living within this culture to ignore, or minimize, the racial injustices of the past, while preserving the myth that the positive and self-affirming qualities, like fairness, merit, and exceptionality are intrinsic to American culture and have always dominated. n176 In spite of collective amnesia or repudiation of past racial politics, past ideologies live in the present, because cultural ideology has "a life of its own." n177 Yet, as historian Michael Hunt observes, "race powerfully shaped the way the nation dealt with other peoples by its grip on the thinking of the men who debated and determined policy, by its influence over the press, and by its hold on the electorate." n178

Nonetheless, practitioners of LatCrit, like their counterparts in CRT, must recognize that their fields stake a position. CRT and LatCrit stake an approach that is culturally and racially positioned, which I will refer to as field positionality. Admittedly there is great variation in how individual practitioners understand and apply CRT and LatCrit. n179 Nonetheless, there is a commonality. First, these are fields of cultural critique, because at the center of this work is an ongoing effort to show how mainstream cultural norms maintain racial inequality. Second, these fields share a commitment to viewing the world through a racial lens in order to uncover how laws are racially unjust. n180 As Bourdieu notes, all systemic theoretical frameworks within a discipline imply a viewpoint, even if "the intention is abolishing one's viewpoint," n181 and even if they claim their approach furthers social justice.

2. Disciplinary Positionality: Law's Troubled Relationship with History

A second set of perspective issues, which I refer to as "disciplinary positionality," affects LatCrit work, as well. This is the perspective that legal scholars in general bring to historical work.

The vast majority of legal scholars who "do" history are not trained as historians. For this reason, Judge Richard Posner is openly skeptical of whether judges and legal scholars can perform competent historical-legal analysis. n182 Posner advises that history not be used to inform legal analysis unless a historical fact is uncontroversial in the historical field. n183 Further, Posner believes that the use of history is dangerous, because it encourages judges and scholars to duck difficult questions by referring to some questionable historical explanation. n184 Professor Mark Tushnet and Judge Harry Edwards view attempts by legal analysts to "do" history as typically arrogant, and more notable for the slip-shod nature of the effort than for its scholarly merit. n185

With notable exceptions, it is generally true that legal scholars do not "do" history, rather they use it for their own purposes. Chief Justice Warren famously observed that "we, of course, venerate the past, but our focus is on the problems of the day and the future as far as we can foresee it." n186 By contrast, the ideal within the discipline of history is to ascertain the past as best as possible, without injecting "presentist" values or perspective. n187 The task is to provide as accurate a rendition of past events as is possible. Historians pride themselves in allowing the data to speak to the analyst. Historians "do" history by inductive reasoning, examining individual documents, deciphering the why of individual events, plowing through key debates, and piecing events into a coherent policy. This is what constitutional legal scholar Bruce Ackerman has described as a "no nonsense, original source" style. n188

The positive of this painstaking approach is that, first, the "proof" of a conclusion is being laid out as the historian works through the material; and second, that the material itself yields nuances and leads to avenues of investigation previously unforeseen. Only after examining voluminous data do historians move on to construct a thesis, or more encompassing observations.

The negative of this approach is that too many disjointed facts may not yield an overarching thesis that is coherent. n189 The New York Times has recently reported that historians are increasingly recognizing that sweeping synthesis and elegant narratives by historians are rare today. n190 Posner
argues that focus on the past may yield perspectives that are overly tied to the past. They may either no longer be relevant to present day concerns or overly glorify a past that robs present day actors of the ability to move beyond old conflicts and hurts to address constructively present day problems. n191

On the other hand, legal scholars' methods are not as careful as historians' methods. As already intimated, many legal scholars "do" history by "picking and choosing" historical data and historiographical analysis that is best suited for his or her "present day viewpoint." There are notable exceptions, as for example, Professor Michael McConnell's historical work on the Fourteenth Amendment that leads him to conclude that Brown v. Board of Education was rightly decided based on the history of the enactment of the Fourteenth Amendment. n192 Further, legal scholars, may take shortcuts in their historical research. There are few incentives for legal scholars who "do" history to "get their hands dirty" by dipping into the archives themselves. Secondary sources are widely used. The reasons are twofold. First, this is accepted within the legal academic discipline. Second, this may well be necessary. Primary research tends to be time consuming. Given the ongoing "publish or perish" pressures of modern academia, the use of secondary sources expedites publication.

This combination of presentist agenda and short cut historical methods can be an explosive mix. As historian and legal analyst Laura Kalman notes, legal scholars can "appropriate historians for advocacy purposes, permitting the present to overwhelm the past." n193 It has even been argued that legal scholars (or courts) are just plain wrong on their historical facts. Worse, the lack of peer-edited journals in law means that a legal [*956] scholar can always publish a well-written article, even if it is based on "history" that is rubbish.

B. Addressing the Conundrum of Positionality

How to respond to these issues? Should legal scholars abandon history? Part III made the case that understanding history is an important part of the LatCrit project. This Part takes the position that the answer is to understand the critiques and readjust approaches to historical work, just as American historians have used internal critiques to reassess their approaches to the analysis of the Spanish American War. Part VI.B.1 addresses the issues of what I have called field positionality, and Part VI.B.2 addresses disciplinary positionality. Part VI.B.1 takes the position that the LatCrit researcher should, first, be self aware of her perspective and undertake self-scrutiny to raise her awareness of her perspective, assumptions, as well as interests in undertaking research. Part VI.B.2 argues that the researcher should also ground her work by using traditional historical methods, such as archival research. A LatCrit researcher's conclusions should not only be persuasive, she should also be able to conclude that her interpretation is both fair and reasonable.

1. Addressing Field Positionality: The Struggle for Objectivity

The racial and cultural positionality of LatCrit and other similar approaches was described in Part VI.A.1 as a position of cultural critique. Academic traditionalists have reacted by arguing that such critiques destabilize the practices that traditional scholars have customarily used to measure academic product, what is "truth" and what is "good" in scholarship. For example, David Harlan in The Degradation of History laments the impact of postmodern thought on historical practice. n194 Harlan asks, "What now becomes of the 'historical fact' . . . ?" n195 Harlem states that "the overwhelming abundance of possible contexts and perspectives, the ease with which we can skip from one to another, and the lack of any overarching meta-perspective from which to evaluate the entire coagulated but wildly proliferating population of perspectives--all this means that the historical fact, once the historian's basic atomic unit, has jumped its orbit and can now be interpreted in any number of contexts, from a virtually unlimited range of perspectives." n196 He concludes that this kind of questioning eliminates any "hope of acquiring stable, reliable, objective interpretations of the past." n197

Within the legal academe, Professors Farber and Sherry echo this view. In Beyond All Reason, they argue that CRT only seeks to [*957] "expose" racial "pathologies." n198 They accuse CRT theorists of refusing to reason because they view "reason as a political entity" designed to enshrine racism, sexism, and homophobia. n199 Farber and Sherry also charge that critical theorists believe that justice is merely a "rhetorical device." n200 They question critical scholars' commitment to academic values, claiming that these "radicals . . . have relatively little interest in the nuances of philosophical theories," are "sloppy scholars" and are "paranoid in style and rigid." n201

What is at play here is a fundamental schism. It is what Thomas Kuhn describes as an irresolvable paradigm gap. n202 John Rawls calls this "diversity of reasonable comprehensive . . . doctrines that . . . is a permanent feature of the public culture of democracy." n203 Although Rawls and Kuhn come to this kind of problem from very different perspectives and disciplines, both respond to this problem by recommending that engagement continue between perspectives. n204
Engagement, however, cannot occur without self-awareness. Bourdieu calls this process the struggle for objectivity. Self-awareness, for Bourdieu, means as well that the social researcher must understand her social motivations and interests that are involved in her intellectual practice. He observes that academics, as producers of cultural knowledge, have an interest in what kind of knowledge is produced. That interest may be a larger group interest, such as, for example, a leftist political agenda, or it could be personal, such as a researcher's personal desire for status within her profession.

The process of self-criticism, then, first entails asking questions that uncover what, if any, are the underlying interests of the researcher. She should ask: Why is she undertaking this study? How does this study affect me? Does this study enhance my status? By understanding if we ourselves are invested in an outcome, we can begin to obtain the objectivity necessary to uncover "true" social facts.

The second step for the LatCrit analyst is to be self-conscious of the assumptions brought to the research. Rosaldo writes that the researcher constantly must consider her position and the subject's, never losing sight of the dynamics of relative dominance and subordination. For historian Peter Novick, the analyst must recognize the social, political, cultural, and professional context of the past as well as the present. Legal feminists and postmodernists have framed this dilemma in terms of an analyst accepting that her viewpoint and assumptions may not be the "truth."

Starting with a higher awareness of unstated assumptions and that one's working theoretical premises are subject to contest engrains higher self-skepticism that produces more care in the reasoning process. If the researcher constantly keeps in mind that her own positions are contestable, the analyst will spend more effort in substantiating and justifying her own positions, findings, and conclusions. In another context, I have advocated a form of reasoning based on John Rawls' concept of "reciprocity" in which actors, who understand that their position may not be the absolute truth and is contestable, reason with each other according to an ethic that justifies "their actions by giving reasons that the other will understand and reasonably accept." Reciprocity means participants "hold each other in enough regard that each would justify their actions by giving reasons that the other will understand and reasonably accept." As applied to scholarly research, this method requires the researcher to ask whether her conclusions "make sense" from opposite perspectives. The researcher would ask if someone else could reasonably accept her position and assumptions, even if that person does not share the researcher's views or assumptions. The researcher may well not be able to convince that imaginary adversary; however, she can engage the opposition viewpoint. The researcher must consciously justify her choice of parameters, provide sufficient evidence to rebut the other viewpoint, and show how her chosen use of historical evidence and methods does not tilt the evidence and her conclusions.

It must be acknowledged, nonetheless, that this proposed method remains imperfect. Bourdieu warns that adopting a self-critical position does not mean that the researcher escapes positionality. In a similar vein, Geertz and Rosaldo acknowledge that the observer can never fully abandon the power she exercises. We only partially escape from ideological frameworks in which one is invested. However, acknowledging that positionality is inescapable does not necessarily lead to weaker analysis or less critical positions. Rather, it only means that critique is undertaken with care. Particularly for fields like LatCrit and CRT, which are fields of cultural critique, such care is important because critique, as Bourdieu warns, can be another tool for gaining power and status. A researcher can enhance her own status within a discipline or field by criticizing others, for research can be undertaken for the purpose of showing why my chosen theoretical framework is "true" or "neutral"—in Bourdieu's terminology, legitimately produces social knowledge while yours does not.

2. Addressing Disciplinary Positionality: Anchoring Critical Perspectives with Historical Methods

Part VI.A.2 identified the disciplinary positionality affecting LatCrit as the presentist viewpoint that characterizes all legal analysis. The legal field practices law by examining the rules in the present, questioning whether current applications preserve the values of law, rationality, predictability, and fairness. Yet the law is not an entirely presentist discipline, although some fields within law, like the law and economics school, would argue that this should be so. The common law method means that history is always relevant to the endeavor of assessing and reassessing the adequacy of present day rules. On the other side of the ledger, historians' disciplinary positionality is a commitment to a historical viewpoint. Like lawyers, historians cannot abandon the essence of their discipline.

Nonetheless, the schism between law's presentist concerns and history's attention to historical facts is not as great as it seems, because this seeming disciplinary divergence is increasingly blurring. First, historians
have always recognized that presentist viewpoints play a role in their discipline. For example, in 1958 historian C. Vann Woodward made the familiar argument that historical lessons should be relevant to the present. History should not be "something unpleasant that happens to other people," but instead, it should serve to teach about ideals, values, and principles. "America . . . desperately needs criticism from historians of her own who can penetrate the legend without destroying the ideal, who can dispel the illusion of pretended virtue without denying the genuine virtues." n221

Second, historians are increasingly viewing their mission of ascertaining the "facts" as more of an interpretive mission rather than an objectivist one. In That Noble Dream, historian Peter Novick posits that the objectivist creed is an ideal; "truth" and absolute objectivity is not attainable. n222 In spite of David Harlan's lament, Novick does not see infinite interpretations as the result of recognition that absolute objectivity is no longer possible. Rather, Novick, while emphasizing the uncertainty of the enterprise of historical research, also anchors the historian in the discipline's traditional values because he urges a healthy regard for the process of proof, based both in empiricism and reason. n223 Novick describes a process of accepting that there are various interpretations for a set of data; however, empiricism, verification, and careful historical methods limit what interpretations are plausible. n224 The researcher, who is often plagued by gaps in archival documents and conflicting possible motivations, presents the most reasonable and fair interpretation of the data, knowing that there may well be other competing interpretations that [*961] have just as much of a legitimate claim as does her own. n225 The reader determines plausibility based on the historian's persuasiveness.

This is a pragmatist position. It implicitly recognizes that a complete, coherent meta-narrative may not be a plausible goal, either for history or for law. The whole story might have to be told in piecemeal fashion or alternatively, acknowledging the tentative nature of such a meta-narrative. At times, sources may just refuse to yield clearcut answers. Conclusions, therefore, can be fuzzy, equivocal, and tentative. One way to contend with these limitations is, as Novick suggests, for historians to be more "self-conscious" about their work and engage with contemporary and past interpretations. n226

This self-reflective pragmatist viewpoint shows the way for a better methodology for legal scholars. Legal scholars should understand that history is both a social science and an empirical method. In metaphorical terms, history can be understood as an impressionist tapestry: it consists of a series of interpretations--often multiple and sometimes fuzzy--based on piece-meal facts--the data that historians have been able to recover from the past. History understood in this way invites the legal scholar to view any single historian's work as just one argument in a series of multiple persuasive arguments. Therefore, it might be unwise to "pick and choose" just one or two historians for dressing up a legal viewpoint. Rather, the legal scholar's use of historians' efforts requires that the legal researcher contextualize that historian's work. Is this interpretation reasonable? Is this conclusion hotly contested or highly plausible, according to other historians' work?

To answer these questions requires first, that the legal researcher understand how that particular historian's work fits into work already done. No historical researcher stands on her own, just as no legal scholar stands alone. By situating individual historian's work, the legal researcher can better understand to what extent that viewpoint is contestable, how well substantiated that particular viewpoint is and has been in the past, and how much this historian departs from the established historiography. This allows the legal researcher the possibility of discovering historical work, which remains unacknowledged within the discipline of history, and yet maintain the necessary skepticism to evaluate whether a particular work is well-researched and grounded.

Second, the legal researcher should ground her interpretation of history and her own work by "getting her hands dirty" in the archives. Looking at only secondary interpretative works will seldom be basis enough to evaluate other's research. Primary research makes it possible for the legal researcher to assess for herself which historical interpretation [*962] is reasonable, what avenues to pursue, what research remains to be done. Moreover, as Guadalupe Luna advocated at the LatCrit II conference, primary research enables the analyst to hear the stories that are buried in the original documents.

What I advocate here is born of my own experience in researching the Spanish-American War. I began this project by asking a legal question: What had been the motivations of the negotiators of the Treaty of Paris when they had purposefully excluded Puerto Ricans and Guamanians from full citizenship status, in stark departure to the provisions of the Treaty of Guadalupe? As a LatCrit scholar, I assumed that racial motivations had played a large role in this determination. Thus, I came to this research with the field and disciplinary positionality described in this Part. Expecting to find the "smoking gun" of racial motivation and racial bias, I began examining
historical archives, the McKinley presidential papers, contemporaneous commentary, and the Congressional debates. However, this research did not discover any smoking gun—such smoking guns, I suspect, never do exist. Instead, I was confronted with evidence and documents that supported the claims of innocent racial attitudes and moral civic virtue that early American historiography had viewed as the "true" motivations for this war. Documents directly showing the private thinking processes of the important key actors were scarce, and while public documents that claimed racial innocence were plentiful, they deserved to be viewed skeptically.

Instead, the process of examining primary research and consulting the old and new historiography made it possible to develop a more complex understanding of racial formation. Instead, the influence of racial attitudes is highly integrated with other dynamics. The development of a new national identity, born in competition with other world powers, was at the core of the racial construction of the peoples of the insular territories. Aspirations of major world standing caused political leaders to push the United States toward the annexionist position, even though from the popular standpoint it is not clear that expansionism ever enjoyed wide support. Although annexation was hotly debated at the time, what joined all factions were the racial and cultural attitudes that made it inconceivable to accept the peoples of the new insular territories as co-citizens. The exclusion of these dark-skinned peoples from citizenship in the Treaty of Paris was no accident, but neither was their relegation to a de jure second-class citizenship limbo clearly intended. Rather, the construction of a racially tiered citizenship was the result of an incremental process, at first ambivalent, then more resolute as time passed and colonial policies became increasingly hidden from national consciousness. McKinley's presidential rhetoric of racial innocence and national virtue, the Supreme Court's politically pragmatic decision making, and the eventual routineness of colonial administration, all played a role in normalizing de jure second-class racial citizenship for the residents of the insular territories.

This research has opened my eyes as to how tentative interpretations of racial formation should be. The researcher must be wary of systemic approaches because they oversimplify. Moreover, the legal researcher's presentist viewpoint and deductive reasoning can easily eliminate the fuzziness and ambiguity that are inherent to historical research enterprises. Race, as Professor Francisco Valdes emphasizes, is highly complex, "webleike" and multidimensional. It may well be that the dynamics of race, class, culture, history, social cognition, and social group formation may be too complex to be captured by overarching frameworks.

Finally, digging into dusty archives has its benefits. As Guadalupe Luna reminds us, these documents can "speak to us." Hopefully, we will listen.

FOOTNOTE-1:

n1 This was Secretary of State John Hay's aphorism for the war. One of the better known popular history books used this as its title. See Frank Freidel, The Splendid Little War (1958).

n2 See generally Juan F. Perea et al., Race and Races: Cases and Resources for A Diverse America 326-55 (2000) (linking racial tiering of citizenship for Puerto Ricans with the Spanish American War); Rubin F. Weston, Racism in U.S. Imperialism: The Influence of Racial Assumptions on American Foreign Policy 1893-1946 (1972) (attitude that would permeate dealings with the peoples of the insular possessions had been shaped through White America's experience with, and treatment of, the Native Americans, the Chinese, the Japanese, the African Americans); Juan F. Perea, Fulfilling Manifest Destiny: Conquest, Race and the Insular Cases, in "Foreign in a Domestic Sense": Puerto Rico, American Expansion and the Constitution (Christina Burnett & Burke Marshall eds.) (forthcoming Duke Press) [hereinafter Manifest Destiny & Conquest]; Walter L. Williams, United States Indian Policy and the Debate over Philippine Annexation: Implications for the Origins of American Imperialism, 66 J. Am. Hist. 810 (1980) (linking racial tiering of citizenship of the insular territories with the legal doctrines developed with respect to the American Indians); Carlos Venator Santiago, Towards the Legal Genealogy of the Construction of Race in Puerto Rico (unpublished manuscript, on file with author).

n3 Several of the leading books on the Spanish American War focus on the link between the transformation of national identity and foreign policy. See generally Robert L. Beisner, From the Old Diplomacy to the New 1865-1900 (1975) [hereinafter Beisner, Diplomacy]; H. W. Brands, Bound to Empire: The United States and the Philippines (1992).


n5 See infra Parts I & II.

n6 It is no accident that colonial studies classics are rooted in the European colonial experience. See Frantz Fanon, The Wretched of the Earth (1963); Albert Memmi, The Colonizer and the Colonized (1957); Edward Said, Culture and Imperialism (1993).


n8 See Joint Resolution for the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect. J. Res. 24, 55th Cong. (2d Sess.), 30 Stat. 738, 739 (1898). The message sent by Congress advocated "neutral intervention . . . to stop the war" 31 Cong. Rec. 3885-91 (Apr. 15, 1898).

n9 On February 25, 1895, Juan Gualberto Gomez, leader of the Cuban independence military forces, began the war in the western provinces of Cuba with the Grito de Baire. In 1897, also in the west of the island, Pachin Martin called upon Puerto Ricans to commence its war of independence with the Grito de Yauco. In
Puerto Rico, the Spanish were able to quickly quell the rebellion, but in Cuba, the revolutionary military forces were stronger and more numerous and the Spanish were unable to defeat the ragtag revolutionaries. Jose Marti, Cuba's revolutionary hero, always envisioned that Cuba and Puerto Rico would be liberated together from Spanish rule. Musicant, supra note 7, at 48 (1998); Fernando Pico, Historia General de Puerto Rico 218-19 (1988).

n10 See generally David Bushnell & Neil Macaulay, The Emergence of Latin America in the Nineteenth Century (2nd ed., 1994). This desire to hold on to the remains of the Spanish empire loomed large in the events triggering the Spanish American War. Id. at 263-64.

n11 See generally Bushnell & Macaulay, supra note 10 (emphasizing a selective liberalism as the dominant ideology for the Latin American independence experience); Richard Graham, Independence in Latin America (2nd ed., 1972) (places the independence movement of Spanish and Portuguese colonies in the context of the rise of industrial capitalism, rising democratic idealism, and transformations in social relationships); John Lynch, The Spanish American Revolutions, 1808-1826 (2d ed., 1986) (views the revolutionary outbreak as the culmination of a long process of alienation from Spain and the growing awareness of nationality, consciousness of culture, and jealousy of own resources).

n12 Cuban revolutionaries had fought a resolute and savvy guerilla war, exacting casualties from the Spaniards, and disappearing when outnumbered them. See Foner, supra note 3, at 35-118; Louis A Perez, Jr., Cuba Between Empires, 18781902 53-56 (1982) [hereinafter Perez, Cuba]. The second Spanish commander, General Valeriano Weyler, sent to quell the Cuban independence movement in 1896, initiated a strategy of fighting "war with war." Offner, supra note 3, at 129.

n13 Rural peasants provided cover and material support. It became "a war without a clearly identifiable enemy." Perez, Cuba, supra note 12, at 51; Musicant, supra note 7, at 50-66.

n14 The Cuban insurrection was made up of mostly landless field workers. See Foner, supra note 3, at 98-118; Perez, Cuba supra note 12, at 53-56. The Spanish depicted the Cuban military General Maceo, as a "crude, Barbaric, caudillo de negros who delighted in practices forbidden by the rules of civilized warfare and sought a black republic of Cuba, headed by himself." Musicant, supra note 7, at 66. Maceo managed to outwit the Spanish generals and the superior equipped Spanish army for more than three and a half years, until the Americans intervened. Id. at 64-67.

n15 Weyler's response to the guerilla war was to imprison the mostly agrarian Cuban population into reconcentrados, the equivalent of concentration camps, where they suffered disease and starvation. Perez, Cuba, supra note 12, at 51; see also Foner, supra note 3, at 77, 110-118, 130-33.

n16 Official reports put the number of reconcentrados at 500,000 and estimated that by December 1897, 200,000 had died, and at least that many were starving. Foner, supra note 3, at 115. Offner quotes a variety of figures: the Cuban revolutionary government headed by Blanco estimated 300,000 dying or starving; a Boston merchant reported to Congress that the island's total deaths equaled 500,000. Offner, supra note 3, at 111-12. The Hearst papers, carrying headlines like, "Blood on the Doorsteps," reported that 400,000 to 500,000 Cubans had died. Freidel, supra note 1, at 4.

n17 As is widely known, the press played a prominent role in sensationalizing the events leading to the Spanish American War. The Hearst papers bragged that they had manufactured the War. See infra note 23. As well, eye witness narratives of the Cuban reconcentrados were an important catalyst. In particular, Senator Proctor gave a detailed report to the Senate of his unofficial trip to Cuba, which caused great commotion:

All the country people in the four western provinces, about 400,000 in number . . . under Weyler's order . . . were driven into this towns and these are the reconcentrados. They were the peasantry. . . It is but fair to say that the normal
condition of these people . . . was not high . . . but . . . satisfactory. . . . Torn from their homes, with foul earth, foul air, foul water, and food or none, what wonder that one-half have died and that one-quarter of the living are so diseased that they can not be saved? The physicians say these cases are hopeless . . . the sight of them makes an appeal stronger than words.

351 Cong. Rec. 2916-17 (March 17, 1898).

n18 Perez emphasizes that Jose Marti's exile in New York was well spent making the case for the Cuban independence movement in widely read American newspapers. See Perez, Cuba, supra note 12, at 14-5, 45, 90-1, 94-5.

n19 The Cuban independence movement was influential in garnering support in the U.S. Congress. Senators argued that the revolutionary junta be recognized as the duly constituted sovereign of the Cuban people prior to U.S. intervention. This was prevented by the McKinley administration. Historian Perez argues that the McKinley administration opposed this because they wanted U.S. control over Cuba, and some inside the administration believed that the insurgents were a motley minority that would not be able to self govern effectively. Perez, Cuba, supra note 12, at 166, 170-71, 173.

n20 Dobson, supra note 3, at 19 ("McKinley's own experiences in the Civil War made him very reluctant to draw the United States into any conflict.").

n21 In his first inaugural address, McKinley made the case for diplomacy:

It will be our aim to pursue a firm and dignified foreign policy, which shall be just, impartial, ever watchful of our national honor, and always insisting upon the enforcement of the lawful rights of American citizens everywhere. Our diplomacy should seek nothing more and accept nothing less than is due us. We want no wars of conquest; we must avoid the temptation of territorial aggression. War should never be entered upon until every agency of peace has failed; peace is preferable to war in almost every contingency. Arbitration is the true method of settlement of international as well as local or individual differences.

McKinley Inaugural Address, March 1897.

n22 Modern historiography gives largely a favorable account of McKinley's efforts. See Lewis L. Gould, The Spanish American War and President McKinley (1980) (highly favorable view); May, supra note 3 (detailed accounting of the back and forth, depicting events as overtaking diplomacy); Offner, supra note 3 (detailing diplomatic efforts and portraying McKinley as determined to avoid war). But see Musicant, supra note 7, at 178 (McKinley was "paralyzed by indecision").

n23 Hearst was to call the Spanish American war "The New York Journal's war." Freidel, supra note 1, at 5. The Spanish American War was the first war in which newspapers and magazines were able to publish authentic photographs of war action. See Harper's Pictorial History of the War with Spain (1899) (also containing explanatory text); James Wyman, Joseph Pulitzer and his World (1941); David Jay Gervich, Leslie's Weekly's Pictorial Coverage of the Spanish American War (M.A. Thesis , University of Missouri-Columbia, 1970) (surveying Leslie's photo journalism). Much modern historiography on the Spanish American war has been aimed at rebutting the claim that the 1898 war was manufactured by the yellow press, and positing instead that more complex motivations were at heart. See sources cited supra note 3.

n24 Dupuy de Lome, was the key Spanish diplomat. The letter, published in the American press, reads in part:

Besides the natural and inevitable coarseness with which he repeats all that the press and public opinion of Spain have said of Weyler, it shows once more that McKinley is weak and catering to the rabble and, besides, a low politician who desires to leave a door open to himself and to stand well with the jingoes of his party. Nevertheless, as a matter of fact it will depend on ourselves whether he will prove adverse to us.

Dupuy de lome to Canalejas (undated), reprinted in Foner, supra note 3, at 232-33.
n25 Foner, supra note 3, at 232-33; May, supra note 3, at 135-37; Offner, supra note 3, at 116-19.

n26 Offner, supra note 3, at 94-100. Offner offers the view that while Madrid believed the reforms to be working, Washington slowly came to the conclusion that Spain could no longer control the situation in Cuba. Further, the administration worried that the rioting threatened American lives and property. Id. at 100; see also Dobson, supra note 3, at 52.

n27 The official purpose of the U.S.S Maine's visit to Havana was a courtesy call. The U.S. consul had voiced concern over the safety of American residents when the January 1897 riots broke out in Havana. McKinley appears to have weighed the risks involved in sending a battleship into such a volatile situation. Freidel, supra note 1, at 4; May, supra note 3, at 13537. Offner reports that DuPuy de Lome saw the stationing of the Maine as a means of appeasing U.S. Congressional pro-war sentiment. See Offner, supra note 3, at 113.

n28 The headline of a New York paper read "Maine Explosion Caused by Bomb or Torpedo? Capt. Sigsbee, in a suppressed dispatch to the State Department says the accident was made possible by an Enemy." The World (Feb. 17, 1898) at 1, reprinted in Freidel, supra note 1, at 6.


n30 See generally May, supra note 3 (asking why did Spain go to war under the circumstances); Musicant, supra note 7 (noting Spanish efforts to avoid war, particularly the Canovas government); Offner, supra note 3, at 86-100 (detailing events motivating Spanish diplomacy).

n31 For the view that the War was not as one-sided in favor of the United States as it would seem, see generally Balfour, supra note 29. Spain had about 200,000 soldiers in Cuba and 30,000 in the Philippines, but they often fought at a numerical disadvantage because they were scattered in small garrisons. See Graham A. Cosmas, An Army for Empire: The United States Army in the Spanish-American War 238 (2nd ed., 1994) (1971) (more than 20,000 Spanish soldiers in the Philippines, 13,000 of them in Manila, versus 12,000 revolucionarios, and 8,000 U.S. troops around the city). In Santiago de Cuba, the only region on the island invaded by the U.S. Army, 8,000 Spaniards were besieged by up to 20,000 Americans and 4,000 Cuban rebels. Id. at 230. The 8,000 Spanish regulars in Puerto Rico were outnumbered 2-to-1 by up to 17,000 U.S. troops. Id. at 234, 236. Foner, supra note 3, at 135, 137 (various historians dispute the number of Spanish troops in Cuba in early 1898, ranging from a low 70,000 combatants to 278,457 of all classes, including regulars from Spain and volunteers and irregulars from the island, versus 30,000 rebels).

n32 LaFeber, supra note 3, at 121-27 (describing the funding of $ 50 million requested by the McKinley administration for modernizing the US Navy). See generally May, supra note 3 (reporting on contemporary commentary that Theodore Roosevelt as US Assistant Secretary of the Navy had been largely responsible for the winning of the War because of his efforts in modernizing the Navy).


n34 The Treaty of Paris setting forth the terms of peace was negotiated in Paris from August 12 to December 15, 1898. It took three weeks, from July 26 to August 12, 1898 to negotiate the protocol for cease fire and peace negotiation. See Brian P. Damiani, Advocates of Empire: William McKinley, the Senate and American Expansion, 1898-1899 23-29 (1987); Offner, supra note 3, at 209-23. On the other hand, the War consisted of three major battles fought from May to July 1898. Roosevelt wrote in private correspondence that he regretted that the War had not lasted long enough.

n35 See generally Robert L. Beisner, Twelve Against Empire, the Anti-Imperialists, 1898-1900 (2d ed. 1985) [hereinafter Beisner, Anti-Imperialists]; Damiani, supra note 34, at 120-202.
n36 Henry Cabot Lodge, Ratification of the Treaty, in Harper's Pictorial History of the War with Spain 430 (1899).

n37 "Instructions of the Peace Commissioners," p. 7, Sep. 16, 1898, Reel 85, Series 5, Messages, William McKinley Papers, Washington: Library of Congress, 1961 [hereinafter WMK]. The stage was set, however, in the negotiation for a peace protocol in which the United States made that claim, and Spain was forced to accept it. Damiani, supra note 34, at 25-29.

n38 The Teller Amendment to the Joint Resolution declaring War provided:

Resolved that the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people.


n40 Dobson, supra note 3, at 108, 110-111 (calling McKinley a "wiley sic politician" who had already adopted "the open door" policy to the Orient as the "administration's guiding principle").

n41 Senators Cushman K. Davis of Michigan and William P. Frye of Maine and New York Tribune publisher/editor Whitelaw Reid were proclaimed expansionists. Democrat Senator George Gray of Delaware held well-known isolationist views, and William Rufus Day, the president of the commission, was a moderate expansionist. See Whitelaw Reid, Making Peace With Spain: The Diary of Whitelaw Reid, September December 1898 26-27, 239-42 (H. Wayne Morgan, ed. 1965); see also Damiani, supra note 34, at 29-32 (McKinley chose the commission "shrewdly" and, for political reasons, rejected Henry Cabot Lodge's bid to be on the Commission); Stuart Creighton Miller, "Benevolent Assimilation:] American Conquest of the Philippines, 1899-1903 20 (1982) (arguing that McKinley chose a "shrewdly balanced commission"); David F. Trask, The War With Spain in 1898 435-36 (1981) ("At the outset . . . the majority . . . favored a 'large policy.'").

n42 Dobson, supra note 3, at 109, 112 (seeing purpose of the tour to "create the impression of popular support" and, thus, providing McKinley with confidence in his expansionist policy); Miller, supra note 41, at 14-16 (arguing that McKinley "was a reluctant imperialist," and that his decisions "had more to do with a shift of popular opinion as reflected in the press that with the counsel of Lodge or Hay"); Trask, supra note 41, at 441, 444 (arguing that McKinley took several "grudging" steps "toward territorial expansion" as he gained more information and also in response to "the outbursts of popular expansionist sentiment.").

n43 Benton, supra note 39, at 243 (by late October 1898, "the President had become the staunchest supporter of territorial expansion"); Damiani, supra note 34, at 23-24 (in February 1898, McKinley was willing to settle War with only Cuba at stake; in May, McKinley stipulated that Spain could keep the Philippines; by July, McKinley insisted that Spain could not retain the Philippines).


n45 Art. IX of the Treaty of Guadalupe Hidalgo provides that Mexican citizens who remained in the ceded territories and did not elect to retain Mexican citizenship "be incorporated into the Union of the United States, and be admitted at the
proper time (to be judged by the congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution."

n46 The Treaty of Paris, Article IX, provided that the inhabitants of the Philippines, Puerto Rico and Guam, had only such "civil rights and political status . . . as shall be determined by the Congress." Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754 (1898), T.S. No. 343.

n47 Cf. Abbot Lowell, The Status of Our New Possessions --A Third View, 13 Harv. L. Rev. 155, 155-170, 171 (1899) ("All the treaties for the acquisition of territory on the continent of North America have therefore provided that the people should be incorporated to the Union, or admitted to the rights of citizens."). Professor Lowell, political science professor, and later president at Harvard, provides an excellent analysis of this purposeful exclusion of citizenship rights. Because this departure was purposeful, he argued that the terms Congress intended to be "unincorporated." This was to be the theoretical basis for the Court's subsequent unincorporated territories doctrine. See Gerald L. Neuman, Whose Constitution? 100 Yale L. J. 909, 959-60 (1991) (Lowell's "distinction between two kinds of acquired territories . . . based on a political decision to make them part of the United States, would eventually persuade a majority of the Supreme Court").


n49 This idea is the "pure" anti-imperialist position. See George S. Boutwell, Isolation and Imperialism, in The Crisis of The Republic (1900) (as President of the Anti-Imperialist League, setting forth the argument against annexation of these territories); Jim Zwick, Mark Twain's Opposition to United States Imperialism: A Centennial Perspective (describing Twain's long time opposition to annexation and the US-Filipino War); see also William Jennings Bryan, Bryan on Imperialism (1900). Jennings Bryan would later change his mind and argue that the Treaty should be approved, meaning that the United State should first annex the territories and determine their future later. This last minute change of heart is credited for the Treaty's victory in the Senate. Id. at 195-96 (reporting on Bryan's switching positions); see Beisner, Anti-Imperialists, supra note 35, at 157-58 (opining that Bryan's support for the Treaty must have influenced some of the sixteen Democrat and pro-silver Senators who voted for ratification); Brands, Empire, supra note 3, at 34 (reporting that Republican Senator Hoar called Brian "the most thoroughly guilty man in the United States of the wrong of this whole Philippine business").

n50 This idea came to be the compromise position of the anti-imperialists, particularly George F. Hoar, a respected Republican Senator from Boston, and Jennings Bryan. Bryan proposed that the U.S. ratify peace and that, later, Congress make explicit U.S. intent to establish stable governments in Cuba, Puerto Rico, and the Philippines. Savannah, Georgia Interview Dec. 13, 1898 in Bryan, supra note 49, at 5-6. Hoar supported the amendment to the Treaty proposed by Democrat Augustus Bacon of Georgia that would have provided that the United States would not exercise permanent control over the Philippines and would provide independence when these islands had "a stable and independent government." Beisner, Anti-Imperialists, supra note 35, at 151-57.

n51 McKinley would argue that only this option was open to the United States, and that the first and second options were a dereliction of duty, to withdraw would precipitate a "civil war of endless . . . slaughter" and "invite foreign intervention." Instructions of Peace Commissioners, at 5-6, Sept. 16, 1898, Reel 85, Series 5, Messages, WMK.
n52 See Boutwell, supra note 49. In his inaugural speech as President of the Anti-Imperialist League, Boutwell eloquently set forth this position.

A beaten foe has no right to transfer a people whose consent has not been asked, and a free republic has no right to hold in subjection a people so transferred. . . . As solemnly as a people could, we announced the war to be solely for humanity and freedom, without a thought, desire, or purpose of gain to ourselves; all that we sought has been accomplished in Cuba's liberation. Shall we now prove false to our declaration and seize by force islands thousands of miles away whose peoples have not desired our presence and whose will we have not asked? Whatever islands we take must be annexed or held in vassalage to the Republic. Either course is dangerous. . . .

Id. Beisner calls "conservatism" this attention to core civic values and contends that although many anti-imperialists held racist views and feared racial "mixing," it is this civic concern that lies at the core of the anti-imperialist movement. See Beisner, Anti-Imperialists, supra note 35, at 237-38.

n53 The Philippine-American war commenced on February 4, 1899 as Aguinaldo, the leader of the revolutionary forces, asserted that he had done "everything possible to avoid armed conflict, in the hope of securing our independence through peaceful means . . . ." Did McKinley or expansionists manipulate its outbreak? No evidence seems to be available. Clearly the timing is auspicious since some Senators felt more compelled to vote for the Treaty once the United States was at war. See Brands, Empire, supra note 3, at 49; Miller, supra note 41, at 57.

n54 See Benton, supra note 39, at 243 (no plebiscite necessary because Puerto Ricans had welcomed Miles's forces). Damiani reports that Spain knew of Puerto Ricans' support for the U.S. military invasion and that this fact dissuaded the Spanish negotiators from insisting that Puerto Rico not be a war indemnity. See Damiani, supra note 34, at 22-25.

n55 General Miles invaded Puerto Rico on July 25, 1898. Miles declared when he landed in Puerto Rico:

We have not come to make war upon the people of a country that for centuries has been oppressed, but on the contrary to bring you protection, not only to yourselves but to your property, to promote your prosperity, and to bestow upon you the immunities and blessing of the liberal institution of our government . . . . This is not a war of devastation but one to vie all to within the control of its military and naval forces the advantages and blessing of enlightened civilization. We come bearing the banner of freedom . . . . the fostering arm of a nation of free people, whose greatest power is in justice and humanity for all those living within its fold.


n56 Autonomists were fragmented between a vision of an independent country and affiliation with Spain with local home rule, and all variations in between these two models. See Pico, supra note 9, at 216-19.

n57 The Autonomous Charter covering Cuba and Puerto Rico was signed on November 19, 1898, and granted Puerto Rico representation in the Spanish parliament. The Puerto Rico junta had actively negotiated with Spain. Consequently, the Autonomous charter was viewed as a good result in Puerto Rico since it provided rights of citizenship equivalent to those of other Spanish citizens. See Carrion, supra note 55, at 133-35; Jose Trias Monge, I Historia Constitucional de Puerto Rico (1980); Musicant, supra note 7, at 169.

n58 See Carrion, supra note 55, at 207; Pico, supra note 9, at 216-17. Luis Munoz Rivera, as a nonvoting Resident Commissioner to Congress, would later, in 1917, oppose the Jones Act granting U.S. citizenship to Puerto Ricans, asking that
this "mass naturalization project" be postponed for several years. Congress passed the bill over his objection and without a plebiscite. Monge, supra note 4, at 73.

n59 Annexation was effectuated by a joint resolution adopted by Congress on July 7, 1898, known as the Newlands Resolution. Resolution No. 55, Newlands Resolution, July 7, 1898, 30 Stat. 750.

n60 In 1893, White planters organized an armed overthrow of the Hawaiian Kingdom, then headed by Queen Liliʻuokalani, in which the military assistance offered the U.S. Minister of Foreign Affairs, John L. Stevens, was instrumental. On July 17, 1893, those who orchestrated the overthrow formed the Provisional Government and organized the Republic of Hawaii with Robert Dole, an American planter, as President. President Grover Cleveland rejected this government's bid for annexation to the United States, pointing to the lawlessness of the actions of both John Stevens and the American planters. Ernest May writes that Cleveland was not opposed to the annexation of Hawaii on expansionist grounds, but morally opposed the actions of the planters. See May, supra note 3, at 20-23, 267 (2nd ed. 1991). See generally Thomas J. Osborne, Empire Can Wait: American Opposition to Hawaiian Annexation, 1893-1898 (1981).

n61 The President's message declared that "the overthrow" and "revolt" that had "dethroned" the monarchy, and other "remarkable features of the transaction" made it his "duty . . . to withdraw the treaty of annexation" from consideration by the Senate. See President's Message To Congress Relating to the Hawaiian Islands (Pres. Grover Cleveland). House Exec. Doc. No. 47, 2d Sess., 53d Cong., 1893-94 at iii-xvi.

n62 While McKinley was in office in June 17, 1897, the United States signed a treaty of annexation with the plantercontrolled Hawaii Republic, while Queen Liliʻuokalani was under house arrest. McKinley submitted the treaty to the Senate, where prolonged debate stalled passage. Only after the Spanish American developed did the logjam break and Congress annexed Hawaii because of its "military importance." See LaFeber, supra note 3, at 366-70.

n63 The Twelfth Census of the United States, Supplementary Analysis and Derivative Table 20 (1906) (reports the following population counts: Philippine Islands 7,635,426; Puerto Rico 953,243; and Guam 9,000); Robert C. Schmitt, Demographic Statistics of Hawaii, 1778-1965 12, 74-5 (1968) (the Hawaiian 1896 census reported a population of 109,020 of which 39,504 were full or part Hawaiian, 19,382 Chinese, and 22,329 Japanese); U.S. Bureau of the Census, Cuba: Population, History and Resources, 1907 132, 143 (1909) (the 1899 Cuban census reported a population of 1,572,797 of which 505,443 were categorized as "colored").

n64 The Insular Cases consist of De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. New York and Porto Rico Steamship Co., 182 U.S. 392 (1901); Dooley v. United States, 183 U.S. 151 (1901); and The Diamond Rings v. United States, 183 U.S. 176 (1901). Some authors group the decisions decided between 1903 and 1914 as well. See Hawaii v. Mankichi, 190 U.S. 197 (1903); Gonzalez v. Williams, 192 U.S. 1 (1904); Kepner v. United States, 195 U.S. 100 (1904); Dorr v. United States, 195 U.S. 138 (1904); Mendezona v. United States, 195 U.S. 158 (1904); Rasmussen v. United States, 197 U.S. 516 (1905); Trono v. United States, 199 U.S. 521 (1905); Grafton v. United States, 206 U.S. 333 (1907); Kent v. Porto Rico, 207 U.S. 113 (1907); Kopel v. Bingham, 211 U.S. 468 (1909); Dowdell v. United States, 221 U.S. 325 (1911); Ochoa v. Hernandez, 230 U.S. 139 (1913); Ocampo v. United States, 234 U.S. 91 (1914). Finally, Balzac v. Porto Rico, 258 U.S. 298 (1922), not decided until after the Jones Act was passed and Puerto Ricans were granted U.S. citizenship, is also to some analysts part of the Insular Cases.
n65 Downes, 182 U.S. at 341-342 (White, J., concurring) (a territory is not foreign to the United States in an international sense but is foreign in a domestic sense). The White concurrence was adopted by the Court in Dorr v. United States, 195 U.S. 138 (1904), and Balzac v. Porto Rico, 258 U.S. 298 (1922).

n66 For critique of the Insular Cases, see T. Alexander Aleinikoff, Puerto Rico and the Constitution: Conundrums and Prospects, 11 Const. Comment. 15, 22 (1994) (current jurisprudence based on Insular Cases is "startling and troubling"); Torruella, supra note 4, at 3, 5 (doctrine of incorporation, the doctrine of "separate and unequal" and "anacronistic remnants of the stone age of American constitutional law" that are comparable with "Plessy v. Ferguson in permitting disparate treatment of a discrete group of citizens."); Monge, supra note 4, at 23 (doctrine of incorporation is "morally illegitimate constitutional principle").

n67 See infra notes 105-110 and accompanying text.

n68 This applies as well to the other U.S. territories, the U.S. Virgin Islands and the other U.S. Commonwealth, American Samoa. See generally Arnold H. Leibowitz, Defining Status 140-55 (1989). Congress has granted Puerto Rico increasing degrees of local rule but never allowed for representation at the federal level, authorizing instead only a nonvoting resident delegate in the House of Representatives. Initially, Puerto Rico was governed as a colony, under the Foraker Act, under which Puerto Rico was ruled by a Governor appointed by the President of the United States, and the Governor had the power to veto legislation adopted by the local legislature and to appoint judges. Foraker Act, ch. 191, §§ 17, 31, 33, 31 Stat. 77, 81, 83-84 (1900) (repealed 1917). The 1917 Jones Act extended U.S. citizenship to residents of Puerto Rico and provided for local election of both houses of the legislature. Puerto Rico Organic Act of 1917 (Jones Act), Pub. L. No. 64368, § 36, 39 Stat. 951, 963 (1917). In 1950, Congress enacted Public Law 600, "in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." PL 600 is the foundation of the current Commonwealth status, subject to veto by the U.S. Congress, and to elect its Governor. Act of July 3, 1950, Pub. L. No. 600, ch. 446, 64 Stat. 319, 319 (1950).

n69 The Puerto Rican government litigated this issue in federal court and lost. De la Rosa v. United States, 107 F. Supp.2d 140 (D.P.R. 2000), rev'd and vacated by 229 F.3d 80 (2000). See also Igartua De La Rosa v. United States, 32 F.3d 8, 10 (1st Cir. 1994) (challenging the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff-1 et seq., under which a Puerto Rican citizen who moves to a state, registers to vote, and then moves to a foreign country can continue to vote for president where she was last domiciled but not if she returns to Puerto Rico); Attorney Gen. of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984) (holding that American citizens living in Guam cannot vote for the President).

n70 U.S. Const. art. I, § 8, cl. 1. The Uniformity Clause provides that "all duties, imposts, and excises shall be uniform throughout the United States." Id. The territorial clause provides that Congress shall have the power to make "all needful Rules and Regulations respecting the Territory . . . belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

n71 Downes v. Bidwell, 182 U.S. 244, 278-79 (1901) (concluding that because territories are not constitutional equivalents to states, they are subject to greater congressional control); The Diamond Rings, 183 U.S. 176, 181-82 (1901) (construing broadly the Territorial Clause of the Constitution and refusing to limit Congress's legislative power over the American territories).

n72 See Harris v. Rosario, 446 U.S. 651 (1980) (per curiam) (rejecting
constitutional challenge to Congress's decision to offer lower level of assistance in federal public benefit program to Puerto Rico than that offered states); Califano v. Torres, 435 U.S. 1 (1978) (per curiam) (upholding requirement that federal disability benefits are payable only to residents over the fifty states and the District of Columbia).

n73 See Dooley v. United States, 182 U.S. 222, 235-36 (1901) (holding that Puerto Rico became part of the United States for purposes of tariffs); Armstrong v. United States, 182 U.S. 243, 244 (1901) (holding that tariff duties on goods imported from Puerto Rico were proper prior to cession by treaty); Huus v. New York & Porto Rico S.S. Co., 182 U.S. 392, 397 (1901) (holding that steamship trade between New York and Puerto Rico came under U.S. trade laws).

n74 For example, under the Jones Act, Puerto Rico must use U.S. marine transport. While in the 1900s, the U.S. was competitive in prices charged, in current markets U.S. transport is inordinately costly. The imposition of this requirement works to a great disadvantage to Puerto Rico manufacturers, who have argued that the Jones Act makes Puerto Rico non-competitive.

n75 H.R. Rep. 105-131, pt. 1, at 13-14 (Under the Jones Act, Congress extended statutory United States citizenship to residents of Puerto Rico, but less than equal civil rights. "The current United States citizenship of persons born in Puerto Rico is created and defined by Congress in the exercise of its Territorial Clause power and in implementation of Article IX of the Treaty of Paris.").

n76 See, e.g., Harris, 446 U.S. at 651 (holding that Congress may reimburse less to Puerto Rico for Aid to Families with Dependent Children than to the states, and may treat Puerto Rico differently from states so long as there is a rational basis for discrimination). Professor Aleinikoff criticizes the Court's one page and a half per curiam decision issued without full briefing or oral argument and its rational basis "review." "The Court is surely correct that residents of Puerto Rico pay no federal income tax and that funding Puerto Rico at the level of the states would cost the federal treasury more. [However,] the arguments supplied in support of the statute are rational by not being crazy." Aleinikoff, supra note 66, at 22-23.

n77 Dorr v. United States, 195 U.S. 138, 146 (1904). This latter rule held whether or not the territorial population had been granted U.S. citizenship. Balzac v. Porto Rico, 258 U.S. 298, 308-10 (1922).


n81 See Miller, supra note 41, at 268; Brands, Empire, supra note 3, at 51.

n82 For passionate accountings by Americans, see Brands, Empire, supra note 3; Stanley Karnow, In our Image: America's Empire in the Philippines 79 (1989); Miller, supra note 41.

n83 The Philippines gained official independence on July 4, 1946. Brands, Empire, supra note 3, at 227. He calls it the "transition from formal to informal imperialism." Id. at 353.

n85 This is Brand's main argument. See Brands, Empire, supra note 3, at 345-46; see also Miller, supra note 41, at 263-65, 269.

n86 See E. San Juan, Jr., From Exile to Diaspora (1998); Brands, Empire, supra note 3, at 347, 353-54.


n88 Benjamin, Hegemony, supra note 87, at 52, 57, 183-4; Benjamin, Revolution, supra note 87, at 52-91. The Baccardi family, owners of Baccardi, manufacturers of rum, is an example of this millionaire class.

n89 Benjamin, Hegemony, supra note 87, at 187-8.

n90 21 Stat. 897-98. The Platt Amendment gave the U.S. the right to intervene as it wished to protect Cuba's independence and to limit the Cuban debt.

n91 The United States invoked the Platt Amendment on several occasions to mold Cuban society, limit the power of radicals, and to preserve stability. Benjamin, Hegemony, supra note 87, at 141-42, 149.

n92 Benjamin, Revolution, supra note 87, at 95, 121 (Washington had confidence in Batista because "he had eliminated the radical nationalist and revolutionary socialist threats of the early 1930s[.] . . . had restored coveted stability to the island," and assured "that United States interests would be respected").


n95 Hunt, supra note 94, at 166-67 (continuing the practices of "pretensions to dominance and tutelage" and justifying counter revolutionary practices as necessary to maintain "desired stability in Latin America").


n100 See Perea, Race and Races, supra note 2, at 2. This casebook devotes one-third of its enterprise to the exploration of the history of the major racial and ethnic minority groups in the United States.
n101 Guadalupe Luna's work on the U.S.-Mexico War is a prime example of other historical LatCrit projects. See supra note 48.
n102 See Owen Fiss, The Death of Law?, 72 Cornell L. Rev. 1, 10 (1986) ("What I see is not the unconstrained power of the justices to give vent to their desires and interests, but rather public officials situated within a profession, bounded at every turn by the norms and conventions that define and constitute that profession. There is more to judging than simply confronting the bare words of the fourteenth amendment. . . .").
n103 This is both a concern of traditional scholars and those with a "crit" bent. For example, the critique of the Insular Cases by Judge Torruella and Professors Aleinikoff and Neuman focuses on the inconsistencies of the Court's reasoning and the "thin" rationales. See supra note 66 and accompanying text. By contrast, Perea, Rivera Ramos and Roman argue that these cases should be overturned because they are based on racial attitudes accepted in the past but no longer sustainable. See infra notes 106-10 and accompanying text.
n104 Constitutional scholars and jurists debate whether the Constitution should be interpreted by only referring to the four corners of this text, see Antonin Scalia, A Matter of Interpretation (1997), or whether they should refer to norms derived from the US Constitution and general democratic principles. See Thomas Grey, Do We Have an Unwritten Constitution? (1975); Ronald Dworkin, Taking Rights Seriously (1977).
n105 The books written by these jurists are significant contributions. See Cabranes, supra note 4 (analyzing the legislative and judicial processes that accorded Puerto Ricans' second class citizenship and relating to how racial attitudes and cultural Anglocentrism impacted these decisions); Monge, supra note 4 (long time supporter of Commonwealth status critiquing both doctrine and the politics of Commonwealth status); Torruella, supra note 4 (surveying the development of "separate and unequal" unincorporated territories doctrine).
n106 Rivera Ramos calls this the "ideology of expansion":

The discourse of the Insular Cases incorporated many of the notions that constituted what I have termed the "ideology of expansion". First of all, it was overtly racist. . . . [Second,] is the notion that the peoples of the new territories were incapable of self-government. Moreover, that they were not fit to become full-fledged members of the American polity, with a right to participate in its government.

Ramos, supra note 4, at 288-90.

n107 Roman, Alien-Citizen Paradox, supra note 4; Roman, Empire, supra note 4.
n108 Roman, Alien-Citizen Paradox, supra note 4, at 32.
n109 Perea, supra note 2, at 15-19.
n110 Id.
n111 Professors Perea, Roman, and Ramos make this important point. See Perea, supra note 2, at 15-19; Roman, AlienCitizen Paradox, supra note 4, at 18. Ramos explains:

Creating a subject involves a process of reification: that is, constructing a category that acquires the quality of an object. . . . The particularities of the realities which the category is intended to represent fade away as they are subsumed in the universal quality of the category. In a sense, the particular realities exist no more. . . . In this case, the "reality" created was that of the "unincorporated territory." It did not have any existence before the cases were decided. But the authoritative pronouncement of the Court brought it into existence . . . .

Ramos, supra note 4, at 304.


n115 See Venator Santiago, supra note 2.

n116 Id.

n117 See Lazos & DeWitt, supra note 4.

n118 Id.

n119 See Perez, supra note 12.

n120 See infra notes 135, 137, 140-41.

n121 See supra note 105.


n123 For writings on Latino/as as "hyphenated" or "borderland" identities, see Ilan Stavans, The Hispanic Condition: Reflections on Culture and Identity in America 18-19 (1995); Renato Rosaldo, Culture and Truth: The Remaking of Social Analysis, at 196-217 (2d ed. 1993) (Chapter 9, Border Crossings); Gloria Anzaldúa, Borderlands La Frontera: The New Mestiza 21 (1987).


n125 Philosopher Edmund Husserl proposed that by focusing on the act of "experiencing something," rather than on the thing being experienced, one could produce a new kind of knowledge more relevant to the human experience that went beyond scientific knowledge. Edmund Husserl, Cartesian Meditations: An Introduction to Phenomenology (Dorion Cairns trans., Martinus Nijhoff, The Hague 4th impression 1970).


n127 Id. at 32.

n128 Id. at 52-53.

n129 McKinley was a devout Protestant during an age of renewed missionary efforts. See Miller, supra note 41, at 24. Historian Creighton Miller argues that McKinley was "sincere" in his belief that it was America's duty to uplift and civilize Filipinos. See id.


n131 See Mignolo, supra note 126, at 53-54.

n132 Id. at 53 (drawing upon Foucault's subordinated knowledges and Ribeiro's subaltern knowledges).

n133 See id. at 33.

n134 See generally id. at 54-57.

n135 The sources cited in footnote 3 suggest that the Spanish American War was a major event for United States national identity and foreign policy. See also Healy, supra note 3 (connecting foreign policy and new cultural and racial attitudes); May, supra note 3 (transformation of the United States into a new world power) Musicant, supra note 7 (emphasizing military aspects); Trask, supra note 41. Of course, authors emphasize different aspects of transformation. For example, Hunt's analysis focuses on the relationship between a collective self identity based on racial and cultural superiority and a more interventionist foreign policy: See Hunt, supra note 94, at 11-12 (discussing three core ideas relevant to foreign affairs; (1) the American future was defined as an active quest for national greatness; (2) new racial hierarchies; and (3) revolutions in Latin America were not acceptable because they could develop in dangerous directions). Petra DeWitt, and I elaborate on the themes focusing on new racial
constructions and how these affected discussions of civic principles and eventually evolved into new legal constructions of de jure second class citizenship. See generally, Lazos & DeWitt, supra note 4.

n136 Robert Beisner catalogues the many ways that the Spanish American War represents a "paradigm shift" in foreign policy and national identity. See generally Beisner, Diplomacy, supra note 3.

n137 The cultural historians have taken the lead in developing this view of the subtle racial political rhetoric that accompanied the approval of the Treaty of Paris and the annexation of the insular territories. See generally Hunt, supra note 94; Healy, supra note 3; Beisner, Anti-Imperialists, supra note 3; Miller, supra note 41; Lazos & DeWitt, supra note 4.

n138 During the fall and winter of 1898 and 1899, McKinley stated that the "mandate of duty" included "freedom from oppression and the maintenance of human rights" not just through war but also through "guidance and protection." "Speech at Auditorium," Atlanta, Dec. 15, 1898, Reel 82, Series 4, WMK; "Speech at Banquet," Savannah, Georgia, Dec. 17, 1898, Reel 82, Series 4, WMK. He explained that "the genius of American civilization is understood in the remotest corners of the earth to be . . . wise, beneficent, . . . and capable of conferring the blessings of unselfish leadership." "Speech at Auditorium," Atlanta, Dec. 15, 1898, Reel 82, Series 4, WMK.

n139 Henry Cabot Lodge, The War with Spain 234 (1899). Lodge continues,

now men saw that the long connection, ever growing closer, with the Hawaiian Islands had not been chance; that the culmination of the annexation movement in the very year of the Spanish War was not accident, but that it all came from the instinct of the race .. and that Americans, and none else, must be the masters of the cross-roads of the Pacific.

Id. at 235.


n141 Historian Matthew Jacobson provides an in depth view of the tiering of Whiteness at the turn of the century Matthew Frye Jacobson, Whiteness of a Different Color: European Immigrants and the Alchemy of Race (1998); see also Lewis H. Carlson & George A. Colburn, In Their Place: White America Defines Her Minorities, 1850-1950 (1972).

n142 The analysis of racializing of the Irish at the turn of the century, and how they "became white" is now plentiful. See generally Hunt, supra note 94, at 52 (focusing on racializing and stereotyping); Noel Ignatiev, How the Irish Became White (1995) (emphasizing labor and class struggles); Jacobson, Whiteness & Immigrants, supra note 141 (using cartoons); Roediger, supra note 125 (becoming White by excluding Blacks).

n143 See generally Jacobson, Whiteness, supra note 141, at 123-35, 164-67.

n144 See Hunt, supra note 94, at 52. Slavs were particularly disliked because of their role as scabs in labor strikes of the steel and coal mines. See John Hingham, Strangers in the Land: Patterns of American Nativism 1800-1925 102105 (1972).

n145 Jacobson's work is particularly strong in making this duality clear. See generally Jacobson, Whiteness & Immigrants, supra note 141.

n146 "Abandoning" the insular territories would mean leaving them in a state of anarchy and handing them over to "endless war and slaughter, and inviting foreign intervention." "Not Delivered," Speech dated Oct. 1899, Reel 83, Series 4, WMK.

n147 On his tour of western cities during the fall of 1898, McKinley stated that "territorial expansion is not . . . always necessary to national achievement." However, McKinley thought there had to "be a constant movement toward a higher
and nobler civilization." And "in our present situation, duty and duty alone should prescribe the boundary of our responsibilities." "For humanity's sake, we must accept all obligations which . . . duty and honor imposed upon us." "Speech of President McKinley at the Banquet in the Auditorium," Chicago Illinois, Oct. 19, 1898, Reel 82, Series 4, Speeches, WMK.

n148 In these speeches, McKinley referred to the duty of the United States as not shirking its responsibility toward those in need of the nation's wisdom, especially those who had become the "wards" of the United States. "Speech at Banquet of Ohio Society," Mar. 3, 1900, Reel 83, Series 4, Speeches, WMK.

n149 Rudyard Kipling's poem, "The White Man's Burden," was first published in the United States in February, 1899, as the battle for ratification of the Treaty of Paris raged in the Senate. In a passage, Kipling described the duty of Anglo Saxons to serve the needs of "new caught, sullen peoples, half devil, half child" who inhabited the lands coming "under the influence of western civilization." Rudyard Kipling, "The White Man's Burden" (1899).

n150 No matter how grave the problems or how embarrassing the situation, "they must be met with courage and wisdom and we must follow duty. The genius of the nation, its freedom, its wisdom, its humanity, its courage, its justice, favored by Divine Providence, will make it equal every task and the master of every emergency." "Speech at Trans-Mississippi and International Exposition," Omaha, Nebraska, Oct. 12, 1898, p. 22 of Speech, Reel 82, Series 4, Speeches, WMK.

n151 The extent to which commercial ambition motivated the Spanish American War has been the subject of heated debate between Marxist historians and the "realist" historians. Compare LaFeber, supra note 3 (arguing that the War was motivated by expansionist commercial ambition and that McKinley was on board even prior to his election) with Beisner, Diplomacy, supra note 3, at 22-23 (1975) (arguing that LaFeber's thesis that there was a unified policy by business interests for economic expansionism is overstated; but agreeing that the urge for creating increasing markets was a key element of the impetus for the war). But see Freidel supra note 1, at 15 (representing an earlier view in categorically stating that Wall Street was not behind the War, rather it was fought for moral and humanitarian reasons).

n152 See generally Matthew Frye Jacobson, Barbarian Virtues: The United States Encounters Foreign Peoples at Home and Abroad, 1876-1917 (2000).


n154 Id.


n156 See Mignolo, supra note 126, at 32; see also discussion supra Part V.B. and accompanying text.

n157 Historian David Weber argues that White Southerners who settled in Texas already regarded Mexicans as racial others given the amount of intermixing of White and indigenous blood. As well, the animosity felt towards Mexicans was derivative of English antipathy towards the Spanish and Catholicism. As a result, Americans' prevailing attitude towards Mexicans was that they were "indolent, ignorant, bigoted, cheating, dirty, blood-thirsty, cowardly half-breeds." David J. Weber, Introduction to Foreigners in their Native Land: Historical Roots of the Mexican Americans 59-60 (David J. Weber ed., 1973) (citing contemporaneous accounts). Acuna's work views the Mexican American War as part of an internal racial conquest motivated largely by pre-existing racial attitudes, the ideology of manifest destiny and Americans' greed for land. See Rodolfo Acuna, Occupied America: A History of Chicanos 13-21 (3d ed. 1988). Rodolfo Alvarez has argued that if a social system and economic structure have been racialized because of historical, social, economic, and class dynamics, new entrants will become "incorporated into an already thoroughly structured, thoroughly defined, social situation." See Rodolfo Alvarez, The Unique Psycho-Historical

n158 See discussion supra notes 35-39 and accompanying text.

n159 See discussion Part V.B.

n160 See Sylvia R. Lazos Vargas, Globalization or Global Subordination?: LatCrit Links the Global to the Local and the Local to Global, 33 U.C. Davis L. Rev. 1429 (2000) (explaining that understanding local racial dynamics informs how to understand global subordination and vice versa).


n163 By the term "posititions," I mean that the theorist holds a cultural position (which includes all aspects of identity and class) that inevitably influences how she analyzes her subject). See discussion infra notes 167, 174-75, 181 and accompanying text.

n164 See Gary Minda, Postmodern Legal Movements: Law and Jurisprudence at the Century's End 224-229 (1995) (stating how CRT fits into other jurisprudential approaches that currently dominate law).

n165 See e.g., Perea, Manifest Destiny & Conquest, supra note 2, at 1 (stating more specifically, Juan Perea uses Albert Memmi's post colonial thesis that racism is a necessary justification for nakedly aggressive military conquests and expansions); Ramos, supra note 4, at 285-88 (Professor Efren Rivera Ramos develops a complex theoretical framework of "ideology of expansion" into which he incorporates cultural ideological hierarchies (Anglocentrism), pre-existing racial beliefs towards Indians and blacks, class hierarchies effected by capitalist institutions and markets, and traditional American beliefs in manifest destiny).

n166 See Perea, Race and Races, supra note 2, at 3.

n167 See Rosaldo, supra note 123, at 168-195 (Chapter 8, Subjectivity in Social Analysis).

n168 See Pierre Bourdieu, Homo Academicus 1-25 (Peter Collier trans., 1988) (Chapter 1, A Book for Burning?) (demonstrating the work of Bourdieu can not be easily classified, nonetheless, his work is clearly aligned with Max Weber's views of institutional legitimacy and status, concepts of the symbolic power of language developed by speech act theorists, and Foucault's post-structural notions of privileged knowledges and their relationship to power). See generally David Swartz, Culture & Power: The Sociology of Pierre Bourdieu (1997).

n169 See Perea, Manifest Destiny & Conquest, supra note 2, at 2 ("The proximity, the resources, the economic opportunities, the wealth, and the strategic value of lands makes them desirable. But the darker skin of the inhabitants of those desirable lands has led to conquest.").

n170 See supra note 107 and accompanying text.

n171 See supra note 106 and accompanying text.

n172 See supra part III.
n173 See Perea, Race and Races, supra note 2, at 3.
n174 See supra note 16 and discussion supra note 167 and accompanying text.
n175 See Clifford Geertz, Ideology as a Cultural System, in The Interpretation of Cultures: Selected Essays by Clifford Geertz 193-233 (1973) (Chapter 8 Ideology As a Cultural System) (arguing that the function of ideology is to provide authoritative concepts that render culture meaningful, the images by which it can be sensibly grasped); see also Rosaldo, supra note 123, at 30 ("Ideology often makes cultural facts appear natural, social analysis attempts to reverse the process. It dismantles the ideological in order to reveal the cultural, a peculiar blend of objective arbitrariness . . . and subjective taken-for-grantedness (it's only common sense - how could things be otherwise?)."); Elisabeth Young-Bruehl, The Anatomy of Prejudices 97 (1996) (emphasizing the unconscious level at which ideology functions; it (i) operates against self-consciousness and thereby avoids rigorous reasoned examination, and (ii) protects against revealing internal contradictions because they are pervasive and self-reinforcing).

n176 Sociologist Jeffery Praeger describes ideology as follows:

Ideology comes to be mistaken for reality. The images that are evoked concerning racial groups come to be the prism through which observation of the real social world is conducted. Only the passage of time and the emergence of new understandings reveal how previous efforts to comprehend differences . . . serve to justify and, in a limited sense, legitimate inequity. . . . Any racial ideology is inadequate so far as it cannot comprehend the individual in the groups. What stands for explanation at the ideological levels easily dissolves when confronted with social reality. . . . Ideology . . . represents the dominant, more or less culturally universal scheme by which social order is understood and explained.


n177 See Hunt, supra note 94, at 12. ("Ideological constructs, which culture not only inspires but also sustains and constrains, as serving as a fount for an instructive and reassuring sense of historical place, as an indispensable guide to an infinitely complex and otherwise bewildering present, and as a basis for moral action intended to shape a better future.").

n178 Id. at 52.

n179 See discussion supra notes 96-99 and accompanying text.

n180 See e.g., discussion supra Part IV (showing how such a perspective can contribute a great deal to historical analysis of the Spanish American War).

n181 Bourdieu, supra note 168, at 6.


n183 Id. at 573.

n184 Id. at 583.

n185 See Mark A. Tushnet, Constitutional Scholarship: What Next?, 67 Chi. L. Rev. 573 (1992) (observing that legal scholars believe that they can enter any other discipline on the basis of their generalized intelligence and interest yet eschew the necessity of having to go through the long period of apprenticeship) (statement of Professor Tushnet) ("[I]t is the [ ] professor as astrophysicist assumption" because the law professor assumes that she "can read a physics book over the weekend and send a rocket to the moon on Monday."); see also Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34 (1992); Mark A Tushnet, Interdisciplinary Legal Scholarship: The Case Of History-In-Law 71 Chi.-Kent L. Rev. 909 (1996).


n187 See Peter Novick, That Noble Dream: 'The Objectivity Question' and the American Historical Profession 1-2 (1988) (describing this as the "objectivist creed"
and applying the insights of Geertz and other cultural anthropologist and sociologist; Novick posits that the objectivist creed is not achievable); see also Laura Kalman, The Strange Career of Legal Liberalism 170-85 (1996); Daniel R. Ernst, The Critical Tradition in the Writing of American Legal History, 102 Yale L.J. 1019 (1993); Jane Larson & Clyde Spillenger, That's Not History: The Boundaries of Advocacy and Scholarship, 12 Pub. Historian 33, 38 (1990) (pointing out that such objectivity is aspirational, and "fairness and credibility" may be a more achievable goal).

n188 See 1 Bruce Ackerman, We The People: Foundations 219 (1991).

n189 See Kalman, supra note 187, at 183 (calling this "contextual antiquarianism").


n191 See Posner, supra note 182, at 578 (citing Friedrich Nietzsche, "History in the Service and Disservice of Life") ("Too much history, or history of the wrong kind . . . fans emotions that impede achievement."); see also Kalman, supra note 187, at 334 n.32 (quoting C. Vann Woodward as calling this "the built-in obsolescence of the lessons taught by historians").

n192 Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947 (1995) (noting similar criticisms have been leveled at the civic republicanism movement, particularly Bruce Ackerman's interpretation of constitutive moments when the "people" change the meaning of the Constitution through political action).

n193 See Laura Kalman, Border Patrol: Reflections on the Turn to History in Legal Scholarship, 66 Fordham L. Rev. 87, 103 (1997).


n195 Id. at xxii.

n196 Id.

n197 Id.


n199 Farber & Sherry, supra note 198, at 25.

n200 Id. at 24-25 (citing Bell's view that "law . . . and . . . courts are 'instruments for preserving the status quo' and only 'periodically and unpredictably' serve as a 'refuge of oppressed people'"").

n201 Id.


n203 John Rawls, Political Liberalism 36 (paperback ed. 1996). Rawls presupposes that participants in society will always disagree because incompatible philosophies are the natural result of human reason. "Diversity of reasonable comprehensive . . . doctrines found in modern . . . societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy." Id.

n204 Kuhn, supra note 202, at 202-03; Rawls, supra note 203, at 36-37.

n205 Bourdieu, supra note 168, at 6.

n206 Id.

n207 Id. at 1-25 (Chapter 1, A Book for Burning?) (providing an in-depth discussion of this concept).

n208 Id. (providing additional discussion).

n209 Rosaldo, supra note 123, at 168-95 (Chapter 8, Subjectivity in Social Analysis) (discussing how 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).

n210 Novick, supra note 187, at 11-12, 628.
n211 See Martha Minow, Making All The Difference: Inclusion, Exclusion and American Law 376 (1990) ("The perspective of those who are labeled 'different' . . . is a corrective lens, another partial view, not the absolute truth."); See generally 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 truths with a more honest, self-critical attitude about the value and potential relevance of other truths."); Lazos, Democracy & Inclusion, supra note 98, at 211 ("To include [minorities' viewpoints] requires that we abandon certainty that our own 'truths' . . . are the universal truth, and open ourselves to the possibility that the 'truth' we have come to accept is contestable."); Martha Minow, The Supreme Court, 1986 Term Foreword: Justice Engendered, 101 Harv. L. Rev. 10 (1987) (arguing that judges should be aware of their unstated point of reference when assessing others).

n212 Cf. Lazos, Democracy & Inclusion, supra note 98, at 206-33 (discussing how a judge can avoid racial positionality when judging racial issues).

n213 Rawls, supra note 203, at xlv.

n214 Id. at 137.

n215 See Bourdieu, supra note 168, at 6.

n216 See Geertz, supra note 175, at 27; see also Rosaldo, supra note 123, at 168-195 (Chapter 8, Subjectivity in Social Analysis) (discussing the observer's power).

n217 Bourdieu, supra note 168, at 6.

n218 Id. at 20-24.

n219 Id.

n220 For example, Posner argues that the legal method constrains but that judges nonetheless manipulate outcomes. Posner proposes to reconcile the gap between law's indeterminacy and judges' need to appear neutral "by turning law into something else - economics perhaps." Richard A. Posner, The Problems of Jurisprudence 124-25 (1990); see also Posner, supra note 182 (arguing that history should not be used in law unless it is uncontroverted).


n222 Novick, supra note 187, at 2, 10, 584.

n223 Id.

n224 Novick uses the example of Robert W. Fogel & Stanley L. Engerman, Time on the Cross: The Economics of American Negro Slavery (1974) who used empirical evidence to support their argument that slavery was an economically viable labor system. Id. at 588-89.

n225 See Larson & Spillenger, supra note 187.

n226 See Novick, supra note 187, at 17.

n227 See Lazos & DeWitt, supra note 4.

n228 See Francisco Valdes, Piercing Webs of Power: Identity, Resistance and Hope In LatCrit Theory and Praxis, 33 U.C. Davis L. Rev., 897 (2000) (understanding that racial dynamics are made up of multiple processes that can be interrelated and mutually reinforcing).
Globalization has obscured the fact that the ecological limits of local ecosystems have already been exceeded because production and consumption are physically separated.

-Carmen G. Gonzalez, Beyond Eco-Imperialism

The film begins with ... a scene in which a newly wed couple Susan and Vargas is in the process of crossing [from Mexico] to the U.S. for their honeymoon. As Vargas, a "Mexican" detective played by Charlton Heston, approaches his lips to the lips of the Anglo-American wife Susan, played by Janet Leigh, this act coincides with a dramatic explosion ... The juxtaposition of the image of the kiss between the Mexican male and the Anglo female with the explosion in the background recreates for the audience the hysteria projected on to the media by the McCarthyism of the 1950s, and its biological obsession with the danger of infection of the "American" body.

-Juan Velasco,

Making Evil: Crime Thrillers and Chicano Cinema

El Cenizo is a poor community [located on the Texas border. It] lacks basic services. . . . Presently, the city does not have a fire station or a fire engine. . . . A high incidence of health problems . . . stems from frequent flooding, dust and heat. One in four adults over twenty-five years old in El Cenizo has a high school degree . . . Four in five of the residents only speak Spanish . . . There are no adult education programs. The city has only one elementary school.

On August 3, 1999, El Cenizo . . . adopted an ordinance which . . . mandates that all city functions . . . be conducted and posted in . . . the predominant language of the community . . . The Mayor and Commissioners of El Cenizo . . . claim that since the passage of the ordinance, they have seen an increase in the level of civic participation of their constituents.

-Maria Pabon Lopez, The Phoenix Rises from El Cenizo

As the foregoing quotations suggest, the three articles in this cluster are in some ways wildly divergent and in many ways filled with paradox. They are different in tone and focus, they are informed by different kinds of sources, they examine different kinds of social and intellectual practices, and they use different tools to explore the objects of their analysis. They stress both separation and contact, violent rupture at one moment and wholesome healing the next. But the articles converge in important ways as well. The editors of this volume have defined them as "the cluster on borders," and it is easy to see why they chose to highlight that common thread.

Two of the articles in this group begin with a very concrete border that exists in a particular physical location: the 2000-mile boundary between Mexico and the United States. The third article engages the contemporary discourse of "free trade," an intellectual and geo-political project deeply preoccupied with national borders and with strong prescriptions regarding which people and organizations in the world should control the meaning of those borders and define their operation. Taken together, the three articles in this cluster illustrate several important themes of LatCrit scholarship. They also demonstrate some of the special contributions that LatCrit scholars are bringing to more general efforts to develop a progressive anti-racist theory and practice that is equal to the task of understanding and changing the contemporary world.

At a moment like the one in which I am writing, a time after September 11, 2001, when national borders are being breached but also fortified in unprecedented ways, when transnational perspectives, peoples, and other entities are stepping onto center stage, when being able to see a given problem from both sides of a heavily disputed boundary has become a particularly precious but endangered capacity, the contributions of LatCrit to the process of understanding borders may be more crucial than ever. The articles in this symposium, and most of the introductions that accompany them, are based on talks given at a meeting in the late spring of 2000, and they were put into final form no later than summer 2001. I am sure that by the time the authors in this symposium have a chance to read their words in print, they will see them, at least in part, as poignant
messages from another era—from a time that was far from "innocent," but was surely less filled with dread and less heavy with inflicted and threatened suffering than is the present time.

Nevertheless, even a cursory glance at the collection will also remind future readers that well before the recent bloody turn, there was already dread and suffering enough to challenge the best of our thinkers. Such a glance will show them that themes lifted up by LatCrit scholars before September 11 were already pointing us toward problems and possible responses that have only grown more pressing and more important with the intervening weeks. [*967]

This introduction comes too late for me to speak as though the events of September 11 and of subsequent days had not occurred. n1 Perhaps that fact is to the good, because having to speak in a way that acknowledges those events may require and allow me to build something of a bridge between the unusually disjunct times in which the initial writing and the later reading of this symposium's offerings will take place. But I am sure the timing will also impose its costs. My hand is far from steady at this point, and my vision far from clear. Smoke still rises from the rubble of September 11, and the work of identifying bodies in New York City inches agonizing forward. Meanwhile, bombs are falling on Afghanistan. Likely their rubble is smoking too, and who can say when the smoke will clear?

I. The Border in LatCrit Theory

If ever there was a physical location with special significance for LatCrit theory and practice, it would have to be the U.S.-Mexico border. That long, violent, contradictory, material and imaginary line produces so many startling effects, causes so much unnecessary suffering, has itself been the subject of so many rounds of varying representation, and embodies so many cogent lessons in history and power, it is a compelling subject of study and reflection for anyone interested in the current state of the world. But for LatCrit scholars, the Border—both as place and as metaphor—presents itself as an all but imperative concern.

Of course the border is significant for several of LatCrit's core communities, and for many different reasons. The line itself represents the physical extent of U.S. conquest over Mexico, memorialized in the Treaty of Guadalupe Hidalgo and now marked by the line itself. It symbolizes the restrictiveness of U.S. immigration policy toward Mexican persons. The border lives vividly in the memories of countless Mexicans who have crossed it illegally in order to enter the U.S., and sounds resonantly in the narratives they tell to friends and kin, and sometimes tell nowadays to the larger public as well. Moreover, the border has come to symbolize policy conflicts with countries well beyond Mexico, and it is often seen in the U.S. as a border that separates our nation not only from Mexico, but from "all places Latin" or even all places in the third world from all those brown and black countries to the South.

Beyond the line itself, with all its subtle complexity and raw simplicity, "the border" is also a geographic and cultural region. These long hot borderlands have a special character of their own, displaying languages, foods, musical expressions, human institutions, and social practices found nowhere else on earth, different on each side of the international [*968] line, but intimately and intricately related across it. These unique border cultures are the subject of no small amount of projection and fantasy by people in the interior regions of both the U.S. and Mexico. One should be wary of easy generalizations or stereotypes about these cultures. Even through properly cautious eyes, the border region is remarkable. One source of the region's distinctiveness, of course, is the border itself, with the imperatives it has imposed upon the people who live there, and the creativity with which they have responded.

Over the past ten years or so, the border between the two countries has become a subject of interest for another reason as well: its special significance for the new neo-liberal gospel of free trade. As a particularly raw interface between unequal trading partners within the North America Free Trade Agreement (NAFTA), the U.S.-Mexico border has come to symbolize much of what critics say is wrong with that trade agreement and others like it.

For instance, opponents of NAFTA and of the more recently proposed hemisphere-wide Free Trade Area of the Americas (FTAA) complain that if most goods are now to be allowed to move freely across borders, then people should be able to do so as well. These opponents protest the radically different and patently racial treatment accorded to human crossers at the U.S.-Mexico and U.S.-Canada borders, and they question how such a difference can reasonably be justified. Critics also point out that the gap in average wealth and median income between the U.S. and Mexico is so extreme that conjoining the two economies into a regional trade and investment block produces dramatic and unjust effects. They note that many other free trade areas, such as the European Economic Community, have taken great pains to accompany or precede the lowering of trade and investment barriers with significant transfers of material and informational resources directed toward less-developed countries to help close and soften gaps...
between the wealthy and poor nations and thereby minimize foreseeable pathologies.

In these debates both critics and supporters of neoliberalism have pointed to some of the practices and institutions on the border as exemplars of what "free trade" presages for the rest of the world. For instance, NAFTA opponents predicted that the regional trade agreement would impose the "maquiladora model" throughout North America, and warned that it would bring with it the environmental problems, worker exploitation, and community disintegration so characteristic of the export processing areas along Mexico's northern frontier. Meanwhile, supporters pointed with pride to the dizzying growth rate and job proliferation in border towns that were sites of mushrooming maquiladora development in Mexico. They also argued that the industry constituted a smashing success as a development strategy for countries like Mexico that have an excess labor pool.

II. Three Takes on Borders and the Border in this Symposium

The articles in this cluster invite us to think about the border between the U.S. and Mexico, and also about global borders generally, from these different perspectives. In some cases, the border examined is a physical place, in others it is an organizing principle or cultural emblem, in others a focus of ideological dispute and policy debate.

A. Beyond Eco-Imperialism

Carmen Gonzalez, in Beyond Eco-Imperialism, engages the border-challenging project now being pressed by supporters of "free trade" under the banner of neo-liberal economics. The neo-liberal project seeks a new set of global trade and investment rules that would favor multinational corporations and international investors. Meanwhile, it would weaken local and national legislative authorities that previously had jurisdiction over economic ground rules within their respective borders. It would also weaken many of the political constituencies that have traditionally been able to use the organs of popularly elected government to secure statutory protections for the vulnerable and redistribute social surplus. Gonzalez criticizes this expanding global regime of free trade, arguing that it leads to environmental degradation in poor countries, and lets the rich countries off the hook for the heavy role they play in pollution and resource depletion worldwide.

She structures her analysis around a kind of border: the deep geo-political divide separating the world's North and South, criticizing in particular the unequal "North-South distribution of the environmental consequences of liberalized trade." She illustrates her case by reference to the Northern export of hazardous waste and the steady march of deforestation in both temperate and tropical zones. At every step, she points out the asymmetry of global environmental dynamics.

For instance, she reports that the North generates the lion's share of the demand for forest imports, and further that the primary beneficiaries of expanded harvesting of forest products are multinational timber companies headquartered in the global North. Meanwhile, Southern countries are pressured into ever-greater depletion and export of forest resources by pro-free-trade international financial institutions. These institutions can dictate domestic policy to countries laboring under the inequitable and unmanageable debt now commonly borne by countries in the global South.

Like other critics of corporate-led globalization, Gonzalez also attempts to sketch at least the broad outlines of an alternative to the presently dominant neo-liberal line on trade and the environment that she finds so lacking with regard to social justice or ecological sustainability. She suggests that Northern countries should curb their "over-consumption." Likewise, transnational corporations should be made accountable to local individuals and communities and should be subject to effective regulation. Further, she says that local environmental movements should be closely observed, and individuals and communities should be adequately armed with entitlements and tools that could enable them to vindicate claims of human rights related to the environment.

Gonzalez aims to debunk two important myths that she believes are common in debates about free trade and the environment: first, that "environmental protection is a luxury that developing countries can ill afford," and second, that "industrialized countries have generally played a leadership role in the protection of the global environment." In her view, both myths need to be inverted. As to the first myth, that environmental protection must await further growth and economic development in the global South before it is advisable or practical, Gonzalez maintains that environmental protection is presently indispensable for the personal well-being of poor people in the global South, and often for the preservation of their cultural integrity as well. As to the second myth, that the North has led the global way in environmental protection, Gonzalez argues that the consumption patterns of Northern countries can only be maintained because these countries have appropriated the natural resources and waste sinks of countries in the global South, a pattern that is both inequitable and unsustainable in the long run.
B. Making Evil

In Making Evil, Juan Velasco introduces a handful of artistic representations of the U.S.-Mexico border and asks us to contemplate multiple contrasts among them. One is an Orson Welles film noir from 1957, two others are documentaries by Chicana filmmaker Lourdes Portillo from 1988 and 1994. In these works of art, the border becomes a place both real and imaginary, geographic and cultural, located and free-floating.

Velasco first examines the 1957 Hollywood film by Orson Wells, A Touch of Evil. He criticizes Welles for harnessing his powerful cinematic talent to the job of promoting a "hysteria projected on to the media by the McCarthyism of the 1950s, and its biological obsession with the danger of infection of the 'American' body." He is not particularly assuaged by Welles' inclusion in the script of Quinlan, a "bad guy Mexican," who is shown to be overtly and violently anti-Mexican, in a way that seems obviously intended to be repugnant. In Velasco's estimation, the audience is most likely to come away from the film, not with a broad or deep critique of Quinlan's anti-Mexican bias, but with the message that the "touch of evil" infecting Quinlan was spawned in a corruption created by the mongrelization and mestizaje of the border.

Velasco describes with an acute eye how the film presents the border as a place of danger linked to forbidden transgressions of "normal" race and gender bounds. In its opening scene, the newly-wed kiss of a U.S.-Mexican couple, who have just penetrated the U.S. by crossing the border for their honeymoon, seems to trigger a violent explosion. Abstracting from the film's plot, Velasco suggests that "the border becomes the opening in the body, and the MexicanAmerican becomes the viral contamination that undermines the biological immunity of the body politics of America." He points out that this vision of the border as a place of danger is not restricted to Anglo artists, and points to Labyrinth of Solitude, a 1950 novel by Mexican author, Octavio Paz, in which Mexican-American youth are portrayed as disturbing and dangerous cultural hybrids in the borderlands twilight of a Los Angeles slum.

Velasco goes on to contrast Welles' and Paz's treatment of the border with representations by Chicano and Chicana artists. Invoking first America Paredes' With His Pistol in His Hand, a 1959 study of the corrido, or Mexican border ballad, and next Gloria Anzaldua's meditation and cry of protest in her 1987 book, Borderlands/La Frontera, Velasco claims that these Chicano/a writers, both working in times of anti-Mexican backlash, succeeded in creating texts that celebrated the border and the very "multiplicity, hybridity and liminality" that apparently made Welles shudder.

Velasco then moves to a deeper look at a pair of films by Chicana filmmaker, Lourdes Portillo. In Portillo's work, he says, the crossing of boundaries is represented to be a wholesome and integrative act that carries with it the potential power to heal and to create. Her camera follows Mexican people who settle with little concern for boundaries, carrying their traditions with them to new homes, and continuing to nurture ritual and cultural expression in modest, everyday ways that both endure and change. Portillo's aesthetic is one that values and celebrates boundary-crossings of many kinds, including the bounds of gender and sexual orientation. The identities she finds well-suited for navigating the world as she knows it are fluid, dynamic and multicultural. Mestizaje in this vision becomes a source of strength rather than corruption.

C. The Phoenix Rises from El Cenizo

In the third article of the trio, The Phoenix Rises from El Cenizo, Maria Pabon Lopez examines the story of one small Texas-Mexico border town whose political leaders in 1999 passed a "Predominant Language Ordinance" mandating that city functions, meetings and notices would be conducted in the predominant language of the community. Note that the ordinance is colorblind in the sense that it prefers no one language over another. Note also that it takes special pains to assure that those who do not speak the predominant language can easily exercise their generous translation rights simply by requesting them. The ordinance turned out to be a novel step that catapulted the town briefly into the national and even international spotlight. It also sparked an outbreak of rude attention from anti-immigrant groups and individuals. However commonsensical El Cenizo's grassroots initiative might seem to some, it generated significant opposition and alarm when it was first made public.

Despite the initial firestorm, Pabon Lopez's article suggests that things in El Cenizo since the ordinance have gone without significant uproar or upset. The main change she reports is gratifying, but hardly startling: the residents of El Cenizo are now more involved and more interested in participating in the affairs of their local government than they were when city business was conducted in a language that the majority of them could not understand.

Pabon Lopez provides helpful context for understanding the controversy and for assessing the city's action. She describes the colonia phenomenon that has come into existence along the Texas and New...
Mexico borders. Immigrants often bring with them to the extremely poor counties along the U.S. side of the international boundary, practices and skills they learned in Mexico, where rural migrants to the city must often make housing for themselves in precarious settlements at the urban fringe. Adapting these practices to new U.S. environments, immigrant communities at the border have established a variety of colonias, neighborhoods usually lacking infrastructure or secure title at least at the beginning, but providing a way for very poor families to create shelter for themselves and to work gradually toward secure home ownership, even in situations where traditional financing is out of the question.

Pabon Lopez describes the particular community of El Cenizo in vivid detail: its beginning as a barren colonia with few resources, the continued poverty of many of its residents, the paucity of their educational options, the predominance of Spanish as the spoken language of the community, the hard jobs people do. These jobs usually involve a long commute by private bus to Laredo, and the INS frequently targets these bus lines. The agents are authorized to proceed with only minimal legal restraints, and this important freedom for law enforcement officials is justified by the highest authorities on grounds of the community's close proximity to the border.

To read Pabon Lopez's description of El Cenizo is to know that a distinctive culture exists along the Texas-Mexico border. To read U.S. Supreme Court opinions on police stops near the border is to know that fear and loathing of border crossers is alive and well in U.S. jurisprudence. To read the tale of El Cenizo's ordinance and its matter-of-fact defense by El Cenizo city officials is to know that borderlands culture is not solely created by passive inheritance or forged through experiences of victimization. [*973]

As Pabon Lopez asserts, El Cenizo residents are engaged in the process of active civic and cultural production, establishing the reality of substantive citizenship even while many of them are under the real cloud of possible deportation. Just as they are building physical shelter with their own hands, and establishing legal title through financial and often political struggle, they are constructing through local legislation a new kind of borderlands citizenship that should serve as instruction to other local polities in how to revive and invent democracy.

III. Signs of LatCrit at Work

A number of themes characteristic of the larger LatCrit project are evident in these three articles. Set out below are a few of the salutary things these articles do that situate them in the emerging LatCrit tradition. It is hardly a complete list of LatCrit themes, or even of the themes in the three papers at hand, but perhaps it offers one way of seeing how these pieces fit into the exciting larger project represented by the LatCrit initiative. Here are some things that LatCrits do:

A. Identify, praise, and support anti-subordinationist practices by Latino/a communities and Latino/a writers and artists

Juan Velasco lifts up Americo Peredes and Lourdes Portillo, while Maria Pabon Lopez describes and honors the actions of people in El Cenizo. It is important to any group that its members and its artists have intellectuals who are interested in finding their stories and celebrating their accomplishments. Groups need intellectuals who will be critical as well as celebratory. They need readers and listeners who can speak the necessary languages, who are willing to reach out in respectful and inclusive ways, and who are possessed of sufficient background information to understand what is being said.

LatCrit scholars are well situated to play this role for Latino communities in the United States, and for Latino writers and artists of the past and present. It is inspiring to see Maria Pabon Lopez, for instance, identify a small and relatively powerless community that has undertaken a praiseworthy and creative democratic initiative, to watch her build a description that includes first-hand interviews with the principles (some of these apparently conducted in Spanish), and to share the fruits of her investigation with a wider public. Her article also provided a very concrete kind of support to El Cenizo by laying out the results of her doctrinal research in a way that would have been invaluable to a litigation team had it been necessary to mount a legal defense of the El Cenizo ordinance.

Similarly, it is illuminating to be the recipient of Juan Velasco's knowledge about the Chicano literary canon and the related but different world of Mexican literature. He not only introduces readers to Latino/a writers and artists, but he helps us to see what they are doing and to [*974] discern important themes that run through much Latino/a writing. If Pabon Lopez helps readers appreciate the citizenship-building activities of low-income Latino residents along the border, Velasco helps readers see how generations of Latino/a writers have built on each other's work and have shared in the elaboration of central themes.

In a more global context, Gonzalez points out the lack of local voices and grassroots perspectives in the case for "ecoimperialism" mounted by free traders. For instance, at one point Gonzalez discusses a recent article on the practice of locating "shipbreaking" activities in third world countries (that is, the
dismantling of ships for scrap, with much attendant exposure to hazardous materials). She notes that the article includes interviews with owners and overseers from the Indian shipbreaking industry, but "not a single Indian environmentalist is quoted in the article despite the fact that India has one of the largest environmental movements in the world," and she then cites readers to sources where they can learn more about these Indian movements.

B. Mobilize outsider vantage points to support and inform critique of dominant ideologies and to expose false norms that exclude or oppress Latino/a people and communities

LatCrit scholars celebrate oppositional activity from the grassroots and the margins, but they also voice critiques of dominant perspectives and activities radiating from the top and center. Carmen Gonzalez does a superb job of exposing dominant myths in the debate over the environment and free trade. She works to de-throne what she calls the "carefully constructed media image" that environmentalism is a "new form of imperialism, whereby the environmental preferences and priorities of the wealthy countries of the North are imposed on the poor countries of the South."

It is especially significant that Gonzalez chose to turn her attention to a wedge issue where dominant interests in the U.S. are attempting to rally and display support for their international investment policy agenda from leaders of poor third world countries--including Mexico, with its maquiladoras and its (highly problematic) membership in "North America," but including many other countries in Latin America as well. Using an outsider perspective, Gonzalez is able to avoid having her perceptions captured by the multinational corporations and free trade ideologues on the one hand, or by the often-provincial U.S.-based environmental movement on the other. Instead, functioning as a kind of "outsider within," a person with one foot inside and another foot outside the national norm, she takes the view of poor people in the global South, and builds her analysis and recommendations from that foundation.

Similarly, Velasco unpacks Orson Welles' filmmaking to expose and critique its messages about the border and about the people of all colors [*975] who live there. Pabon Lopez, in turn, contrasts the El Cenizo Ordinance to English Only rules and shows how unflattering the result is to the latter, because it throws their bias and narrowness into such high relief.

C. Create mirrors, opposites, dangerous complements and reversals of dominant ideology

In addition to celebration of existing and emergent antisubordinationist practices, and in addition to critique of dominant ideologies, LatCrit scholars can and do create alternatives. Velasco, for instance, describes in lively detail the ways that filmmaker Lourdes Portillo is working to create a different vision of borders and borderlands, one that embraces some of the very aspects that Welles and Paz seemed to dread, but one that also shows these aspects to be supportive of harmony, peace and well-being, rather than conflict and depravity.

For her part, Gonzalez proposes an alternative vision for protection of the global environment. This alternative would demand self-examination and change by the over-consuming North rather than continued striving for growth in that region. It would impose greater restrictions on multinational corporations rather than the radical unleashing that characterizes most current international trade deals. It would stress local control and local input, rather than their obliteration as things of the past. It would also suggest use of human rights law as the best source of ordering rules for the new global economy, rather than the construction of new trade and investment charters that give rights only to states and international investors.

Meanwhile, El Cenizo's Predominant Language Ordinance is in two different senses a reply to and inversion of English Only. In the immediate context, of course, it is different because it establishes Spanish as the language of public meetings in El Cenizo. In a larger sense, however, it is not just a flipped image, but a more deeply different one. It embraces no particular language, but articulates a preference for substantive access geared to the concrete situation, coupled with minority language rights for speakers not proficient in the locally dominant language.

D. Serve as a bridge between cultures and worldviews

This bridge theme may well be implicit in those already set out above, but I believe it merits separate treatment. Many LatCrit scholars, because of their languages, cultures, experiences or studies, are in a position to serve as guides for members of the dominant culture, or for members of other subordinated communities who want to know more about Latinos/as. They are often in a position to move in the opposite direction as well, serving as guides for Latinos/as who want to know more about native-born or other cultures. These roles can produce problems, of course, but they are much needed in a situation where racial formations [*976] are changing in some respects and stubbornly remaining unchanged in others.

In this trio of articles, Gonzalez lifts the international curtain for a moment and shows readers something of how the global economy looks to poor people in poor
It is easy to imagine further nightmares, launched by farflung and desperate networks of terrorists, or by the United States and its own farflung world systems. Certainly one can imagine a monstrous rebirth of the hysteria and "biological obsession with the danger of infection of the 'American' body" that Velasco saw in Touch of Evil. Surely if there was ever a time when such fears were likely to flourish and develop in dangerous directions, this would be that time.

IV. In the Aftermath of September 11

It is hard to look at this trio of articles and not think about September 11. It is unsettling even to read the parts of Velasco's article that describe a seemingly normal international entry that erupts into an utterly unexpected—but perhaps dreadfully predictable—explosion. It is particularly searing to read the parts of Gonzalez's article that describe the maldistribution of environmental costs and benefits and caution that we should attend to this inequitable and destabilizing pattern. (She remarks, for instance, "The North, with 20% of the world's population, currently consumes a disproportionate share of the world's resources, including 85% of the world's timber, 75% of its metals, 70% of its energy, and 60% of its food.")

Beyond this particular trio, it is hard to think about LatCrit commitments as a whole and not think about September 11. Certainly LatCrit scholars are likely to share a special concern for immigrants' rights, and any advocate for immigrants has had to shudder at the possibilities for private and state-sponsored backlash that have loomed on the horizon since that day.

Now more than ever, it seems that the voices of "outsiders within" will be imperiled in various ways, but desperately needed. If it was important before September 11 to have a Carmen Gonzalez helping people in the U.S. to build an internationalist vision, introducing us to third world environmentalists, and reminding us how U.S. consumption patterns look from beyond our borders, then it is all the more obviously important today. If it was important before to learn about immigration policy, to understand the operation of our boundary to the South, and to stand for the rights of outsiders among us, then it is all the more obviously crucial today.

If we needed before September 11 to learn from scholars of literature and popular culture about the ways that images have shaped our perception of color and culture and nationhood, then it is even more important to do so now. On that day some men gone mad became nightmare artists, took the stuff of popular culture and drew indelible images[*977] in a real blue sky, using the bodies and lives of real people—including their own—to send a message straight to the American people. How will Americans receive and interpret that message, and what tools will be available to them for this unprecedented task?

It is easy to imagine further nightmares, launched by farflung and desperate networks of terrorists, or by the United States and its own farflung world systems. Certainly one can imagine a monstrous rebirth of the hysteria and "biological obsession with the danger of infection of the 'American' body" that Velasco saw in Touch of Evil. Surely if there was ever a time when such fears were likely to flourish and develop in dangerous directions, this would be that time.

Nevertheless, I also see some signs for hope. It is not only people like LatCrit theorists, progressive social activists, and antiWTO demonstrators who are now asking whether present levels of gross inequality and absolute deprivation in the world are sustainable. Many people are newly motivated to question and learn about the history of a foreign policy that includes such disturbing facts as training of the Taliban in Afghanistan, support for massacres of indigenous people in Central America, accommodation of corrupt royalty in the Middle East, unmistakable contributions to the deep and worsening impasse over Israel and Palestine, and the whole host of past and present policies that seem either clearly or possibly connected to the present situation.

Of course questioning and recognizing past sins is hardly the same as seeing a way out of the emergency we are in. But surely nothing solid can come without such questioning and recognition. In any event, it is my conviction that members of LatCrit, using the tools of analysis developed by LatCrit scholars and seeking direction from the principled commitments of LatCrit activists, can and should play an important role in the national and international debates and decisions to come.

FOOTNOTE-1:

n1 The lateness is of my own making: other introducers were more timely in their submissions. Perhaps this is the place to thank the gracious editors of this law review for their patience, and to express my appreciation for the chance to participate in this symposium.
As trade ministers from 135 nations gathered in Seattle for the Third Ministerial Conference of the World Trade Organization (WTO) in late November 1999, over 50,000 protesters, including farmers, trade unionists, and environmentalists, joined forces in a raucous demonstration of opposition to the current organization of the global economy. The massive protests, which quickly became known as the "Battle in Seattle," featured teach-ins, rallies, marches and other events designed to draw attention to the WTO's impact on labor, environmental, food safety, human rights and consumer protection measures.

Media coverage of the issues underlying the protests emphasized the WTO's threat to U.S. environmental and labor laws, and posited a conflict between developed countries' concerns for workers' rights and environmental protection on the one hand, and developing countries' needs for unfettered economic growth on the other.

In order to place the environmental imperialism claim in proper context, some historical background is appropriate. Although the tension between free trade and environmental protection had been building for quite some time, the conflict came to a head in 1991 when a dispute resolution panel, convened pursuant to the General Agreement on Tariffs and Trade (GATT), found that a U.S. embargo on Mexican tuna caught with dolphin-endangering "purse seine" nets violated GATT. The tuna/dolphin decision ushered in a decade of debate over the environmental impact of liberalized trade, and over possible strategies for integrating environmental protection into the GATT/WTO framework.

One important element missing in much of the scholarly literature about trade and the environment is a critical assessment of the environmental imperialism claim. To what extent do the North's efforts to integrate environmental protection into the international trade regime constitute an imposition of Northern values and preferences on less powerful nations? This article attempts to address this question by situating it in the larger context of North-South economic relations and by examining how the economic benefits and environmental burdens of liberalized trade are distributed.

Part I of the article discusses the myth that environmental protection is a luxury that developing countries can ill afford. The second myth is that industrialized countries have generally played a leadership role in the protection of the global environment. This article attempts to deconstruct these myths in order to critique the environmental consequences of trade liberalization from an environmental justice perspective.
concludes that environmental protection, far from being a luxury, is necessary to the protection of the natural resource base upon which the South relies for survival.

Part II of the article discusses the myth that industrialized countries have generally played a leadership role in the protection of the global environment. It examines the contribution of the North to the deterioration of the global environment, and identifies the North's resource-intensive, consumption-oriented lifestyle as the primary cause of global environmental degradation. Regrettably, this lifestyle can only be maintained through the ongoing appropriation of the natural resources of the South. Part II concludes that the North, far from being a global environmental leader, is more accurately described as a global environmental looter.

Part III of the article examines why developing countries have denounced Northern proposals to incorporate environmental protection into the WTO framework as environmental imperialism, and reveals that many of these proposals attempt to impose Northern environmental standards on the South without addressing the North's far more ecologically damaging behavior. Part III recognizes the validity of the environmental imperialism charge and suggests several approaches to the trade/environment debate that address the North's disproportionate contribution to global environmental degradation rather than imposing Northern ecological preferences on the South.

Part IV concludes the article by redefining the term "environmental imperialism" as the North's systematic and ongoing appropriation of the South's ecological resources. It calls for the reconciliation of social justice and environmental protection through policy proposals designed to scale back the North's over-consumption of the world's resources, and through support of grassroots resistance to environmental degradation. The article calls for close scrutiny of initiatives to reconcile trade and the environment in order to ensure that they promote environmental justice and do not merely reinforce Northern political and economic dominance.

I. Environmental Protection: Luxury or Necessity?

The myth that environmental protection is a luxury that developing countries can ill afford rests on the assumption that environmental protection is an obstacle to economic development and is irrelevant to the immediate needs of the poor. n14 This Part critically assesses this myth by contrasting the environmentalism of the rich with the environmentalism of the poor, and by examining the impact of environmental degradation on the Southern poor and on the natural resource base required for economic development.

A. Environmental Justice: North and South

The environmental movement in the United States has long been perceived as white, middle class, suburban, and concerned first and foremost with the protection of parks, wilderness areas and endangered species. n15 The environmental justice movement, which emerged in the 1980's, challenged the priorities of the traditional environmental movement by making an explicit connection between environmental degradation and issues of poverty, racism, and democracy. n16 Environmental justice activists argued that the traditional environmental movement and the government agencies charged with environmental protection neglected the distributional consequences of environmental degradation and failed to effectively incorporate in environmental decision-making the communities bearing the greatest environmental risk. n17 As a result, poor people and racial and ethnic minorities suffer disproportionately high levels of exposure to toxic substances while whites residing in more pristine suburban neighborhoods reap the benefits of environmental protection. n18 These allegations were confirmed by studies that found income and racial bias in both the location of hazardous waste facilities, and in the enforcement of statutes that set standards for air, water and waste disposal. n19 [*985]

The movement to preserve the global environment has likewise been perceived as a Northern, middle class movement concerned primarily with the protection of nature. n20 Northern environmentalists have typically adopted a technocratic approach to environmental protection, n21 emphasizing global management of the environment based on scientific principles [*986] while neglecting Southern aspirations for social justice, cultural rights, selfdetermination and democracy. n22 Southern non-governmental organizations (NGO's) and grassroots movements have challenged the North's technocratic approach by placing environmental issues in the context of international inequality and the struggle for social justice. n23 Southern environmentalists have charged that Northern development policies and consumption patterns are the primary causes of resource depletion and global pollution and that the world economic order has institutionalized Southern poverty, which places additional stress on the environment. n24 [*987]

Indeed, one prominent Southern environmentalist has argued that the South is bearing a disproportionate share of the environmental consequences of
globalization, and has described this phenomenon as environmental apartheid. n25

The allegations of Southern environmentalists have been supported by studies commissioned by the United Nations Development Program, n26 and are explored below in the context of two specific environmental problems: the export of hazardous wastes and deforestation. These examples are designed to illustrate the North-South distribution of the environmental costs of liberalized trade and to critically assess the notion that environmental protection is a luxury that the South can ill afford.

B. Toxic Colonialism: the Export of Environmental Hazard

The North-South distribution of the environmental consequences of liberalized trade is perhaps most apparent in the context of the export of polluting industries and hazardous wastes from the North to the South. Indeed, the North-South distribution of environmental degradation was explicitly recognized by World Bank Chief Economist Lawrence Summers (subsequently U.S. Treasury Secretary) in a controversial 1991 memorandum outlining why the World Bank should encourage the migration of dirty industries from the North to the South. n27 Mr. Summers cited three reasons in support of this policy recommendation. n28 First, since the costs of pollution are generally calculated based on the foregone income caused by the premature death and illness of wage earners, the income lost through the death of a worker in a developing country is much less per unit of pollution than the income lost through the death of a worker in a developed country. n29 Second, less contaminated countries, such as African countries, are the logical places to dump pollution since the marginal, incremental costs of pollution are much lower than in heavily polluted places. n30 Finally, the demand for a clean environment is likely to be less in poor countries with higher mortality. n31

Newspapers throughout the world quoted the Summers memorandum n32 and the outraged responses from environmental organizations. n33 Although Mr. Summers claimed that his comments were not intended as serious policy recommendations, the memorandum served to alert environmentalists to the distributional consequences of neoclassical economic thinking divorced from ethical and social justice considerations. n34

The export of hazardous wastes from North to South poses serious risks to developing countries. From 1978 to 1998, per capita waste generation in industrialized countries increased almost threefold. n35 The United Nations Environment Program estimates that approximately 440 million tons of hazardous wastes are generated annually worldwide and that approximately 10 percent of these wastes are exported across international borders. n36

Hazardous waste generators in the North export wastes to the South because strict environmental regulation and citizen opposition to the location of waste disposal facilities have increased the cost of waste disposal in the North. n37 By contrast, hazardous waste disposal is significantly cheaper in the South due to weak environmental regulation, lax enforcement, and government corruption. n38 Moreover, poverty and debt create powerful incentives for developing countries to accept hazardous waste shipments from other nations in order to earn badly needed foreign exchange. n39

Notwithstanding attempts to regulate the waste trade by treaty, and despite the decision of many developing countries to impose unilateral bans on the importation of hazardous wastes, n40 the hazardous waste trade continues to flourish. n41 Government officials have intercepted illegal shipments from the United States destined for Ecuador, Guinea, Haiti, Malaysia, Mexico, Panama, and Sri Lanka. n42 East European countries have intercepted thousands of deceptively labeled waste shipments from Western Europe, including shipments labeled as humanitarian aid. n43 Environmentalists have rightfully denounced this practice as "toxic colonialism." n44

However, it is not only the illegal waste trade that imperils the health of people in the South. The expansion of the legal waste trade in recyclable materials is also a significant factor. n45 The export of wastes for recycling is believed to account for 90 percent of the North's total hazardous waste exports, n46 and can be as harmful as the illegal waste trade. While recycling is generally viewed as environmentally beneficial, many recycling operations in the South are extremely hazardous due to improper waste management and lack of adequate worker protection. n47 For example, millions of used car batteries are shipped from the United States to Brazil, China, India, and South Africa, among others, to be melted down for lead recovery. n48 Without proper protective equipment, workers are exposed to dangerous lead levels, causing headaches, stomach cramps, dizziness, and kidney pains. n49 Prolonged exposure can cause more serious problems, such as kidney damage, reproductive problems, and brain impairment in children. n50 In addition, sham recycling is a growing problem. In many instances, hazardous waste generators label wastes "for recycling" in order to circumvent bans and restrictions on hazardous waste disposal, thereby blurring the line
between the legal and illegal hazardous waste trade. n51 Whether legal or illegal, the hazardous waste trade has imposed significant health and safety costs on the South.

The consequences of improper waste disposal have been devastating for developing countries. n52 Improper waste disposal poses particular health and safety risks in the South because many developing countries lack the legal and administrative infrastructure to regulate waste disposal. n53 Dumpsites are often located near population centers, and poor people are exposed to hazardous wastes when they scavenge for items to use or sell. n54 In addition, the climate of many developing countries may increase the risk of human exposure to hazardous wastes. For example, heavy rainfall in tropical countries may cause wastes to leach into groundwater, thereby harming people who drink untreated water. n55 The dumping of wastes into rivers kills fish and injures both those individuals who earn their livelihoods through fishing, and those who rely on the rivers for drinking water. n56 Developing countries that receive hazardous wastes often experience soil and groundwater contamination, air pollution and threats to natural resources. n57 While Southern elites can insulate themselves to some extent from the consequences of the waste trade by moving into more pristine communities with better access to clean air and water and uncontaminated land, it is the poor who must suffer the consequences of environmental degradation. n58 Far from being a luxury, environmental protection is necessary to preserve the health, safety and well-being of the Southern poor.

While the South bears the environmental costs of the hazardous waste trade, the North reaps significant economic benefits. The shipment of hazardous wastes from North to South allows developed countries to maintain a level of economic activity that exceeds domestic waste disposal capabilities. The waste trade thereby reduces incentives to minimize waste generation, maintains the illusion of unlimited economic growth, and imposes the costs of industrialization on developing countries without the corresponding benefits of industrial production. n59

C. Deforestation: Clearing the Forest for the Trees

The North-South distribution of the environmental consequences of free trade is also well illustrated by the problem of deforestation. Forests harbor more than half of all plant and animal species on earth and provide a range of valuable natural services, including flood control, erosion control and regulation of local and regional rainfall. n60 They also mitigate global warming by absorbing carbon dioxide and are therefore referred to as carbon sinks. n61 At the same time, forests are a valuable commercial resource, and the global trade in forest products has climbed steadily from $29 billion in 1961 to $139 billion in 1998. n62 Since 1850, the world has lost one third of its forests, and the rate of loss is rapidly accelerating. Most deforestation has occurred in the temperate regions of the North, but forest loss is now occurring more rapidly in the tropical regions of the South, which contain 60 percent of the world's remaining forests. n63

Northern environmentalists have depicted deforestation as a global problem, and have urged the South to protect its tropical forests in order to reduce global warming, preserve resources needed for biotechnological and medical research, and preserve the beauty of nature. n64 However, the North's depiction of forest preservation as a universal concern of all humankind masks both the underlying causes and the distributional consequences of deforestation.

Commercial logging is the major contributor to global deforestation, and it threatens both the tropical forests of the South and the temperate and boreal forests of Canada, the United States, and Russia. n65 Indeed, while Northern environmentalists have focused on the protection of tropical forests, approximately 80 percent of the documented international timber trade comes from the temperate and boreal forests of the North. n66 Industrialized countries also account for approximately 80 percent of the value of forest product imports. n67 The North's demand for forest products and the North's failure to protect its own forests account for a significant percentage of global deforestation attributable to the international trade in forest products. n68 However, as demand for forest products grows, the South is rapidly increasing its share of global forest product exports. Brazil, Indonesia and Malaysia are now in the ranks of the top 10 forest product exporters. n69

Notwithstanding the serious levels of deforestation presently being experienced, a controversial proposed agreement championed by the United States at the 1999 WTO Ministerial Conference in Seattle could increase the pressure placed by global commerce on the world's forests. The proposed agreement, denounced by environmentalists as the "global free logging agreement," would eliminate both tariff and non-tariff trade barriers on pulp, paper, furniture and other forest products. n70 Such non-tariff barriers may include border restrictions to prevent entry of invasive species, export bans to reduce logging, and government procurement and eco-labeling practices designed to promote the use of recycled paper and sustainably harvested wood products. n71 The
proposed agreement would accelerate the process of deforestation by promoting the expansion of trade in forest products. n72

Expanded commercial logging benefits transnational timber corporations and their Southern partners. For many years, timber companies from the North have been conducting commercial logging operations in developing countries. n73 For example, European firms have been cutting down timber in Africa, and Japanese firms joined forces with local companies to clear the forests of Indonesia, Malaysia, and other Southeast Asian countries. n74 With their own forests depleted, timber companies from Indonesia, Malaysia and other Asian countries have, in turn, purchased logging rights in other developing countries, including Brazil, Cameroon, Guyana, Papua New Guinea, and Suriname. n75 Transnational timber corporations have also joined forces with local investors to set up related woodproducts operations, such as sawmills and pulp and paper operations, that utilize locally supplied wood. n76

A significant factor promoting over-exploitation of forests in the South is debt. The World Bank and the International Monetary Fund have accelerated deforestation in the South by promoting export-led structural adjustment policies designed to ensure loan repayment. These policies have resulted in the unsustainable export of forest products and in the clearing of tropical forests to produce export commodities such as coffee, cacao, and cotton. n77 Declining terms of trade for primary commodities have caused developing countries to attempt to increase their output by clearing additional forests as well as using existing agricultural lands more intensively. n78 The World Bank and regional development banks have also funded energy, mining, resettlement and transportation projects in the South that have contributed greatly to deforestation, and have resulted in the massive displacement of indigenous and local people from their traditional lands. n79 Mining, energy development and related activities represent the second largest threat to forests after logging. n80

While transnational corporations and Southern timber, mining, and agribusiness companies reap the benefits of deforestation, the costs are often borne by the Southern poor. The commercial exploitation of tropical forests has had significant social and economic consequences. Commercial logging operations as well as mining, ranching and agribusiness, displace indigenous and local communities, destroying their social structure and economic base, driving them to survive on smaller parcels of land, and ultimately creating an exodus to the cities. n81 Deforestation produces flooding and soil erosion, and harms both subsistence and commercial farmers and fishermen as rivers fill with silt from the erosion of terraces and hillsides. n82 Deforestation has been at the root of catastrophic events in Asia, Africa and Latin America that have caused massive injury and economic dislocation. For example, deforestation was a major cause of the Ethiopian droughts and famines of the 1970s and 1980s. n83 Deliberate burning of forests for palm oil and pulpwood plantations was the cause of the Indonesian wildfires that blanketed Indonesia, Singapore, Malaysia, Southern Thailand, and part of the Philippines in smoke in 1997 and 1998, and forced some 20 million people to breathe contaminated air for prolonged periods. n84 Finally, the massive clearing of the Central American rainforests for cattle ranching in the 1960s and 1970s made Honduras and Nicaragua particularly vulnerable to the devastating floods caused by Hurricane Mitch in 1998. n85 These floods allegedly set back development in Honduras and Nicaragua by 30 years. n86 Thus, deforestation affects not only those who live on or near tropical forests and rely on them directly for their survival, but also those who rely on the services provided by forest ecosystems, such as erosion control, flood control and regulation of rainfall.

Deforestation also has global consequences, and the costs and benefits are likewise unevenly distributed between North and South. Deforestation degrades the global environment through loss of biodiversity, release of greenhouse gases and loss of carbon sinks. n87 The North is responsible for 90 percent of the anthropogenic greenhouse gas emitted during the past 150 years, and it has, therefore, benefited from its ability to use the global atmosphere as a sink for the harmful by-products of industrialization. n88 However, Southern countries will bear a disproportionate share of the environmental consequences of global warming, including droughts, floods, rise in sea level, and more frequent storms and hurricanes, due to their more vulnerable geographies and economies. n89 Loss of biodiversity will also have disproportionate impacts in the South. Tropical forests contain most of the world's biodiversity, providing habitat for 70 percent of all known species. n90 For the North, loss of biodiversity constitutes foregone opportunities for biotechnology, agribusiness and pharmaceutical industries to commercially exploit the valuable raw materials of the South. n91 For local and indigenous communities in the South, biodiversity represents food, medicine, clothing, shelter, and cultural integrity. n92 Conserving biodiversity is essential to the physical and cultural survival of the more than 500 million people who depend on tropical forests for their wellbeing, and includes fighting to protect rights to land, natural resources and cultural knowledge. n93
As the hazardous waste and deforestation examples illustrate, the current organization of the global economy enables the North to reap the benefits of expanded trade while imposing the environmental costs on the South. In general, it is the Southern poor who bear the consequences of environmental degradation and whose health, safety and livelihoods are thereby jeopardized. Contrary to the myth that environmental protection is a luxury that the South can ill afford, environmental protection is necessary to the preservation of the natural resource base upon which the population of the South relies for its survival. It is therefore not surprising that Southern environmental movements are rooted in material conflicts and in the struggle for social justice. n94

The hazardous waste and deforestation examples also illustrate how liberalized trade under the GATT/WTO regime exacerbates pollution and natural resource depletion. By removing both tariff and non-tariff barriers to trade in forest products, the "global free logging agreement," advocated by the United States at the WTO Ministerial Conference in Seattle, would expand global commerce in forest products and accelerate deforestation. n95 With respect to the hazardous waste trade, the GATT/WTO dispute panel and appellate rulings discussed in Part III of this article raise serious questions about whether trade restrictions imposed under environmental treaties to promote waste minimization and curb the hazardous waste trade would survive a WTO challenge. n96 Finally, the GATT/WTO rulings threaten to undermine environmental quality by creating uncertainty as to whether domestic legislation to protect the local or global environment would run afoul of WTO requirements. n97 Countries might very well forego vigorous environmental protection measures (including taxes and trade restrictions) in order to avoid becoming embroiled in lengthy and protracted trade disputes. n98

II. The North: Global Leader or Global Looter?

The second myth underlying the media image of environmental imperialism is that the North is a global leader in environmental protection. It follows from this myth that the North's efforts to incorporate environmental protection into the international trade regime are designed to protect the global ecosystem by elevating the environmental standards of developing countries. While the North in general and the United States in particular have made significant progress in the protection of the domestic environment during the last three decades, n99 the North's role with respect to the global environment is far more problematic. n100

The international community has long identified the profligate consumption patterns of the North as the primary cause of global environmental degradation. n100 Indeed, Gro Harlem Brundtland, former Prime Minister of Norway, and Chair of the World Commission on Environment and Development, whose work popularized the term "sustainable development," recognized that "it is simply impossible for the world as a whole to sustain a Western level of consumption for all. In fact, if seven billion people were to consume as much energy and resources as we do in the West today, we would need ten worlds, not one, to satisfy all our needs." n101

The North, with 20 percent of the world's population, currently consumes a disproportionate share of the world's resources, including 85 percent of the world's timber, 75 percent of its metals, 70 percent of its energy, and 60 percent of its food. n102 The United States has the highest per capita consumption levels in the world, but consumption rates in Japan and Western Europe are only slightly less. n103

Environmentalists have pointed out that the North's consumption patterns can only be maintained through the appropriation of the natural resources (timber, petroleum, metals, agricultural commodities, biodiversity) and waste sinks (forests, waste disposal facilities) of the South. n104 A team of researchers at the Center for Sustainability Studies in Xalapa, Mexico, developed what they call the "ecological footprint" of 52 nations. This term refers to the amount of biologically productive land and water ("natural capital") that each country must either possess or appropriate in order to maintain its level of consumption. n105 The researchers found that the Netherlands, United States, Belgium, Germany, Switzerland, United Kingdom, Japan, and Israel were among the highest per capita importers of natural capital. n106 In other words, these countries utilized far more natural capital (both natural resources and waste sinks) than they possessed. The Netherlands, for example, requires a land mass over 17 times its size in order to satisfy the national demand for energy, food and forest products. n107

The ability of the North to internalize the benefits of economic growth while shifting the environmental externalities to the South, and to the global commons, has masked the limits of the North's growth-oriented development model. n108 Proponents of the North's development model argue that free trade promotes economic growth and thereby provides developing countries with the financial means to increase expenditures on environmental protection. n109 This model assumes that economic growth is a positive-sum game and that it is possible for all countries to achieve the level of development of the North. n110 However, as the ecological footprint study illustrates, natural
resources are finite, and over-consumption by one country requires underconsumption by another. n111

The North is living far beyond its ecological means, and the South cannot "catch up" without exceeding the limits of the global ecosystem. n112 Because it is impossible for both North and South to be net importers of ecological goods and services, economic growth can no longer be viewed as the solution to the problem of poverty and environmental degradation in the South. n113 Ecological economists have warned that the global economy is rapidly approaching the limits of the global ecosystem's ability to sustain continued economic expansion. n114 Far from lifting all boats, the rising tide of globalization threatens to burst through the banks. n115

Globalization has obscured the fact that the ecological limits of local ecosystems have already been exceeded because production and consumption are physically separated. n116 For example, when Maine cod fisheries went into decline due to overfishing, consumers remained blissfully unaware of the problem because they could purchase Russian cod. n117 When Costa Rican forests were cleared, Costa Rica simply imported logs from elsewhere to keep its sawmills operating. n118 The separation between production and consumption creates disincentives to the conservation of local resources and the inability to assess or manage distant sources of supply. n119 This problem is exacerbated by the failure of commodity prices to incorporate ecological damage and human health costs incurred in the production process. n120 As a result, all countries maximize global resource exploitation, which increases total economic production and accelerates the depletion of natural resources. n121

Free trade facilitates the North's over-consumption of the world's resources. Indeed, the term "environmental imperialism," the traditional meaning of which is discussed below, aptly describes the North's systematic appropriation of the South's natural resources and waste sinks. Free trade also obscures the degree to which local ecological limits have been surpassed, and perpetuates the myth of economic growth as the solution to global inequality and environmental degradation. Far from being global leaders in environmental protection, industrialized countries are more accurately described as global looters.

III. Beyond Environmental Imperialism

Despite the fact that the South bears a disproportionate share of the environmental consequences of trade liberalization, much of the opposition to the integration of environmental protection into the international trade regime has come from developing countries. n122 As explained more fully below, this opposition is due to the North's historic use of trade sanctions to impose its environmental preferences on the South while neglecting to address the North's far more ecologically damaging behavior. This Part provides the background to the trade/environment debate, describes some of the proposals advanced by the North to reconcile free trade and environmental protection, outlines the objections of developing countries, and proposes alternative approaches.

A. Unilateral Trade Restrictions: The Empire's New Clothes?

The United States has long used trade sanctions to compel other nations to implement environmental conservation measures. n123 However, [*1005] the legality and legitimacy of unilateral trade restrictions n124 to protect the environment did not become the subject of intense international debate until 1991, when a GATT dispute resolution panel found that a U.S. embargo on Mexican tuna caught with dolphin-killing "purse seine" nets violated the GATT. n125 The tuna/dolphin decision exposed the previously obscure link between trade and the environment, n126 and represented the first volley in a long battle over the legality under GATT/WTO of unilateral trade restrictions designed to protect the environment. Three years after the 1991 tuna/dolphin decision, the European Economic Community challenged the United States' embargo on tuna exports from intermediary nations that failed to certify that the tuna had been caught with dolphin-safe nets. In 1994, a GATT dispute resolution panel once again ruled against the United States. n127 In 1996, the WTO Appellate Body [*1006] determined that the U.S. violated the GATT by imposing discriminatory pollution standards on gasoline imports from Venezuela and Brazil. n128 Finally, in 1998, the WTO Appellate Body found that the United States violated the GATT by imposing an embargo on shrimp from Pakistan, India, Thailand, and Malaysia on the grounds that these countries failed to require shrimp trawlers to install devices to protect endangered sea turtles. n129

The tuna/dolphin, shrimp/turtle and reformulated gasoline cases brought to a head the conflict between free trade and environmental protection, and the divergent views of Northern environmentalists and developing [*1007] countries with respect to the use of unilateral trade restrictions to promote environmental conservation. In general, Northern environmentalists defended the use of unilateral trade restrictions as an appropriate mechanism to promote the internalization of environmental costs, and denounced the WTO/GATT decisions. n130 Southern environmentalists and developing countries
Northern environmentalists argue that incorporating environmental preferences on the South. n131

Northern environmentalists contend that it is appropriate for governments to respond to environmental dumping by imposing unilateral trade restrictions, such as embargoes, or by equalizing the terms of trade through "countervailing duties" or "antidumping tariffs" on imports from nations with lower environmental standards. n134 Northern environmentalists have also advocated [*1008] upward harmonization of environmental standards across jurisdictions through multilateral agreements as a more long-term approach to the problem of environmental dumping. n135

Developing countries have expressed concern that Northern environmentalists' demands for incorporation of environmental costs in product prices are merely disguised protectionist measures designed to maintain the economic dominance of the North by limiting the South's access to Northern markets. n136

Developing countries have condemned unilateral trade restrictions, eco-duties, and international agreements designed to harmonize environmental standards as intrusions on their sovereign resource management and pollution control decisions. n137 Many developing countries view the North's attempt to impose its pollution control and resource conservation standards on the South as paternalistic and hypocritical given the North's historic and ongoing over-exploitation of the planet's resources. n138 Furthermore, the North tends to prioritize longer-term and [*1009] more global issues, such as ozone depletion, climate change, and wildlife conservation, and to neglect issues of immediate, local concern to developing countries, such as basic environmental infrastructure (water systems and sewers), the dumping of outmoded technologies and banned products in developing countries (such as pesticides), the hazardous waste trade, poverty, food security and desertification. n139 Confronted with environmental demands from the North that reflect Northern interests and priorities, many developing countries have denounced the North's use of unilateral trade restrictions to promote environmental protection as environmental imperialism. n140

There are three fundamental flaws in the North's proposals to reconcile free trade and environmental protection. First, these proposals attempt to change the behavior of the South without addressing the far more ecologically damaging behavior of the North. Environmental trade restrictions thereby become yet another tool for dictating the terms of the North's appropriation of the South's natural resources while the root cause of global environmental degradation, the unsustainable consumption of the North, remains unchallenged. Second, the North's proposals fail to address the activities of the most powerful actors in international trade, Northern transnational corporations. As described more fully in Part B below, transnational corporations account for a significant percentage of international trade and operate in a variety of polluting and hazardous industries in the South. n141 Third, the North's proposals reinforce North-South power relations via top-down solutions driven by the North's environmental and economic agenda. Rather than developing a collaborative approach to the resolution of global environmental problems that takes into account the needs and priorities of developing countries and of local communities most affected by environmental damage, the North's proposals to reconcile trade and environmental protection seek to impose Northern environmental standards on the South as a one-size-fits-all solution to global environmental degradation. n142

B. Alternative Approaches: North and South

While a full discussion of alternative approaches to the trade/environment debate is beyond the scope of this article, several possibilities emerge from the preceding analysis. These alternative approaches can be grouped into two categories. The first category consists of strategies designed to change the behavior of the North and to scale back the North's appropriation of the resources of the South. The second category consists of strategies designed to support local resistance to environmental degradation and to emphasize bottom-up versus top-down analysis and decision-making. The objective of this section is to suggest alternative approaches for future elaboration rather than to undertake a full-blown description and analysis of these approaches.

1. North

As discussed above, the fundamental flaw with the North's proposals to reconcile liberalized trade and environmental protection is that they focus on changing the behavior of the South and do not address the far more significant role of the North in the degradation of the global environment. An approach to the trade/environment debate that spotlights the behavior of the North, rather than simply targeting the South, is therefore an effective way of promoting environmental justice and protecting the global
environment. This section provides a brief sketch of two approaches to address the behavior of the North that have thus far received scant attention in the scholarly literature on trade and the environment.

The first approach is to address the problem of Northern over-consumption. It is the over-consumption of the North that poses the greatest threat to the global environment while imposing the environmental costs on the South. Environmental law has traditionally emphasized pollution control and protection of natural resources while ignoring the ultimate cause of pollution and resource degradation: the over-consumption of the planet's resources. There is little international law addressing the problem of over-consumption, n143 and a remarkable dearth of legal scholarship on the issue. n144 The scholarship that does exist tends to focus on domestic strategies to regulate consumption, n145 and does not [*1011] address the North-South implications of these strategies or fully analyze their relationship to the GATT/WTO trade regime. n146 Moreover, efforts to regulate domestic consumption have thus far focused on the quality of consumption (improving product design to reduce environmental impacts during production, use, or disposal) rather than the quantity of consumption (the total amount of products consumed). n147 While it is important to address both issues, gains in the quality of consumption can quickly be eroded by the ever-expanding quantity of products consumed. For example, today's automobiles are far more fuel-efficient (with the exception of sport utility vehicles, popularly known as SUV's) and far less polluting than in the past. n148 However, the increase in both the total number of automobiles and the total miles driven has outpaced the efficiency gains. n149

A second approach is to regulate the activities of transnational corporations. Transnational corporations are the key actors in the global economy and the primary beneficiaries of liberalized trade. n150 Transnational [*1012] corporations control 80 percent of foreign investment. n151 The vast majority of transnational corporations have parent corporations that are based in the North. n152 However, transnational corporations operate in a wide variety of hazardous and pollution-intensive industries in the South, including mining, petroleum, and agribusiness. n153 Their activities have the potential to produce significant impacts on human health and the environment. n154 Transnational corporations also account for a significant volume of international trade. n155 The trade/environment debate should therefore include an analysis of the role of transnational corporations in environmental degradation and of possible strategies to regulate their conduct. Such strategies might include strengthening environmental enforcement capacity in developing countries, regulating the extra-territorial environmental conduct of corporations headquartered in the North, developing multilateral agreements imposing standards of conduct on transnational corporations, and expanding the rights of foreign victims of [*1013] environmental abuse to sue Northern corporations in Northern courts for acts committed in other countries. n156

2. South

The trade/environment debate should also be expanded to take into account the local consequences of global environmental degradation. From Love Canal in the United States to the movement of the Ogoni people of Nigeria against oil drilling by Royal Dutch Shell, the environmental movement has grown out of the local struggles of the people most directly affected by environmental degradation. n157 Indeed, one of the most important lessons of the environmental justice movement in the United States is the importance of paying attention to grassroots struggles in order to understand the precise social and economic forces that produce environmental injustice and to identify the types of policy reforms likely to promote environmental justice. n158 This insight is particularly significant in the era of globalization because it is at the local level that ecosystem limits have already been exceeded. n159 By spatially separating the economic benefits of production from the environmental costs, trade liberalization masks the overshooting of local environmental constraints until they become global crises. n160 Consequently, both social justice and environmental protection imperatives call for close attention to local environmental struggles and for environmental policymaking from the ground up.

Focusing on local struggles reveals the relationship between environmental degradation and other forms of social injustice, and the unique issues that must be addressed to promote environmental justice in each context. While this article has focused on the North-South distribution of [*1014] the benefits and costs of trade liberalization, the distributional paradigm is inadequate to address the full panoply of issues raised by environmental injustice. Environmental injustice manifests itself in different ways for different groups and along a variety of axes (racial, ethnic, gender, class), and calls for different solutions at both the global and local level. n161 For indigenous groups in the North and the South, for example, sovereignty issues with respect to natural resource use may be paramount. n162 In Central America, where women have borne the brunt of environmental degradation, the struggle to protect the environment is inextricably intertwined with the struggle to improve the status of women. n163 Consequently, a one-size-fits-all solution
to the problem of environmental degradation that does not pay heed to local conditions and to other axes of oppression is likely to exacerbate rather than relieve environmental injustice.

Human rights law can serve as an important vehicle to link the environmental struggle with the struggle for social justice. As the foregoing discussion suggests, environmental degradation in the South is often accompanied by human rights violations. Indeed, environmental degradation is itself a violation of the emerging right to a healthy environment. Civil and political rights (such as freedom of expression and freedom of association) can be deployed to allow groups and individuals to voice their objections to environmentally damaging activities, to organize resistance movements, and to seek official redress. The right to self-determination recognizes the rights of indigenous people to sovereignty over their natural resources. Economic and social rights (such as the rights to health and livelihood) may require governments to prevent environmental degradation.

Emerging rights to a healthy environment, to environmental information, to participate in environmental decision-making, to environmental impact assessment, to legal redress for environmental violations, and to effective remedies for environmental harm are important tools in the promotion of grassroots participation in environmental decision-making. Human rights law is an important tool for ensuring that the trade and environment debate takes into account the local consequences of trade liberalization, and for ensuring that those most directly affected by environmental injustice have the opportunity to participate in environmental decision-making and to seek redress for environmental injuries.

C. Reconciling Environmental Protection and Social Justice

The critique of trade liberalization presented in this article gives new meaning to the term "environmental imperialism." While this term traditionally refers to the North's imposition of its ecological agenda on the South, it is also an apt description of the North's systematic and ongoing appropriation of the South's natural resources. The North reaps the benefits of liberalized trade while imposing a disproportionate share of the environmental costs on the South. While this may be efficient from the standpoint of some proponents of neoclassical economics, it is ethically problematic and ecologically unsustainable.

Liberalized trade accelerates global pollution and resource depletion, masks ecological harm by shifting it to the South, and increases the likelihood that the global economy will exceed the limits of the global ecosystem.

The North's consumption-oriented development model is the primary cause of global environmental degradation. This article therefore recommends that Northern environmentalists and policy-makers focus their energies on scaling back the North's appropriation of the world's resources rather than imposing their environmental preferences on the South through unilateral trade restrictions or through demands for harmonization of environmental standards. Regulating the conduct of transnational corporations and adopting strategies to promote sustainable consumption are two possible approaches to achieve this objective.

An environmental justice critique of trade liberalization also suggests that it is important to focus on local environmental struggles in order to understand the precise social and economic forces that promote environmental degradation and social injustice and to develop effective policy responses. Top-down solutions driven by the North's environmental and economic agenda exacerbate environmental injustice by reinforcing Northern economic and political dominance, and by failing to take into account the needs and priorities of those most affected by environmental degradation.

Finally, it is important to recognize that trade, human rights, and the environment are inextricably intertwined, and that policy proposals to address global environmental degradation must take into account their complex relationship. Northern initiatives to reconcile trade and environmental protection must be carefully scrutinized to ensure that they promote environmental justice and do not become yet another instrument for transferring resources from the South to the North under the guise of environmental protection.

FOOTNOTE-1:


n2 See WTO Protesters Have Cause Worth Hearing, supra note 1, at A12.

n3 Much of the media attention focused on the protesters' expressed concern that the WTO would promote the downward harmonization of environmental and labor standards by allowing WTO member nations to challenge each other's environmental, worker safety, and consumer protection laws as nontariff

n4 See Senseless in Seattle, Boston Globe, Dec. 2, 1999, at A26 (stating "the United States cannot impose its environmental or labor standards on the world by diktat. The developing countries see their low wages as giving them a competitive edge and a way out of poverty."); Helene Cooper, Clash in Seattle: Poorer Countries are Demonstrators' Strongest Critics, Wall Street Journal, Dec. 2, 1999, at A2 (describing the opposition of delegates from developing countries to proposals to link trade liberalization to environmental and labor standards); David Postman, Everyone Has an Agenda Including the Turtles, Seattle Times, Nov. 28, 1999, at E1 (describing the desire of U.S. environmentalists and trade unionists to extend Western-style labor and environmental protections to countries that trade with the United States, and quoting WTO director general Mike Moore's concern that this would not be acceptable to developing countries).

n5 The terms North and South are used in this article as convenient shorthand for wealthy industrialized countries and poor developing countries, respectively. However, these terms are ultimately unsatisfactory because they obscure the substantial common interests between Southern elites and their Northern counterparts, and the significant conflicts between Southern elites and the Southern poor. Indeed, as the process of globalization increases income disparities both within and between nations, "North" and "South" are increasingly socioeconomic rather than geographic categories. See Wolfgang Sachs, Planet Dialectics: Explorations in Environment and Development 73-74 (1999) [hereinafter Planet Dialectics]. Furthermore, the terms North and South suggest homogeneous blocs and thereby obscure the significant differences between the interests and priorities of large industrialized Southern nations, such as Brazil, India and China, and small developing states such as Bangladesh and the Maldives. See Benjamin J. Richardson, Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum, 11 Colo. J. Int'l Envtl. L. & Pol'y 1, 7-9 (2000); Karin Michelson, Rhetoric and Rage: Third World Voices in International Legal Discourse, 16 Wis. Int'l L.J. 353, 355-62 (1998). Nevertheless, the countries of the South do have some significant common ground. First, nearly all Southern states (with some notable exceptions, such as China, Thailand, and Iran) are former colonies, with Westernized ruling elites who see themselves as heirs to colonial overlords and are often perceived as corrupt and illegitimate. Second, nearly all countries of the South are burdened by debt service to the North, and have export-oriented economies that are highly dependent on the ever-decreasing prices of primary commodities. The need to maximize foreign exchange earnings in order to pay off the debt often leads to overexploitation of natural resources. Third, the pervasive poverty of many Southern nations makes them more vulnerable to the consequences of environmental degradation, such as floods, drought, and loss of agricultural lands through soil erosion. See, e.g., Peter & Susan Calvert, The South, the North and the Environment 5-15 (1999).

n6 See Bill Bryant, Bully's Folly: Imposing Our Ways on Others Could Lead to More Environmental Harm, Not Less, Seattle
n7 The move to incorporate environmental concerns into the WTO framework has long been viewed with suspicion by developing countries. For example, at the conclusion of the Uruguay Round of GATT negotiations, a coalition of developing countries expressed vehement opposition to any measure designed to link trade and environmental protection, fearing that such measures would be used by developed countries to block imports of their products. See William Drozdiak, Poor Nations Resist Tougher Trade Rules, Wash. Post, Apr. 14, 1994, at A20; see also Jessica Matthews, The Great Greenless GATT, Wash. Post, Apr. 11, 1994, at A19 (reporting that the economic benefits of the GATT agreement outweigh substantial environmental shortcomings).

n8 A recent article on the practice of shipbreaking illustrates the operation of these myths. See William Langewiesche, The Shipbreakers, Atlantic Monthly, Aug. 2000. The article describes the dangerous health, safety, and environmental conditions in a town in India where ships sold for scrap are dismantled, and discusses the campaign by Greenpeace to halt the North's sale to the South of ships permeated with toxic waste. Depicting environmentalism as a Northern imposition, the article compares the working conditions of the shipbreakers with the desperate plight of workers elsewhere in India, and questions the relevance of environmentalism to India's poor. Not a single Indian environmentalist is quoted in the article despite the fact that India has one of the largest environmental movements in the world. Id. See also Peter & Susan Calvert, supra note 5, at 2-3; Katharine Inez Ainger, In India, Peasants are Burning Crops, Mocking Their Leaders - and Dying, The Guardian (London), Jan. 27, 1999.

n9 Environmental justice has at least four distinct components: social justice, distributive justice, procedural justice, and corrective justice. See Robert R. Kuehn, A Taxonomy of Environmental Justice, 30 Envtl. L. Rep. 10681 (2000) (describing and giving examples of these four distinct but interrelated aspects of environmental justice). The social justice approach views environmental concerns within the larger context of economic, political and racial injustice. Id. at 10698. It does not separate environmental degradation from the problem of economic inequality, race and gender subordination, and colonial and post-colonial domination of the South by the North. Id. The distributive justice approach focuses on the distribution of environmental degradation, particularly the disproportionate environmental burdens borne by people of color and low-income communities. Id. at 10683. The procedural justice approach emphasizes the need for open, informed and inclusive public participation in environmental decision-making. Id. at 10688. The corrective justice approach requires that those who cause environmental degradation be held accountable, be required to remedy the harm, and be prevented from profiting from their misconduct. Id. at 10693. All four aspects of environmental justice inform this article. However, distributive justice is emphasized because the article's environmentally responsible shipbreaking. While the article does point out that the U.S. government fails to regulate the sale and dismantling of the large number of commercial U.S.-flagged vessels (as well as ships owned by companies based in the U.S. regardless of what flag they fly), the fact that shipbreaking represents the North's export of toxic waste to the South is mentioned only in passing. As a result, the reader is left with the impression that the North is a global leader in environmental protection and that Northern environmental activists zealously seek to impose these values on the rest of the world. Id. See also Peter & Susan Calvert, supra note 5, at 2-3; Katharine Inez Ainger, In India, Peasants are Burning Crops, Mocking Their Leaders - and Dying, The Guardian (London), Jan. 27, 1999.
primary focus is the North/South distribution of the environmental costs of free trade. Id. at 10683.


n12 See generally Esty, supra note 10, at 181-92 (explaining that the term "environmental imperialism" or "ecoimperialism" refers to the North's imposition of its pollution control and resource conservation strategies on the South notwithstanding the South's conflicting environmental preferences, economic preferences, and priorities).

n13 The term "environmental dumping" refers to the sale of products at a price that fails to take into account the environmental harm occasioned during the production process. Northern environmentalists have argued that failure to internalize environmental costs amounts to an unfair subsidy, and have called for embargoes and "countervailable duties" on such imports. See Hudec, supra note 11, at 19-20; See also Jagdish Bhagwati, Trade and the Environment: The False Conflict, in Trade and the Environment: Law, Economics, and Policy 166-168 (Durwood Zaelke et al. eds., 1993) [hereinafter Trade and the Environment].

n14 See Ramachandra Guha, Environmentalism: A Global History 98-99 (2000) (describing the widespread belief that poor countries cannot generate environmental movements because environmental protection is a concern of the affluent).


n17 See Gauna, supra note 16, at 5-10; see also Toward a New Environmentalism, 15 Greenpeace 2 (July-Aug. 1990) (stating that "national environmental groups are out of touch with certain pivotal realities in the industrialized world issues of racism, social justice, economic fairness and democracy. . . as long as it has poor communities to dump on, corporate America will have no incentive to reduce waste production or substitute safe materials.").


n20 See Peter & Susan Calvert, supra note 5, at 2-3 (1999); Guha, supra note 16, at 98-99; Alexander Stille, In the 'Greened' World It Isn't Easy Being Human, N.Y. Times, July 15, 2000, at B9 (describing World Bank-financed conservation projects in developing countries that displaced millions of local people in order to protect "nature"). As several commentators have pointed out, it is paradoxical that the North is viewed as more environmentally conscious despite the fact it consumes roughly 80 percent of the planet's resources while possessing roughly 20 percent of the planet's population. Tariq Banuri, The Landscape of Diplomatic Conflicts, in Global Ecology: A New Arena of Political Conflict 49, 50-51 (Wolfgang Sachs, ed. 1993) [hereinafter Global Ecology]. This perception has helped engender the belief that the North alone is capable of saving the planet from environmental devastation and has obscured both the large and growing environmental movement in the South, and the extensive literature documenting the environmental content of traditional and indigenous knowledge systems. Id. at 51-52; see also Guha, supra note 14, at 112-124 (describing the history of the environmental movement in India and Brazil). Indeed, a 1992 Gallup Institute poll, conducted to coincide with the 1992 United Nations Conference on Environment and Development, found no significant difference between the North and the South with respect to their level of environmental concern. See Banuri, The Landscape of Diplomatic Conflicts, supra at 51. However, there are significant differences between the environmental agenda of the North and the environmental agenda of the South. Like the
environmental justice movement in the United States, Southern environmentalism is inextricably intertwined with the struggle for social and economic justice. See Guha, supra note 14, at 105-07. Moreover, this struggle is frequently grounded in an indigenous ideology of social justice, such as Gandhism in India, Buddhism in Thailand, and liberation theology in Latin America. Id. at 107. Finally, another striking feature of Southern environmentalism is the significant role of women at both leadership and grassroots levels. Id. at 107-08. The misperception of North/South interest in environmental issues, and the different agendas and ideologies of Northern and Southern environmentalism account, in part, for the familiar image of environmentalism as a Northern imposition on a reluctant South.

n21 A prime example of the North's technocratic approach to environmental protection is the 1989 special edition of the Scientific American, aptly entitled "Managing Planet Earth." William C. Clark, Managing Planet Earth, Scientific American, Sept. 1989, at 47-54. The "global environmental management" approach advocated in this special edition and in many diplomatic conferences on the environment transforms environmental protection into the efficient allocation of resources and waste sinks so as to maintain a balance between human extractions or emissions on the one side, and the regenerative capacity of nature on the other. See Wolfgang Sachs, NeoDevelopment: "Global Ecological Management," in Global Economy, supra note 3, at 243-45, 250-51 (describing the pervasiveness of the global environmental management approach during the 1992 United Nations Conference on Environment and Development in Rio de Janeiro); Eduardo Gudynas, The Fallacy of Ecomessianism: Observations from Latin America, in Global Ecology, supra note 20, at 171-78 (describing the belief of some Northern environmentalists and international institutions that they have the knowledge and the resources to manage the global environment); Eric Laferriere, Environmentalism and the Global Divide, 3 Environmental Politics 91, 97 (1994); Whose Common Future: Reclaiming the Commons, in The Ecologist 117-18, 128-40 (1993); Bruce Rich, Mortgaging the Earth: the World Bank, Environmental Impoverishment, and the Crisis of Development 273-80 (1994).

n22 The technocratic approach of Northern environmentalists and international institutions has been criticized on several grounds. First, this approach presents human beings' relationship to nature as a strictly scientific and technical problem, and elevates scientific knowledge above the grassroots knowledge and preferences of farmers, indigenous people and local communities. This conception of scientific knowledge overlooks the diversity of views among scientists and produces a discourse that precludes democratic discussion of alternative approaches to environmental protection. Second, this approach suggests that we are all in the "same boat" with respect to protecting the global environment, and fails to acknowledge the North's historic contribution to global environmental degradation and its corresponding obligation to bear its fair share of the costs of repairing the damage. Third, this approach obscures current power relations among and within nations by failing to identify who gains and who loses from environmental degradation, and by failing to explicitly address class, race, culture and gender issues as they pertain to access and control over natural resources. Fourth, this approach typically attributes environmental degradation to Southern poverty (i.e. insufficient capital, outdated technology, lack of expertise, faltering economic growth) rather than Northern affluence, and thereby promotes the notion that the solution lies in the transfer of financial and technical resources from North to South rather than in a radical reassessment of the development model adopted and promoted by the North. This, in turn, entrenches the Northern development model, and results in projects and programs defined by the North's priorities and by the North's assessment of the South's environmental problems. Finally, by portraying environmental degradation as a global problem requiring global solutions, this approach suggests
that only international institutions and national governments can address the problem, thereby reducing incentives for local stewardship of natural resources and disempowering local communities. See Gudynas, supra note 21, at 170-77; Vandana Shiva, The Greening of the Global Reach, in Global Ecology, supra note 20, at 154-56; Nicholas Hildyard, Foxes in Charge of Chickens, in Global Ecology, supra note 20, at 29-31; Joyeeta Gupta & Matthijs Hisschemoller, Issue Linkage as a Global Strategy Toward Sustainable Development: A Comparative Case Study of Climate Change, in 9 International Environmental Affairs 289, 295 (1997); Rich, supra note 21, at 273-80.


n24 For example, Northern environmentalists want the South to protect its tropical forests in order to reduce global warming, preserve resources needed for biotechnological and medical research, and preserve nature's majesty. See Laferriere, supra note 21, at 97. Several commentators have pointed out that this prescription ignores the root causes of global warming, namely the North's wasteful and excessive energy consumption, and promotes the North's appropriation of the forests of the South as pollution sinks and as raw material for the Northern biotechnology industry. See Guha, supra note 14, at 142; Cheng Zheng-Kang, Equity, Special Considerations, and the Third World, 1 Colo. Int'l Envtl. L. & Pol'y 57, 59 (1990); Whose Common Future: Reclaiming the Commons, supra note 21, at 170; Klaus M. Meyer-Abich, Winners and Losers in Climate Change, in Global Ecology, supra note 20 at 81-86; Eduardo Gudynas, Vendiendo la Naturaleza: Impactos Ambientales del Comercio Internacional en America Latina 35 (1996). Southern environmentalists have also charged that this proposal fails to distinguish between the "survival emissions" of the poor (such as greenhouse gas emissions from the clearing of land for sustenance, agriculture or firewood) and the "luxury emissions" of the rich (such as the greenhouse gas emissions from gas guzzling automobiles in North America and Europe). Guha, supra note 14, at 141-43. Finally, this proposal fails to address the relationship between deforestation and international inequality, including export-oriented development strategies fueled by international debt; falling commodity prices for the South's agricultural exports; Northern demands for cheap timber; and the North's bid to secure intellectual property rights for plants, seeds and knowledge originating in the South. See Gupta & Hisschemoller, supra note 22, at 295; See also ZhengKang, supra at 59 (describing the importance of developing countries' exploitation of their raw materials to repay debts to banks in developed countries). Southern environmentalists have argued that the protection of tropical forests depends on the efforts of local communities, and have emphasized the importance of land reform, local control over natural resources, and local participation in development - including restrictions on the expropriation of natural resources and indigenous knowledge through the patenting of plants, animals and local know-how. See Nicholas Hildyard, Foxes in Charge of Chickens, in Global Ecology, supra note 20, at 23-24; Vandana Shiva, Biopiracy: The Plunder of Nature and Knowledge 96 (1997).


n27 For the text of the memorandum, see Let Them Eat Pollution, The Economist, Feb. 8, 1992, at 66.
n28 Id.
n29 Id.
n30 Id.
n31 Id.
n33 See Greenpeace Calls for Summers Resignation, The World Bank Watch, Feb. 17, 1992, at 8 (recounting Greenpeace's call for the resignation of Summers as the World Banks chief economist); Sam Dillon, Waste Dumping in Third World Urged, Miami Herald, Feb. 8, 1992, at 18A (describing environmentalists' indignant response to the Summers' memorandum); David Lauter, Environmentalists Flex Muscle Over Key Appointment Transition, L.A. Times, Dec. 10, 1992, at A27 (describing how environmentalists lobbied to block the naming of Lawrence Summers as President Clinton's chief economic advisor); South Americans Shut Door on Toxic Imports, Christian Science Monitor, March 10, 1992, at 4 (describing the furor the Summers memorandum caused in Latin America, and Argentinean and Brazilian efforts to regulate the hazardous waste trade).
n34 See Rich, supra note 21, at 247. Environmental justice advocates in the United States have likewise critiqued utilitarian cost-benefit analysis in environmental decision-making. Under the utilitarian framework, the objective is the economically efficient result that maximizes overall wealth. Since it is more economical to place hazardous activities where land is cheaper and where local residents lack the political clout to successfully oppose the siting, the efficient result will sacrifice the interests of people of color and low-income communities in order to maximize net environmental benefits. See Gauna, supra note 16, at 40-41. As Professor Gauna concludes, "environmental justice challenges reside in an ethical dimension beyond utility, and this is a central reason why environmental justice cannot be fully integrated into environmental regulation as it currently exists." Id. at 46.
n37 See Jennifer R. Kitt, Waste Exports to the Developing World: A Global Response, 7 Geo. Int'l Envtl L. Rev. 485, 488 (1995). In the late 1980's, waste disposal costs in the North were often as high as $ 2000 per ton. Id. at 488. By contrast, the cost of waste disposal in Africa during the same period was often as low as $ 40 per ton. Id.
n38 See Ibrahim J. Wani, Poverty, Governance, the Rule of Law, and International Environmentalism: A Critique of the Basel Convention on Hazardous Wastes, 1 Kan. J.L. & Pub. Pol'y 37, 38 (1991). When developing countries have comprehensive environmental regulations, they often lack the administrative infrastructure to ensure proper enforcement. Kitt, supra note 37, at 488-89. In addition, the hazardous waste trade is quite lucrative, thus encouraging government corruption and outright criminal activity. Waste exporters can often reduce their disposal costs and evade regulation by simply bribing individual government officials and concealing the toxic nature of the wastes. Wani, supra at 38. The consequences of ineffective government enforcement are best illustrated by the infamous Koko Island incident in Nigeria, where a resident allowed over 8000 drums of highly toxic waste from Italy to be dumped in his back yard for a mere $ 100 per month. See Mutombo Mpanya, The Dumping of Toxic Waste in African Countries: A Case of Poverty and Racism, in Race and the Incidence of Environmental Hazards: A Time for Discourse 205 (Bunyan Bryant & Paul Mohai eds., 1992). The Nigerian government did not discover the toxicity of
the fraudulently labeled waste until the drums began leaking and local residents became ill. See Wani, supra at 38. Workers involved in the cleanup effort suffered severe chemical burns, nausea, vomiting of blood, partial paralysis, and coma. Id. In addition, the rate of premature birth in Koko increased dramatically. See Mpanya, supra at 205.

n39 See Rebecca A. Kirby, The Basel Convention and the Need for United States Implementation, 24 Ga. J. Int'l & Comp. L. 281, 285 (1994). In Latin America, for example, it is estimated that a third of the population lives below the poverty level. See Quentin Wodon, Poverty and Policy in Latin America and the Caribbean, in World Bank Technical Paper No. 467, 15 (2000). In addition, many developing countries are pressed to concentrate on economic growth as opposed to enforcing environmental laws due to debt accumulated during the 1980s. See Kitt, supra note 37, at 488. "In one case, waste traders offered the West African country of Guinea-Bissau $ 600 million to import fifteen million tons of industrial waste over five years. This amount represents more than twice the country's national debt and four times its gross national product." Id. at 490. Under these circumstances, the lure of the waste trade can be quite powerful. Id.

n40 The Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal, which entered into force in 1992, allows parties to export hazardous wastes if the importing country has received prior notification of the shipment and has given its written consent. Basel Convention, 28 I.L.M. 649 (1989), art. 6, P 1-2. Environmental organizations and many developing countries have criticized the Basel Convention for legitimating rather than prohibiting the hazardous waste trade. Donna Valin, The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal: Should the United States Ratify the Accord? 6 Ind. Int'l & Comp. L. Rev. 267, 275-76 (1995); Marguerite M. Cusack, International Law and the Transboundary Shipment of Hazardous Waste to the Third World: Will the Basel Convention Make a Difference? 5 Am. U.J. Int'l L. & Pol'y 393, 420-22 (1989). Indeed, many developing countries have enacted legislation unilaterally banning hazardous waste imports. Kitt, supra note 37, at 507. The members of the Organization of African Unity (OAU) advocated a total ban on the hazardous waste trade during the Basel Convention negotiations, and refused to sign the Basel Convention when it was opened for signature in 1989. Kitt, supra note 37, at 498-99. Instead, the OAU members negotiated the Bamako Convention on the Ban of Import into Africa and the Control of Hazardous Wastes Within Africa, which essentially bans the import of hazardous waste generated outside of Africa. Bamako Convention, 30 I.L.M. 773, 775, 780 (1991); Kenneth D. Hirschi, Possibilities for a Unified International Convention on the Transboundary Shipment of Hazardous Wastes, 10 Geo. Int'l Envt'l L. Rev 169, 174 (1997). In September 1995, the parties to the Basel Convention adopted an amendment that would prohibit the shipment of hazardous waste from developed countries to developing countries. David A. Wirth, Trade Implications of the Basel Convention Amendment Banning North-South Trade in Hazardous Wastes, Int'l Env'tl Rep., Sept. 4, 1996, at 796. The amendment is not yet in force, and a few key governments, including Australia, Canada, New Zealand, and the United States, continue to object to its provisions. French, supra note 36, at 74. Moreover, it is unclear whether the Basel Convention's use of trade restrictions to promote waste minimization and responsible waste management would survive GATT/WTO scrutiny. As explained more fully in Part III of this article, GATT/WTO dispute resolution panels have consistently concluded that trade restrictions designed to promote environmental protection violate GATT obligations. While these determinations have been made in the context of unilateral trade restrictions rather than trade restrictions imposed pursuant to multilateral environmental agreements, these rulings raise significant questions regarding the legality under the GATT/WTO of trade restrictions imposed pursuant to environmental treaties that do not include all GATT contractual parties. See Lakshman D. Guruswamy, Should


n42 See French, supra note 36, at 74-75.

n43 Kitt, supra note 37, at 490-91, 491 n.40.


n45 See Kitt, supra note 37, at 510. Technological advances have enabled industry to recover valuable materials from scrap metal, including lead, chromium, copper and mercury. In the United States, the export of scrap metal for recycling is estimated to produce annual revenues of over $ 5 billion. Valin, supra note 40, at 281-82. Indeed, the United States' failure to become a party to the Basel Convention has been attributed to opposition by the U.S. Chamber of Commerce in the aftermath of the amendment banning North/South trade in hazardous waste, including recyclable waste. Id. at 281-87; Kitt, supra note 37, at 513.

n46 See Kitt, supra note 37, at 510.

n47 See Valin, supra note 40, at 282; Kitt, supra note 37, at 492 (describing workers at a lead recycling facility in the Philippines disassembling car batteries with their bare hands, in contrast to the full-body protection required in the United States); Garbage in the Backyard, Business Line, Sept. 1, 1997, at 18 [hereinafter Garbage] (describing environmental and worker safety risks posed by the mishandling of car batteries and zinc ash exported to India for recycling).

n48 French, supra note 36, at 82.

n49 Id.

n50 Id.

n51 See Kitt, supra note 37, at 510; Garbage, supra note 47, at 18.

n52 In 1998, for example, nearly 3000 tons of mercury-contaminated crushed concrete waste from Taiwan was dumped in plastic shipping bags with no warning labels outside the Cambodian port city of Sihanoukville. French, supra note 36, at 75. Local people scavenging among the deposited materials initially believed that the crushed concrete might be used as fertilizer and that the bags might be used as floor mats or tarpaulins. Id. After two people died from mercury poisoning, news of the potential danger sparked riots in which one additional person was killed. Id. Four more people died as more than 10,000 panic-stricken citizens fled the city. Id. The World Health Organization has been monitoring the consequences of mercury exposure in Sihanoukville, and has concluded that the wastes may pose serious long-term risk to the health of residents, such as nerve disorders and lung and skin ailments. Id., see also WHO Says Waste Dumped in Cambodia May Pose Long-Term Threat to Health, 22 Int'l Env't Rep. 24, Jan. 6, 1999, at 24; Jim Puckett & Ion Hernandez, Avoiding the "Logic" of Waste Trade, Business World, Jan. 24, 2000, at 5.

n53 See Kitt, supra note 37, at 492.

n54 Id. at 491-92.

n55 Id. at 491.

n56 See Guha, supra note 14, at 111.
n57 See Valin, supra note 40, at 270.
n58 See Guha, supra note 14, at 111-12.
n59 See Kitt, supra note 37, at 492; Gudynas, supra note 24, at 29-35. One possible consequence of restricting the North-South hazardous waste trade is the migration of polluting industries to the South, where they benefit from less stringent health and safety regulation and lax environmental enforcement. See Valin, supra note 40, at 285. While industries decide to migrate overseas for a variety of reasons, including labor costs, the availability of natural resources, and access to markets, the relocation of industry to the cities of the South has been fraught with serious public health and environmental consequences, including severe air pollution, inadequate sewage treatment and water purification, and massive dumping of toxic wastes. Id. While an analysis of the migration of polluting industry to developing countries is beyond the scope of this article, it should be noted that this problem represents the second aspect of "toxic colonialism" denounced by environmentalists and advocated by Lawrence Summers in the infamous World Bank memorandum. See supra notes 27-34 and accompanying text.


n61 See Id. at 221-25.

n62 See French, supra note 36, at 20.


n64 See Laferriere, supra note 21, at 97.


n66 See French, supra note 36, at 20-22. However, these figures reflect only officially reported trade. Much of the international timber trade is illegal, and this illegal trade accounts for a significant amount of the deforestation in Bolivia, Brazil, Cambodia, Cameroon, Ecuador, Georgia, Ghana, Indonesia, Kenya, Laos, Mexico, Paraguay, the Russian Federation, Thailand, and Vietnam. Id. at 21-22.

n67 Id. at 20-22.

n68 Despite the North's significant contribution to global deforestation, discussions of global forest policy in preparation for the 1992 United Nations Conference on Environment and Development (UNCED) focused on the protection of tropical rainforests. See Stephen Hopgood, American Foreign Environmental Policy And The Power of the State 179-80 (1998). Developing countries insisted that any forest protection treaty include both tropical and temperate forests, and opposed any commitments that would impinge on their sovereign rights to use forest resources to meet their development needs. Id. Developing countries also sought to link protection of Southern forests to trade and debt issues and to Northern commitments to reduce greenhouse gas emissions. Id. When it became apparent that concessions from the North were not forthcoming, developing countries, led by India and Malaysia, blocked the adoption of any forest convention at UNCED. Id. Instead, the parties negotiated non-binding forest management principles. See id; seealso, Ans Kolk, Forests In International Environmental Politics: International Organisations, NGOs And The Brazilian Amazon 159-60 (1996).

n69 See French, supra note 36, at 21. The relative contribution of commercial logging to deforestation varies from region to region. In Southeast Asia, logging for the export market is the primary cause of deforestation, and the bulk of the processed forest products are exported to North America. See Heather A. Wolf, Deforestation in Cambodia and Malaysia: The Case for an International Legal Solution, 5 Pac. Rim L. & Pol’y J. 429, 430-31 (1996). Commercial logging for export is also the most significant cause of deforestation in certain parts of Africa. See Kolk, supra note 68, at 69. However, in Central America, cattle ranching for meat
exportation is the leading cause of deforestation. Id. 69-70. In Brazil, highway construction, land colonization, hydroelectric and dam construction projects, livestock production and mining, along with commercial logging, are major causes of deforestation. Id. at 72.

n70 See French, supra note 36, at 24-25; Merrill Goozner, WTO Awash in Protests, Chic. Trib., Nov. 30, 1999, at N1. See generally, Earthjustice Legal Defense Fund and Northwest Ecosystem Alliance, Our Forests at Risk: the World Trade Organization's Threat to Forest Protection, at http://www.earthjustice.org/news/pr091499.htm (analyzing and critiquing the proposed agreement). Indeed, the Asia-Pacific Economic Cooperation, a regional trade association, has identified several forest protection policies as potential nontariff trade barriers, including China's logging ban in the upper Yangtze basin, which was imposed in the aftermath of catastrophic flooding in the region. French, supra note 36, at 25.


n72 See French, supra note 36, at 25.

n73 See French, supra note 36, at 22-24.

n74 See French, supra note 36, at 22-24; Edward Goldsmith, Global Trade and the Environment, in Global Economy, supra note 3, at 82.

n75 See French, supra note 36, at 24.

n76 See Id.

n77 Susan George, The Debt Boomerang: How Third World Debt Harms Us All 1-4 (1992); Robert Costanza, et al., An Introduction to Ecological Economics 235 (1997); Peter & Susan Calvert, supra note 5, at 80; Gudynas, supra note 24, at 109; Rich, supra note 21, at 188; French, supra note 36, at 130-31. Export-oriented development strategies have both environmental and social justice consequences. In addition to promoting deforestation, such development strategies produce a shift from the growth of subsistence crops to the production of commodities for the international market, such as coffee, tobacco, livestock and timber. Peter & Susan Calvert, supra note 5, at 179-80; Gudynas, supra note 24, at 109. The shift to export commodities is typically accompanied by the displacement of small farmers by modern agribusiness, which in turn destroys traditional social structures and results in migration to the cities. George, supra at 3; Gudynas, supra note 24, at 109-11. This shift also causes Southern countries to rely on food imports to satisfy domestic consumption, and increases vulnerability to famine since staple foodstuffs are no longer produced in sufficient quantities to satisfy local demand. Peter & Susan Calvert, supra note 5, at 179-81. The WTO's Agreement on Agriculture exacerbates food insecurity in the South by requiring developing countries to phase out agricultural import restrictions designed to protect local farmers from being displaced by cheap grain imported from the North. French, supra note 36, at 64-65; Walden Bello, The Great Euro-American Agriculture Dumping Machine, Bus. World, Sept. 2, 1999, at 1.

n78 Peter & Susan Calvert, supra note 5, at 115; Gudynas, supra note 24, at 10. Commodity prices have plummeted over time as debtor countries have flooded the market with raw materials. See George, supra note 77, at 2. Because commodity prices have fallen relative to the prices of manufactured goods, the purchasing power of developing countries has declined and their debt load has increased. As a result of mounting debt, the South is currently transferring vast amounts of wealth to the North in debt service (estimated at $ 40 billion per year since 1985), and is increasing its natural resource exploitation in order to earn the hard currency to make these payments. Increased natural resource exploitation accelerates environmental degradation and gluts the market with raw materials, resulting in a vicious cycle of declining commodity prices, over-
exploitation of resources and growing debt.


n79 See Kibel, supra note 65, at 768-69. For a detailed description and critique of World Bank-financed development projects and their environmental and social justice consequences, see generally Rich, supra note 21; see also Nicole Wendt, 50th Anniversary of the World Bank and the IMF Prompts Criticisms, 9 Transnat'l L. & Contemp. Probs. 149 (1999). For a description of Brazil’s widely reviled World Bank-financed land colonization scheme designed to alleviate pressure for land reform, see Peter & Susan Calvert, supra note 5, at 126-29. Deforestation is the product of both internal forces, such as population pressure and national development policies, and external forces, such as export-oriented development strategies designed to repay international debt and satisfy the demand for timber and other commodities in distant export markets. In the interest of clarity and brevity, this article does not attempt to address the variety of internal forces that promote deforestation in developing countries.

n80 See French, supra note 36, at 26. In addition to disturbing ecosystems, mining activities are particularly harmful to local and indigenous communities, destroying forests and fields used for farming and grazing, and contaminating drinking water supplies with toxic chemicals. Mining and oil and gas firms are increasingly active in the South, and industrial countries are the main consumers of minerals. Id.

n81 See id. at 20; Whose Common Future: Reclaiming the Commons, supra note 21, at 40-45, 100-104; George, supra note 77, at 4. For a description of the environmental degradation and massive displacement of local and indigenous people caused by World Bank-financed infrastructure projects, see generally, Rich, supra note 21. For a description of the displacement of local and indigenous people in India resulting from dam projects, see Madhav Gadgil & Ramachandra Guha, Ecology And Equity: The Use And Abuse of Nature in Contemporay India 61-76 (1995). See also, Soren Hvalkof, Outrage in Rubber and Oil: Extractivism, Indigenous Peoples, and Justice in the Upper Amazon, in People, Plants & Justice: The Politics of Nature Conservation 83-116 (Charles Zerner ed. 2000) (describing the regime of terror imposed on indigenous people in Ecuador, Peru and Bolivia during the last century by extractive industries).

n82 See Kibel, supra note 65, at 747-49.


n87 See Myers, supra note 60, at 221-26.


n89 See Harris, supra note 88, at 30; Sachs, supra note 88, at 72-73; Meyer-Abich, supra note 24, at 78-81. The South will be disproportionately affected by global warming for several reasons. First, many developing countries are located in parts of the world that are already subject
to extreme climate conditions (such as drought in many parts of Africa or floods and hurricanes in Bangladesh and the Philippines), and global warming will merely exacerbate the problem. Second, global warming will have particularly negative consequences for agriculture, and the countries most affected will be those whose gross national product and export revenues are most closely tied to agricultural production. Third, rising sea levels threaten the very existence of certain low-lying island states, such as Barbados and the Maldives, and threaten countries whose most fertile regions are in river valleys and coastal areas, such as Egypt, Bangladesh and Senegal. Finally, many developing countries lack the technical and financial resources to protect themselves from the impacts of global warming (by strengthening dikes and levees, for example) or to recover from devastating droughts, floods, and hurricanes. See Sachs, supra note 88, at 72-73.

n90 See Sachs, supra note 88, at 78; Gudynas, supra note 24, at 73.

n91 See Sachs, supra note 88, at 78; Shiva, supra note 24, at 120-21.

n92 See Naomi Roht-Arriaza, Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities, 17 Mich. J. Int'l L. 919, 921-933 (1996). Local and indigenous communities in the South have long used plants native to their surroundings in order to satisfy a variety of needs, including food, medicine, shelter, and clothing. Id. at 921. While Western researchers breed plants for maximum commercial yield, indigenous and local farmers, who produce at least in part for their own consumption, strive to maintain crop diversity, including crops suitable for food, forage, medicine and shelter. Id. at 934. Indigenous and traditional peoples often transmit their knowledge of the medicinal as well as other properties and uses of plants, animals, and soils through stories and songs. Id. at 932. Indeed, indigenous and traditional peoples view the stories, songs and scientific knowledge, as well as the landscape and naturally occurring species of plants and animals with which a people have long been associated, as an indivisible manifestation of their cultural heritage and as essential to the preservation of cultural integrity. Id. at 930. For local and indigenous communities, conserving biodiversity means conserving the resources needed for economic and cultural survival. See Shiva, supra note 24, at 120-21. This is in sharp contrast to the Northern view of biodiversity as raw material to be altered and manipulated for commercial advantage. Id.

n93 See Sachs, supra note 88, at 78; Shiva, supra note 24, at 120-21; see also Mara Kimmel Hoyt, Breaking the Trade Barrier: Common Property Solutions to Tropical Deforestation, 5 Minn. J. Global Trade 195, 197 (1996). While a detailed analysis of the causes of biodiversity loss is beyond the scope of this essay, a brief outline of its historic evolution sheds light on its relationship to the problem of deforestation and to the question of social justice. Southern environmentalists have acknowledged that deforestation is a significant contributor to loss of biodiversity, but have accused the North of neglecting the primary cause of biodiversity loss, namely the deliberate replacement of naturally diverse ecosystems by monocultures through development projects spearheaded by the North. See Vandana Shiva, Monocultures of the Mind 83-84 (1993); Gudynas, supra note 24, at 102. Southern environmentalists have argued that this process began during the colonial era with the displacement of Southern biodiversity by plantation economies (spices, sugar, coffee, bananas, rubber, and cotton) designed to transfer wealth to the imperial powers. See Shiva, supra at 78-79; see also Gudynas, supra note 24, at 15-26. The process continued in the post-colonial era with the large-scale introduction of high yield monocultures in the South during the so-called Green Revolution. As a result of the Green Revolution, developing countries abandoned the cultivation of thousands of crops in favor of wheat, rice and other crops from a very narrow genetic base, and became dependent on Northern pesticides, fertilizers, and seeds. See Shiva, supra at 66-68, 79-80. Most recently, Northern pharmaceutical and agribusiness
corporations have begun to realize the potential commercial value of the biodiversity that is being lost in the South, and have been actively collecting germ plasma for future seed development and plants, bacteria, algae, fungi, corals, sponges and other organisms as possible sources for new medicines. See id. at 80-82. Northern companies have patented plant and seed varieties and knowledge derived from indigenous and local communities with little or no compensation to those communities. Roht-Arriaza, supra note 92, at 924-26. The WTO's agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) facilitates the North's appropriation of these resources by requiring developing countries to adopt intellectual property laws patterned on those of the North even if these conflict with existing national laws and with the traditions of many agricultural and indigenous communities. See Lakshmi Sarma, Biopiracy: Twentieth Century Imperialism in the Form of International Agreements, 13 Temp. Int'l & Comp. L.J. 107, 123-27 (1999). The consequence is that developing countries can have their genetic resources appropriated for free, patented by Northern corporations, and sold back at exorbitant prices as medicine or "improved" seeds, resulting in a continuing transfer of wealth from South to North. Shiva, supra at 91; Gudynas, supra note 24, at 81-82.

n94 See Guha, supra note 14, at 119-24. The relationship between social justice and environmental concerns is well illustrated by a petition of December 1990, addressed to the President of Mexico by a community of Nahua ñ Indians threatened with displacement by the San Juan dam on the Balsa river:

Mr. President, we publicly and collectively declare our rejection of the San Juan Telecingo Dam because we cannot allow this project to destroy the economy, the historical and cultural heritage, and the natural resources on which we depend . . . This project, by flooding our villages and our lands, would cause great losses and hardships to us in every way: we would lose our houses, churches, town halls, roads, irrigation systems and other collective works that we have undertaken with great sacrifice over many years. We would lose the best farmland that we live from; we would lose the pastures that support our livestock; we would lose our orchards and our fruit trees; we would lose the clay deposits and other raw materials we use for our crafts; we would lose our cemeteries where our dead are buried, our churches, and the caves, springs and other sacred places where we make our offerings; we would lose, among others, Teopantecuanitlan, a unique archaeological site of great importance . ..; we would lose all the natural resources we know and use for our sustenance as taught to us by our ancestors. We would lose so many things that we cannot express them all here because we would never finish this document.


n95 See supra notes 71-72 and accompanying text for a discussion of the proposed agreement with respect to forest products.

n96 See supra note 40 for a discussion of the Basel and Bamako Conventions on the transboundary movement of hazardous wastes and of the relationship between these treaties and the WTO regime.

shrimp/turtle and beef/hormone cases and arguing that the ad hoc and uncertain nature of trade law stems from the failure to define the concept of free trade).

n98 See Charnowitz, supra note 97, at 539.

n99 Beginning with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § § 4321-4370d (1989), the United States adopted a far-reaching regulatory program to control air and water pollution, regulate toxic substances and hazardous waste, protect endangered species, and require federal agencies to consider the environmental impacts of their actions. See Robert V. Percival, et al., Environmental Regulation; Law, Science, and Policy 105-13 (3d ed. 2000). In general, air and water quality have improved as a result of this regulatory program, and industry has become more efficient and less polluting per unit of output. See James Salzman, Sustainable Consumption and the Law, 27 Envtl L. 1243, 1244-45 (1997). But see Percival, supra at 1204-26 (providing a more pessimistic account of the failures and successes of U.S. environmental regulation). However, many of these statutes address the symptoms of environmental degradation (pollution) rather than tackling the source: excessive energy and resource consumption. See Salzman, supra at 1244-45. The global implications of the failure to regulate consumption are explored in Part II of this article.

n100 At the 1992 United Nations Conference on Environment and Development (Earth Summit), 178 countries endorsed the statement that "the major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production . . . . Developed countries should take the lead in achieving sustainable consumption patterns . . . ." Report of the United Nations Conference on Environment and Development, Vol. I, at 37-38, U.N. Doc. A/Conf.151.26 (1992). Agenda 21, the consensus strategy adopted at the Earth Summit to achieve sustainable development, also acknowledges the primary responsibility of the developed countries to reduce the environmental impacts of consumption. Id. at 38, Vol. IV, at 32, P 4.3; 33 P 4.5; and 34, P 4.8.


n104 See Gudynas, supra note 24, at 204-05; see also French, supra note 36, at 9-10; Sachs, supra note 5, at 168-69.

n105 See Mathis Wackernagel et al., National Natural Capital Accounting with the Ecological Footprint Concept, 29 Ecological Econ. 375, 376-77 (1999).

n106 Id. at 386.


n108 See Sachs, supra note 88, at 70-80; see also Costanza, supra note 77, at 173-74.

environment); see also WTO SECRETARIAT, SPECIAL STUDIES 4, TRADE AND ENVIRONMENT 47-58 (1999) (available at http://www.wto.org/wto/environ/environment.pdf) (concluding that the correlation between per capita income growth and environmental protection is not consistent for all pollutants, that overall economic growth does not necessarily reduce pollution, and that reducing pollution requires active governmental intervention).

n110 See Sachs, supra note 5, at 168.

n111 See Costanza, supra note 77, at 173-74. The ability of the North to continue importing natural capital from the South without surpassing ecological limits requires that the South make the complementary decision to limit its own economic growth in order to continue exporting natural capital. However, the South has embraced the North’s growth-oriented model of development. The fact that many countries of the South have not yet reached their local ecological limits allows the continued exportation of natural capital to the North. Id. See also Mathis Wackernagel, Can Trade Promote an Ecologically Secure World? The Global Economy from an Ecological Footprint Perspective, 5 Buff. Envtl. L.J. 179, 192-93 (1998).

n112 See Costanza, supra note 77, at 173-74. In other words, the North's development model relies on a physical impossibility: unlimited economic growth. This model perpetuates the illusion that developing countries can achieve the North's standard of living while the North continues to expand economically. Since it is not possible for all countries of the world to be net importers of natural capital, this development model threatens to exceed ecosystem limits. This misguided development strategy benefits the North in the short-term by encouraging the South to deplete its natural resources in order to achieve the North's standard of living. While the North reaps the benefits of an unceasing flow of cheap resources from the South, the liquidation of these resources (for example, forests and fisheries) deeply compromises the ability of the South to meet the needs of its own people. See Wackernagel, supra note 111, at 192-93.

n113 See Costanza, supra note 77, at 173-74; Sachs, supra note 5, at 166-68. Indeed, critics of the Western development model have argued that the post-World War II efforts to "develop" the South were motivated not by philanthropic concern for the world's poor, but by the need to bring the South into the North's trading system in order to appropriate the South's natural resources and cheap labor, and to create an ever-expanding market for the North's goods and services. See Edward Goldsmith, Development as Colonialism, in Global Economy, supra note 3, at 253-66.

n114 See Gudynas, supra note 24, at 205; Costanza, supra note 77, at 6-13; Herman Daly, Free Trade: The Perils of Deregulation, in Global Economy, supra note 3, at 234-35. The United Nations Development Program (UNDP) has likewise recognized that excessive resource consumption threatens to exceed the "outer limits" of what the planet can support. See United Nations Development Program, supra note 26, at 3. Specifically, UNDP identifies the growing deterioration of renewable resources (water, soil, forests, fish, biodiversity), and the growing inability of the planet's waste sinks to absorb everincreasing amounts of waste as the primary threats to the global ecosystem. Id.

n115 Wolfgang Sachs, the German environmentalist, developed this metaphor. See Sachs, supra note 5, at 168.

n116 See Costanza, supra note 77, at 164-67; Sachs, supra note 88, at 70.

n117 See Athanasiou, supra note 102, at 190.

n118 See Costanza, supra note 77, at 86.

n119 Sachs, supra note 88, at 70; Daly, supra note 114, at 237; Costanza, supra note 77, at 165.


n121 See Mathis Wackernagel & William E. Rees, Our Ecological Footprint:
Reducing Human Impact on the Earth 21, 130-32 (1996); Daly, supra note 114, at 237; Costanza, supra note 77, at 173-74.

n122 See e.g., Esty, supra note 10, at 181-192.

n123 See Steve Charnovitz, Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices, 9 Am. U. J. Intl L. & Pol'y 751, 758 (1994). The most well-known statute authorizing environmental trade sanctions is the 1971 Pelly Amendment, which authorizes sanctions against any country that diminishes the effectiveness of any international fishery or wildlife conservation program for endangered or threatened species. 22 U.S.C. § 1978 (2000). The United States has imposed trade sanctions under the Pelly Amendment on only one occasion, but has threatened to do so on at least twenty occasions. In general, the mere threat of sanctions has been sufficient to cause other nations to change their behavior. See Charnovitz, supra at 772; Joseph Robert Berger, Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case, 24 Colum. J. Envtl L. 355, 394-395 (1999).

n124 For purposes of the analysis that follows, a "unilateral trade restriction" is a trade restrictive measure, such as an import quota, an export quota, an embargo, or a tariff, tax or duty that is not taken pursuant to an international treaty obligation.

n125 See Esty, supra note 10, at 29-32. See GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, 30 I.L.M. 1594 (1991) [hereinafter, Tuna/Dolphin I]. The GATT panel found that the United States violated GATT Article XI, which prohibits both import bans and export bans. Id., at P. 7.1(a). The panel also found that the United States violated GATT Article III's "national treatment" requirement by discriminating against "like products" from another country based on how they are produced. Id., at P. 5.15. In other words, the Tuna/Dolphin I case stands for the proposition that the GATT does not permit discrimination between products with similar physical characteristics on the basis of the production process. See Esty, supra note 10, at 30. Furthermore, the GATT panel found that the trade measures did not fall within GATT Article XX's environmental exceptions. The panel agreed with Mexico that the GATT Article XX exceptions do not apply to trade restrictions adopted by countries to protect natural resources outside their jurisdiction. Tuna/Dolphin I., at PP. 5.27, 5.31, and 5.32. Moreover, even if trade measures to protect extra-jurisdictional resources were permitted, the United States had failed to demonstrate that it had exhausted less trade-restrictive options to achieve this objective, such as the negotiation of a multilateral agreement. Id., at P. 5.28. Even though Mexico did not have the panel's decision adopted by the GATT Council (a necessary step for the decision to have binding effect under the pre-Uruguay Round GATT rules), the panel's decision produced heated debate between environmentalists and advocates of free trade. See Esty, supra note 10, at 29-32.

n126 See Esty, supra note 10, at 27-32.

n127 See GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994) [hereinafter, Tuna/Dolphin II]. Because Mexico did not ask the GATT Council to adopt the Tuna/Dolphin I decision, the European Economic Community was obliged to bring its own case in order to challenge the "secondary embargo" on countries that purchased tuna from an embargoed country. See Esty, supra note 10, at 31. The Tuna/Dolphin II panel rejected the notion that the GATT Article XX environmental exceptions apply only to natural resources within the jurisdiction of the country adopting the trade restriction. Tuna/Dolphin II, at P 5.20. However, the panel found that the United States' embargo did not fall within the GATT Article XX environmental exceptions because the United States had failed to demonstrate that less trade-restrictive alternatives were unavailable, and because the embargo was primarily designed to force other countries to change conservation policies within their own jurisdictions. Id., at PP 5.26, 5.35, 5.39, and 5.42.
n128 See WTO Report of the Appellate Body: United States- Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603 (1996) [hereinafter WTO Appellate Report: Reformulated Gasoline]. The case involved regulations promulgated by the U.S. Environmental Protection Agency (EPA) to implement a provision of the Clean Air Act requiring oil refiners to reduce a variety of contaminants in their gasoline from a baseline determined by the composition of the gasoline in 1990. See 42 U.S.C. § 7401 (2000); see also 40 C.F.R. § 80.91(a)(i) (2000). While U.S. refiners were permitted to use their own data from 1990 to establish the baseline, most foreign refiners were required to use the 1990 U.S. industry average due to EPA concerns about the availability and reliability of foreign data. See WTO Panel Report: United States Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 274, 296 (1996) [hereinafter, WTO Panel Report: Reformulated Gasoline]; see also 40 C.F.R. § 80.91(a)(i). A WTO dispute resolution panel found that the regulation violated GATT Article III's "national treatment" requirement and did not satisfy the GATT Article XX environmental exceptions. WTO Panel Report: Reformulated Gasoline, supra at PP. 8.1-8.2. The Appellate Body found that the regulation did meet one of the GATT Article XX's environmental exceptions, but violated the Article XX chapeau (preamble), which prohibits "arbitrary" or "unjustified" discrimination or a "disguised restriction" of free trade. See WTO Appellate Report, Reformulated Gasoline, supra at 618-33. The Appellate Body found that the regulation violated the Article XX chapeau because the EPA failed to adequately consider ways of mitigating the administrative and enforcement difficulties associated with allowing individual baselines for foreign refiners, and because the EPA considered the cost of various regulatory options to domestic refiners, but not to foreign refiners. Id. at 631-33.

n129 See WTO Report of the Appellate Body: United States - Import Prohibition of Certain Shrimp and Shrimp Products, 38 I.L.M. 118 (1999) [hereinafter, WTO Appellate Report: Shrimp]. A WTO dispute resolution panel issued a ruling in 1998 finding that the embargo violated GATT Article XI's prohibition on quantitative trade restrictions and was not justified by the exceptions in GATT Article XX. See WTO Panel Report: United States - Import Prohibition of Certain Shrimp and Shrimp Products, 37 I.L.M. 832 (1998), P 7.65. The Appellate Body ruled against the United States, but its reasoning departed from earlier WTO/GATT interpretations. The Appellate Body found that the Article XX exceptions applied to unilateral trade measures designed to influence the conservation policies of other countries, and concluded that the shrimp embargo fell within one of the GATT Article XX exceptions. WTO Appellate Report: Shrimp, supra at 121-47. However, the Appellate Body found that the U.S. had applied the embargo in a discriminatory fashion in violation of the Article XX chapeau. Id. at 161-84. For an analysis of the evolving GATT/WTO jurisprudence on unilateral trade restrictions, see Guruswamy, supra note 11; Carrie Wofford, A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT, 24 Harv. Envtl. L. Rev. 563, 565 (2000); see also Berger, supra note 123; Bruce Neuling, The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate, 22 Loy. L.A. Int'l & Comp. L. Rev. 1 (1999).

n130 See Lori Wallach & Michelle Sforza, The WTO: Five Years of Reasons to Resist Corporate Globalization 13 (1999); David Phillips, Dolphins and the GATT, in The Case Against Free Trade, supra note 10, at 133-38.

n131 See Esty, supra note 10, at 181-88; See also Andrea C. Durbin, Trade and the Environment: The North-South Divide, 37 Environment 16, 18-19 (1995). The tuna/dolphin dispute is a prime example of conflicting North-South priorities and perspectives. Developing countries view the United States' interest in preserving the dolphins as irrational since dolphins are not endangered. From the perspective of developing countries, tuna fishing with purse seine nets is an efficient means of producing low-cost protein for the poor
and an important source of export earnings. See Esty, supra at 188. Southern environmentalists denounced the killing of dolphins as cruel and unnecessary while pointing out that the U.S. systematically neglects to internalize the environmental impacts of other imports, such as Mexican petroleum products. Martinez Alier & Jusmet, supra note 120, at 433.

n132 See Esty, supra note 10, at 65-66; Hal Kane, Managing Through Prices, Managing Despite Prices, in Trade and the Environment, supra note 13, at 63-67; Robert Repetto, Complementarities between Trade and Environmental Policies, in Trade and the Environment, supra note 13, at 242-43; Costanza, supra note 77, at 167-68.


n134 See, e.g., Daly, supra note 114, at 233; Bhagwati, supra note 13, at 166; Charles Arden-Clarke, An Action Agenda for Trade Policy Reform to Support Sustainable Development: A United Nations Conference on Environment and Development Follow-up, in Trade and the Environment, supra note 13, at 76-81; see generally Howard F. Chang, An Economic Analysis of Trade Measures to Protect the Global Environment, 83 Geo. L.J. 2131 (1995) (defending the use of unilateral trade restrictions to protect the global environment); Joshua R. Floum, Exporting Environmentalism: Thoughts on the Use of Market Power to Improve the Environment in the "Free Trade" Era, 35 Santa Clara L. Rev. 1199 (1995) (arguing that unilateral trade measures such as embargoes and tariffs have proven effective to influence the environmental behavior of developing nations). For a list of U.S. legislative proposals designed to address "environmental dumping," see Hudec, supra note 11, at 3-6.


n136 See Esty, supra note 10, at 182; Durbin, supra note 131, at 18; Scott Vaughan, Trade and Environment: Some North-South Considerations, 27 Cornell Int'l L.J. 591, 593-94 (1994).

n137 See Esty, supra note 10, at 182; Durbin, supra note 131, at 18. Developing countries and several prominent economists have condemned unilateral trade restrictions as an imposition of the North's ethical preferences on the South, and as a denial of the sovereign right to establish environmental standards in accordance with local conditions and domestic policy preferences. See Esty, supra note 10, at 181-88; Bhagwati, supra note 13, at 170-76; T.N. Srinivasan, Developing Countries and the Multilateral Trading System 65-69 (1998). Equally problematic are efforts by industrialized countries to promote upward harmonization of environmental standards. As one commentator has pointed out in the context of the North American Free Trade Agreement (NAFTA), upward harmonization of environmental standards perpetuates economic and political inequality among states by depriving developing countries of the competitive advantage offered by lower environmental standards, and by forcing developing countries to divert resources from more pressing social and economic needs in order to "catch up" to the environmental standards of the industrialized world. See Ileana M. Porras, The Puzzling Relationship Between Trade and the Environment: NAFTA, Competitiveness and the Pursuit of Environmental Welfare Objectives, 3 Global L. Stud. J. 65, 72 (1995); see also Esty, supra note 10, at 182. Developing countries have maintained that they cannot be expected to attain international environmental standards unless industrialized countries provide the necessary transfer of capital,
know-how, and technology to enable them to do so, and have invoked the commitments made by industrialized countries at the 1992 U.N. Conference on Environment and Development to provide these resources. See Vaughan, supra note 136, at 594-97; Durbin, supra note 131, at 18-19. See also Gregory Shaffer, WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future, 24 Fordham Int'l L.J. 608 (2000) (arguing that the U.S. shifts the costs of environmental protection to developing countries via unilateral trade restrictions because domestic political constraints preclude the U.S. from providing significant financial support to international environmental institutions to promote sustainable development and from taking measures to curb its own contribution to global environmental degradation).

n138 See Esty, supra note 10, at 185; Durbin, supra note 131, at 20.

n139 See Esty, supra note 10, at 185-86; Peter & Susan Calvert, supra note 5, at 187-89.


n142 See Esty, supra note 10, at 181-88.

n143 The issue of consumption is addressed directly in Chapter 4 of Agenda 21, of the Earth Summit's program of action for achieving sustainable development. See Report of the United Nations Conference on Environment and Development, Annex II, U.N. Doc. A/Conf.151.26, P. 4.3, 4.5, and 4.8. (June 314, 1992). This document is significant because it represents the first time that developed countries have acknowledged their primary responsibility for addressing the environmental consequences of consumption and for promoting sustainable consumption patterns. Id.

n144 For a survey of legal scholarship on the issue of consumption, see Salzman, supra note 99 at 1293, 1293 n. 18. For an analysis of how U.S. tax policy encourages overconsumption and how tax provisions could be used to reduce consumption and to promote resource conservation, see Mona L. Hymel, The Population Crisis: The Stork, the Plow and the IRS, 77 N.C. L. Rev. 13, 100-31 (1998).


n146 For example, the North may decide to reduce consumption by imposing an ecological tax on fuels and timber. Reduced consumption in the North will likely cause producer prices to drop, and the producers may increase their resource exploitation so as to make up for the shortfall by selling their products in other
markets. Consequently, reduced consumption in the North may accelerate resource depletion in the South rather than promote sustainable use of natural resources. See Esty, supra note 10, at 189 (describing such a scenario in the case of timber imports); see also, Sachs, supra note 88, at 210-12 (discussing the North-South implications of using ecological taxes to reduce Northern consumption). For a brief analysis of the relationship between consumer product regulation and international trade law, see Salzman, supra note 99, at 1281-85.

n147 See Salzman, supra note 99, at 1253. While an analysis of the political, economic, cultural and legal obstacles to regulating the quantity of consumption is beyond the scope of this article, it must be acknowledged that these obstacles are formidable. Governments have traditionally promoted consumption in order to increase economic growth and have attempted to limit or reduce consumption only in times of crisis or resource scarcity. Id. at 1266. Although fuel consumption is heavily taxed in Europe, efforts to regulate consumption through taxation in the United States, such as President Clinton's proposed BTU tax, have frequently been rejected. Id. at 1269; Hymel, supra note 144, at 107 (discussing European consumption taxes). The manufacture of needs through advertising is a linchpin of the modern consumer economy, and many citizens of the North view shopping as a primary cultural activity. See Athanasiou, supra note 102, at 41-43. As one U.S. diplomat candidly remarked in preparation for the 1992 U.N. Conference on Environment and Development, "the American lifestyle is not up for negotiation." Salzman, supra note 99, at 1256.

n148 See Sachs, Neo-Development, supra note 21, at 249.

n149 Id.

n150 See Robert J. Fowler, International Environmental Standards for Transnational Corporations, 25 Envtl. L. 1, 2-3 (1995). Transnational corporations in developing countries are perceived to operate in a legal and moral vacuum between ineffective domestic legislation and unenforceable or nonexistent international regulation. Id. at 1-4. Economist Herman Daly argues that globalization benefits transnational corporations by separating the places that benefit from economic activity from those that bear the costs. Herman E. Daly, Problems with Free Trade: Neoclassical and Steady-State Perspectives, in Trade and the Environment, supra note 13, at 151. "The larger the market, the longer corporations will be able to avoid the logic of Henry Ford - that he had to pay his workers enough for them to buy his cars. In a big trading area, you can go for a long time making cars with cheap labor in one place and selling them to the remaining high-wage earners somewhere else. The larger the free trade bloc, the longer you can get away with depleting resources and absorptive capacities in one area in order to enjoy the benefits produced from these costs in a well-preserved environment somewhere else. . . . That is why transnational corporations like free trade and why workers and environmentalists do not." Id. In other words, transnational corporations have little or no accountability to the communities or nation-states in which they operate, to their workers, or to the environment.


n152 See Fowler, supra note 150, at 6. In fact, transnational corporations headquartered in the United States, Germany, France, Japan and the United Kingdom account for more than two thirds of global direct foreign investment. Id.

n153 See Fowler, supra note 150, at 8.

n154 Id. The industrial accidents at Seveso, Italy; Bhopal, India; and Basel, Switzerland alerted the world to the grave consequences of inadequately managed chemical manufacturing plants. Id. at 9. The environmental and human rights implications of petroleum development in the Ecuadoran Amazon have also attracted wide attention. See generally Holwick,
n155 The global trading system is no longer simply a group of nations buying and selling things to each other. Rather, international trade is increasingly dominated by transnational corporations importing and exporting among their own foreign-based subsidiaries. It is estimated that more than 40 percent of U.S. exports and nearly 50 percent of U.S. imports represent goods traded through intra-firm channels rather than in the open market. However, all of this intra-firm trade is included in national trade statistics even though international trade is increasingly driven by the priorities of transnational corporations, and less by traditional notions of comparative advantage among nations. See William Greider, One World, Ready or Not: The Manic Logic of Global Capitalism 22-23 (1997).


n157 See Shiva, supra note 22, at 150; Guha, supra note 14, at 99-108.


n159 See supra notes 116-121 and accompanying text.

n160 Id.; see also Daly, supra note 150, at 155-56.

n161 See Foster, supra note 158, at 802-08.


n163 Lois Ann Lorentzen, Bread and Soil of our Dreams: Women, the Environment, and Sustainable Development - Case Studies from Central America, in Ecological Resistance, supra note 23, at 56-69. Women are at the forefront of the environmental movement in Central America because environmental degradation directly affects their already undercompensated and under-appreciated roles as food producers, food providers, and caretakers for the young, the elderly, and the sick. Soil erosion results in a decline in food production and in malnourished children. Deforestation increases the distance that must be traveled to obtain firewood. Contaminated water supplies produce illness; and overuse of pesticides and chemical fertilizers result in an increase in birth defects. It is, therefore, not surprising that the Central American environmental movement has drawn an explicit connection between the
degradation of nature and the subordination of women. Id. at 59-62.


n165 See Michelle Leighton Schwartz, International Legal Protection for Victims of Environmental Abuse, 18 Yale J. Int'l L. 355, 359-75 (1993) (describing how environmental degradation can violate the right to life, the rights of indigenous peoples, the right to health, livelihood, culture, privacy, and property, the right to freedom of expression and to political participation, and the emerging right to environmental information and to a healthy environment); see generally Human Rights Watch and Natural Resources Defense Council, Defending the Earth: Abuses of Human Rights and the Environment (1992).

n166 See Michael Anderson, Human Rights Approaches to Environmental Protection: An Overview, in Human Rights Approaches to Environmental Protection, supra note 164, at 8-10.

n167 Id. at 4-5.

n168 Id. at 6-7.

n169 Id. at 5.

n170 Id. at 8-10.

n171 See supra notes 27-34 and accompanying text.

n172 See supra notes 108-121 and accompanying text.

n173 Id.
I. Introduction and Background

On August 3, 1999, El Cenizo (meaning "ashen" in Spanish), the small Southwest Texas border town of seven thousand, adopted an ordinance which makes Spanish its "predominant language." The mayor, shortly thereafter in a public ceremony, raised the Stars and Stripes, publicly affirming his town's patriotism. The Predominant Language Ordinance mandates that all city functions, meetings, and notices be conducted and posted in Spanish, the predominant language of the community. Under the ordinance, with forty-eight hour notice, an English translation shall be provided as practicable at all city functions and meetings for those persons who do not speak Spanish. The ordinance further mandates that all ordinances and resolutions will be drafted in English, with translations into Spanish available upon request.

The adoption of the Predominant Language Ordinance by El Cenizo's elected officials caused a nationwide firestorm and even received international attention. Consequently, El Cenizo, a remote Texas town, has been visited by reporters from as far away as Tokyo, Japan. The alleged concerns of nonresidents of El Cenizo have resulted in widespread criticism of the passage of the ordinance. As a result of the ordinance, the Ku Klux Klan has threatened to burn the town down and have its residents sent back to Mexico. Two nationally-syndicated disc jockeys ("shock jocks") based in Virginia telephoned El Cenizo City Hall while on the air and publicly insulted a city commissioner telling her to "eat expletive and die" and that anyone who will not or cannot speak English should "get on their burros and go back to Mexico." The disc jockeys have since apologized after a threatened boycott and have also been fined by the FCC following a complaint filed by the commissioner.

Other critics, including the English First and U.S. English organizations, have called El Cenizo "America's First Quebec" and "the canary in the mine" and have described the city's actions as "benign disassimilation." The mayor and commissioners of El Cenizo have defended their actions by indicating that they did so at the request of the community. They assert that since the passage of the ordinance, they have seen an increase in the level of civic participation by their constituents; the residents can now understand what is being said at City Council meetings now that they are held in Spanish. In addition, residents feel safer in their community because of a "Safe Haven" ordinance. This ordinance, enacted on the same day the City passed the Predominant Language Ordinance, prohibits the City's elected officials and employees from disclosing, investigating or requesting information concerning a resident's immigration status. If an official or employee of the City revealed to a third party the immigration status of a resident of El Cenizo, then, under the ordinance, the disclosure could be grounds for impeachment or termination. Thus, elected city officials also maintain that El Cenizo is now a "safe haven" for undocumented aliens because they want to make clear to their residents that they are not calling the Border Patrol to report them. Although several similar ordinances exist nationwide, the Safe Haven Ordinance has been criticized by the media and pundits. Some have even called El Cenizo a haven for criminals.

El Cenizo officials justify the Safe Haven ordinance by asserting that it was designed to increase the level of trust between administrators and the City's residents, not to hamstring attempts at border control. Officials further assert that the ordinance was adopted in response to the harassment of El Cenizo residents by United States Border Patrol. Even in 1992, almost nine out of ten residents were legal U.S. residents. Notwithstanding this fact, the Immigration and Naturalization Service (INS) would stop Laredo-bound buses, sometimes on a daily basis.

Under current law, the INS may make indiscriminate stops along the border, needing no warrant. Latino, mostly Mexican, border communities have long complained that "driving while brown" or even "riding
the bus while brown" can be physically dangerous to their residents. n38 This phenomenon is exemplified by the recent deadly shooting of a Mexican-American youth near the border, as well as the fact that no Hispanic is immune from INS stops in border areas. n39

Previous to the adoption of the ordinance, Border Patrol officials had established a pattern of stopping and searching local buses carrying El Cenizo residents who were going to work, as well as to welfare and health offices. n30 According to one city official, because innocent people were being stopped, all of El Cenizo's residents had become afraid of the Border Patrol. n31 Thus, the Safe Haven Ordinance was passed to counter accusations of politically-motivated reporting of undocumented persons by El Cenizo officials, to foster trust between the elected officials and residents of El Cenizo, and to help all residents feel comfortable attending monthly city meetings. n32

Such an unprecedented situation in a small, predominantly Mexican-American immigrant "colonia" n33 community demands, as this paper sets forth, an exploration of the contextual/socio-political and legal issues which have arisen in these unprecedented actions. Part II will discuss both the geography and the demographics of El Cenizo, as well as the context of the two ordinances and then will examine the sociopolitical issues they raise. Parts III and IV will explore the legal issues implicated by the ordinances and scrutinize them under current law, in the areas of local government law, constitutional law, language law, and immigration/welfare law. Finally, the Conclusion will provide a discussion of the lessons that can be learned from the actions that have taken place at El Cenizo.

II. Contextual Issues/Socio-political Issues Related to the Two Ordinances

What kind of place is the only known United States locality that has declared Spanish its "predominant language" and has declared itself a safe haven against the INS? Part A discusses the geography and demographics of El Cenizo, and Part B provides a contextual analysis of the two ordinances.

A. Geography and Demographics of El Cenizo

The city of El Cenizo is located twenty-five miles from the Mexican border town of Nuevo Laredo. n34 This is approximately fifteen miles south of Laredo, Texas, adjacent to the Rio Grande River. n35 It is a small community of approximately 800 households, the majority of which have extremely low incomes. n36 For instance, where the median household income in the United States is $ 37,888, the median household income in El Cenizo is only $ 7,423. n37 Seventy percent of the residents of El Cenizo live under the poverty line. n38

El Cenizo is a poor community. Currently operating as a nonhome rule municipality under the Texas Local Government Code, n39 El Cenizo [\$1022] was incorporated on August 29, 1989. n40 Prior to that, it was an unincorporated subdivision of Webb County, Texas. n41 The city very severely lacks basic services, such as paved streets, sewer systems, ambulance services, and other city services. n42 There is also a lack of adequate infrastructure, poor water supplies, and inadequate housing. n43 The houses in El Cenizo are very close together, built out of wood, and are at risk of fire. n44 Presently, the city does not have a fire station or a fire engine. n45 Additionally, there is a high incidence of health problems in El Cenizo, stemming from frequent flooding, dust, and heat. n46

This is a hard-working community. n47 The residents of El Cenizo are mostly Mexican immigrants, n48 young, n49 and trying to do better for themselves and make ends meet as best they can. Many residents are unemployed because there are few jobs in El Cenizo. n50 The majority of El Cenizo residents work in Laredo—usually in retail or housekeeping, n51 commuting for almost four hours a day by private bus services. These are the buses that are frequently raided by INS to verify the citizenship of the passengers. n52

One in four adults over twenty-five years old in El Cenizo has a high school degree. n53 Three in five of the residents indicate that they speak English "not well" or "not at all." n54 Four in five of the residents only speak Spanish, although there is a higher incidence of bilingualism in the younger generations. n55

The educational opportunities in El Cenizo are also extremely limited. There are no adult education programs. n56 The city has only one elementary school, which is named Kennedy-Zapata, to honor both a United States and a Mexican president who were committed to social justice. n57 The school only serves students up to the fifth grade and has only been open for the past three years. n58 For middle school and high school, students are bused to other towns, as far away as Laredo. n59 At Kennedy-Zapata the children receive bilingual education, and no student is asked about his or her immigration status. n60

The current mayor, Rafael Rodriguez, is a naturalized United States citizen of twenty years who speaks very little English. The two other El Cenizo elected officials, Commissioners Gloria Romo and Flora Barton, are also United States citizens. Commissioner
Barton, born in Laredo, counts English as her first language. n61 The passage of the Predominant Language Ordinance is a response to the demographic reality of El Cenizo. The majority of the 7000 residents speak Spanish, only some of whom are bilingual, but more adept in Spanish. n62 Finally, the passage of the Safe Haven Ordinance reflects the dangers of being a Latino immigrant along the border, even a legal one. n63

B. Democracy, Cultural Citizenship and Public Freedom in El Cenizo

A contextual analysis of the ordinances of El Cenizo must begin with the meaning of the ordinances for its residents. For the residents of El Cenizo, their culture is very important. n64 Furthermore, language itself is a significant vehicle of culture. n65 In that sense, adoption of the Predominant Language Ordinance is an affirmation of this "border" culture.

Commissioner Barton has indicated that the Predominant Language Ordinance was approved for the children of El Cenizo, because they need to know the two languages that form part of their culture. n66 However, she indicates that for the adults, in order to fight for their future, "they must [*1024] understand in their own language (Spanish) what we (city officials) are doing." n67

In adopting the ordinances, the people of El Cenizo and their leaders have engaged in the phenomenon identified by Donaldo Macedo as "cultural production." Cultural production constitutes "specific groups of people producing, mediating, and confirming the mutual ideological elements that emerge from and reaffirm their daily lived experiences." n68 Thus, El Cenizo's actions can be interpreted as a "democratic and liberatory educational experience." n69 These actors have spoken the truth about their lived experiences and values through the enactment of the Predominant Language and Safe Haven Ordinances. This community has spoken to what is important to them and what gives meaning to the lives of this cultural and civic citizenry. The Predominant Language Ordinance affirms the community's Mexican heritage. Its enactment affirms this cultural identity and makes a statement as to how this community wishes their assimilation to occur within the larger English-speaking polity. If Commissioner Barton reflects the intent of the community, El Cenizo is looking for a way to coexist within the English speaking polity, while at the same time preserving its Mexican heritage. This is not melting pot assimilation but acculturation on this community's terms.

In addition, what the Predominant Language and Safe Haven Ordinances have done is to enable the city's residents to address what Hannah Arendt has called "their need for public freedom." n70 This public freedom is embodied in an individual's ability to participate actively in the basic societal decisions that affect one's life and create one's way of life. n71 Such an action has empowered the residents of El Cenizo and allowed them to be active in their community, as the majority of the residents can now understand what is being said at the City Council meetings and can feel safe from INS interference in their daily lives. Following [*1025] Ruiz v. Hull, where the Arizona Supreme Court found in the First Amendment a fundamental right to "petition [the government] for redress of grievances," n72 the residents of El Cenizo are now able to exercise their right to have their democracy work for them. Furthermore, in Yniguez v. Arizonans for Official English, the Ninth Circuit Court of Appeals found that an English Only constitutional amendment was overbroad and burdened the right of non-English speakers to "freely discuss government affairs." n73 The Predominant Language Ordinance does the converse and allows the residents of El Cenizo to freely discuss government affairs in their predominant language, Spanish.

The above analysis of the actions of El Cenizo is consistent with notions of Latino cultural citizenship. n74 Blanca Silvestrini has described cultural citizenship as "refering to the ways people organize their values, their beliefs about their rights, and their practices based on their sense of cultural belonging rather than on their formal status as citizens of a nation." n75 Nowhere was this notion of cultural citizenship more palpable than when the mayor and residents of El Cenizo symbolically acknowledged their formal United States ties by raising the American flag in a public ceremony held shortly after the ordinances were passed. n76 Furthermore, regarding the Predominant Language Ordinance, the mayor explicitly has stated that "we are part of the United States and English is still the official language of El Cenizo, even the ordinance itself is written in English." n77 Similarly, with regard to the Safe Haven Ordinance, the residents of El Cenizo no longer fear the INS and feel safe in their own community, yet city officials have indicated that they will cooperate with federal authorities on other matters such as drug interdiction. n78 The fact remains, though, that the passage of these ordinances is the affirmation of the residents' cultural citizenship as Mexican Americans, thereby [*1026] creating El Cenizo's special border "cultural community." n79 This poses a challenge to traditional notions of what it is to be "American."

El Cenizo has created a border cultural citizenship, even though it has received threats of violence since the passage of the ordinances. n80 These have included...
could sue to enjoin the implementation of the legal norms, and if they do not, then to interrogate who Cenizo's elected officials comport with established exam ined in order to determine if the actions of El constitutional law concept of standing need to be analyzed are their legal implications. In the case of sociopolitical and cultural context, what remain to be demographic perspective, as well as from their

This view of the democratic process in action is contrary to the democratic reality described by Noam Chomsky, who defines democracy as a system of elite decision-making and public ratification. In this case, the people of El Cenizo requested these actions, a public rather than elite decision. This is what educators and sociologists would call communities in action. As Gerald Frug admonishes, popular participation may appear "chaotic," but it also provides the promise of re-envisioning legal regimes which sustain a hierarchy that is unwelcoming of outsiders and uncharitable towards the poor. This is why there was such an uproar over this town's actions, since "popular involvement in the formation of public policy is considered a serious threat." For those who would defend a status quo that does not provide for the poor, immigrants and non-English speakers, El Cenizo's public participation is not considered a democratic act, but rather a "crisis of democracy' that must be overcome." This is the reason for the furor over these ordinances and all the critique, some of it nativist. This "crisis of democracy" has been brought about by a "pueblo olvidado" a "forgotten" town of hard working, low income Mexican Americans.

III. Legal Issues Related to Both Ordinances: Local Government Law and the Constitutional Law Concept of Standing

Having seen the Predominant Language and Safe Haven Ordinances from their geographic and demographic perspective, as well as from their sociopolitical and cultural context, what remain to be analyzed are their legal implications. In the case of both ordinances, local government law and the constitutional law concept of standing need to be examined in order to determine if the actions of El Cenizo's elected officials comport with established legal norms, and if they do not, then to interrogate who could sue to enjoin the implementation of the ordinances. Let us begin through the lens of local government law and question whether the enactment of these ordinances is consistent with Texas government law and communitarian principles.

A. Local Government Law

As a Type C General-Law municipality under Texas law, El Cenizo may adopt an ordinance "not inconsistent with state law or in conflict with its general powers, that is necessary for the government, interest, welfare, or good order of the municipality as a body politic." A review of the other state laws or of the general powers of Type C General-Law municipalities under Texas law has not disclosed any inconsistencies or conflicts. The Texas state legislature has not taken any action against El Cenizo for acting outside the scope of its articles of incorporation nor has it enacted an English Only law, although former Texas Governor George W. Bush has stated that "I don't want this town's business being conducted in Spanish. It ought to be conducted in English . . . the great language that provides freedom and opportunity." The ordinances were validly enacted, as they are clearly for the government, interest, welfare, or good order of El Cenizo as a body politic.

The ordinances were validly enacted, as they are clearly for the government, interest, welfare, or good order of El Cenizo as a body politic. El Cenizo city leaders relied on social science data collected preceding the adoption of the ordinances in order to account for their passage. Regarding the Predominant Language Ordinance, the city organized groups of volunteers that canvassed the city house by house to survey the households about their language of preference. The survey results resulted in the passage of the ordinance. Not only is this use of social science evidence of the twentieth century legal history in the United States, it is also a very telling sign of how this community came together to collect and use empirical evidence in order to foster their democratic ideal.

Regarding the Safe Haven Ordinance, the evidence of the abuses of the INS came in the form of anecdotal evidence received by city officials from El Cenizo residents. The use of social science data and anecdotes by El Cenizo's elected officials prior to the passage of the two ordinances is reminiscent and also entirely consistent with the research methodology called "participatory action-research."

Participatory action research actively involves affected people and communities usually excluded in the world of policy-making in trying to formulate the problems they need to solve and the best way to go about solving them. It has been defined by a leading scholar "as a method of study and action that goes hand in hand with the altruistic philosophy of life to obtain useful, reliable results for improving
collective situations, particularly for popular classes." n99 The actions of the residents of El Cenizo fall precisely in place with well known participatory-action examples such as those in the environmental justice area, where low income communities have united to research and solve the pollution and toxic waste problems in their midst. n100

El Cenizo, through these ordinances, is defining itself in an exclusionary way. Thus, the following questions arise: Can a community define itself in a way which may be perceived as isolating it from the state? Can a community provide its services so that the majority of its residents can benefit from them, despite the objections of nonresidents? One of the City Commissioners of El Cenizo, regarding the passage of the Predominant Language Ordinance, has very forthrightly stated, "we're sorry, but we're only thinking of our community," n101 underscoring the fact that "communities by their very nature exclude." n102 Professor Gregory Alexander has called this "the paradox of exclusion." n103

Exclusion may be necessary to serve a community's needs, as seen when El Cenizo Commissioner Romo commented: "we did this for one reason and one reason only: to make it convenient for the majority of the residents to know how we are trying to serve them." n104 Professor Alexander points out that communities, "precisely because they are constituted by shared commitments to some specific good they must, in symbolic effect if not in conscious intention, exclude some members of the society, precluding those individuals from participating in the group's internal life." n105 Thus, El Cenizo's actions, symbolically, if not consciously, have excluded English speakers with the passage of the Predominant Language Ordinance. Similarly, the community has symbolically excluded the INS from their midst through the passage of the Safe Haven Ordinance.

The United States Supreme Court has allowed local communities wide latitude to define the character of their localities, even if sometimes local needs may exclude outsiders. The leading case is Village of Euclid v. Ambler Realty Co., in which the Court declared constitutional a suburb's ordinance designed to stave off the industrial growth of the nearby city of Cleveland. n106 The Court recognized that the suburb, a politically separate municipality, had "powers of its own and authority to govern itself as it saw fit, within the limits of its organic law and the state and federal Constitutions." n107 The Court did not exclude the possibility that in other cases, parochial interests could at times be so outweighed by the general public interest, "that the municipality would not be allowed to stand in the way." n108

The fact that nonresidents of El Cenizo may be opposed to this action n109 should not be determinative of its adherence to local government law principles. Actions taken by a community may affect nonresidents, yet not confer any rights on those nonresidents. In Holt Civic Club v. City of Tuscaloosa, the Supreme Court allowed a city to exercise extraterritorial police powers over an unincorporated community in the city outskirts. n110 The Court noted that "no one would suggest that nonresidents likely to be affected by this sort of municipal action have a constitutional [*1030] right to participate in the political processes bringing it about." n111 This general principle of local government law applies here. Unless extreme, the law protects the right of local self-determination.

Regarding communities, Frug writes optimistically that "a city function of community building lies in its potential for reinvigorating the possibility of a political solution . . ." n112 Bringing this optimism to life, El Cenizo has become what Frug describes as "a new type of entity . . . not just another bureaucracy, but . . . a vehicle for new forms of association and popular participation." n113

B. Constitutional Law--Standing

If the passage of the two El Cenizo ordinances were to be challenged in court, the notion of who would have standing to do so would need analysis and examination. Following constitutional limitations and prudential limitations on a court's exercise of its jurisdiction, in order to challenge a legislative enactment, litigants must meet certain standing requirements. n114 The discussion in this section contemplates a party whose rights have not been violated by the ordinances, for example, a non-resident of El Cenizo who attempts to challenge their validity because it may impair the rights of others. Without anything more, such a claim would fail since a litigant is not usually allowed to challenge legislation if it does not affect the litigant's own rights. n115 However, third-party standing is allowed in very specific, limited circumstances.

To have standing to advance the interests of a third-party, a litigant must meet not only the minimum standing criteria of an injury in fact, a causal connection between the injury and the complained of conduct, a likelihood that the injury will be redressed by a favorable decision, n116 but also that there is a close relationship between the rights of the claimant and the impact upon the third-party's rights. n117 Additionally, a litigant can challenge in the interest of a third-party only if the affected party is unable to defend his or her own rights. n118 [*1031]
Since the two El Cenizo ordinances are purely local enactments concerning only city procedure, it is difficult to see who, outside of local residents who participated actively in the enactment of the ordinances, would have standing to challenge the legislation. The state could pass an English Only law as part of its local government law and require El Cenizo and all other Texas cities to pass and discuss public ordinances only in English, but as discussed, this has not been the political will so far. Except for some unknown individuals possibly at the margin, presumably the citizens of El Cenizo are perfectly capable of asserting their own rights. This would be consistent with judicial policy of having those who are the best advocates for a party, namely the parties themselves, address the issue that would lead to the most proper and binding resolution.

As to non-residents of El Cenizo, there does not appear to be an injury in fact to those individuals who do not belong to the town's population. Without an injury in fact, a nonresident would be unable to challenge the ordinances. n119

As far as standing to sue under the First Amendment, since both ordinances may be seen as infringing on "speech," no injury in fact is required to challenge legislation on the grounds that it may inhibit the First Amendment's guarantee of freedom of speech. n120 Because of the value associated with the exchange of ideas, parties should be free to challenge legislation that potentially prevents free speech. n121 Thus, under the First Amendment, there is a higher likelihood of a potential plaintiff being able to file suit to challenge the Predominant Language Ordinance, but for the reasons discussed infra at Part IV.B, such a suit would likely not prevail on the merits.

IV. Language Law and other Legal Issues Pertaining to the Predominant Language Ordinance: The First Amendment and Equal Protection Clause

Because the Predominant Language Ordinance touches upon the areas of language rights and free speech, it mandates an exploration into language law, including the First Amendment and the Equal Protection Clause, in order to ascertain its validity.

A. Language and the Law

How does the Predominant Language Ordinance relate to the body of law regarding language rights? How does it compare to English Only statutes, ordinances, and policies? These inquiries must begin with the history of the United States itself.

Early language law and policy in the United States did not assert the preeminence of English; in fact, during the revolutionary times, the Continental Congress issued orders and addresses in English, French, and German. n122 Even the Articles of Confederation, published after the Revolutionary War, were printed in the three separate languages. n123

The English language today enjoys an exalted position in the United States. It has been acknowledged by one Circuit Court of Appeals to be the preeminent language of the United States. In Soberal-Perez v. Schweiker, the Second Circuit Court of Appeals stated that "we need only glance at the role of English in our national affairs to conclude that the . . . actions [of the Department of Health and Human Services in failing to provide forms and services in Spanish] were not irrational." n124 "Congress conducts its affairs in English, the executive and judicial branches of the government do likewise." n125 "In addition, those who wish to become naturalized United States citizens must learn to read [*1033] English." n126 Thus, the court reaffirmed that English is the de facto official language of the United States. Notwithstanding this affirmation, it is clear that English is not the de jure official language of the United States, as the often-introduced federal "English Only" bills have never been ratified by Congress. n127

What the El Cenizo Predominant Language Ordinance has done is implicitly challenge the privilege of English in the United States. This in turn challenges the exclusivity of English as the language of communication in this country, very much as Professor Cheryl Harris posits that affirmative action can challenge the property interest in whiteness and "facilitate the destruction of the false premises of legitimacy and exclusivity inherent in whiteness and break the distorting link between white identity and property." n128 So the leaders and residents of El Cenizo, in trying to make their city government more accessible to their own, have accidentally stepped on the raw nerve of impinging on the English language identity of this country, thus the criticism and uproar.

The proliferation of the English Only movement since the 1980s has yielded local ordinances, state statutes, and even state constitutional amendments to declare English the official language of these localities. n129 Though El Cenizo has not declared an official language, it is worthwhile [*1034] to inquire as to how a court may respond to challenges to the ordinance as a declaration of an official language. However, El Cenizo's position is unique in that it is the first political entity in the United States to have mandated that its functions and meetings be conducted in the predominant language of the community, rather than stipulating that the official language of the town is any particular language. Although there are differences, a court faced with a challenge to the
Predominant Language Ordinance would probably generalize from the closest legislative analogue (i.e., Official-English declarations). Thus, it is most useful to analogize to cases in which Official-English legislation was challenged.

B. First Amendment Issues

The landmark case in this area is Ruiz v. Hull, in which the Arizona Supreme Court struck down a state constitutional amendment, Amendment XXVIII, which declared English as the official language of Arizona, mandated its use for all official acts, and prohibited the use of languages other than English subject to very limited exceptions. n130 In invalidating the amendment, the Arizona Supreme Court relied mostly on First Amendment grounds, finding that the amendment was not contentneutral and that instead it constituted "a sweeping injunction against speech in any language other than English." n131 The Court further found that the amendment "unconstitutionally infringed upon multiple First Amendment interests--those of the public, of public employees, and of elected officials." n132 Specifically, the amendment was unconstitutional in that it negatively affected the rights of non-English speakers to access their government. n133

The court noted that the amendment prevented individuals with limited English-speaking skills from participating in government. n134 Because it required all state business to be conducted in English, n135 citizens and residents unable to understand English sufficiently would effectively be blocked from government participation and services. n136 Preventing the participation in representative government and blocking the redress of grievances are violations of fundamental rights protected by the First Amendment. n137 [*1035]

Similarly, as discussed above, n138 the Ninth Circuit Court of Appeals in Yniguez v. Arizonans for Official English, held that under the First Amendment, the Arizona English Only constitutional amendment was overbroad and burdened the right of non-English speakers to "freely discuss government affairs." n139

The El Cenizo Predominant Language Ordinance does not constitute a sweeping injunction against languages other than Spanish. In fact, the ordinance itself recognizes the predominance of English and mandates the use of English for the drafting of city ordinances. n140 Neither does the ordinance impinge on the ability of non-Spanish speakers to seek and obtain information and services from the government or to freely discuss government affairs. n141 In addition to the safeguards set forth in the ordinance (e.g., translations provided, drafting of ordinances in English), n142 the practice in El Cenizo is an English-inclusive one. For example, on any day, callers to the El Cenizo City Hall will have the telephone answered in English by a bilingual city secretary, Elsa Degollado.

The Predominant Language Ordinance does not regulate speech of any official, employee, or resident of the City. Whereas Arizona's Amendment XXVIII required that all government officials and employees speak in the official language, n143 the Predominant Language Ordinance only mandates that all city functions will be conducted in the predominant language of El Cenizo. n144 This is only a procedural rule for the City, and not a law that could curb the speech of its employees and officials. The El Cenizo ordinance, then, escapes the first prong of Amendment XXVIII's invalidity by not regulating the speech of any resident, official, or employee of the City.

As a procedural rule, however, the ordinance does raise an interesting question: Does the ordinance require that a conversation between a city official and resident--both of whom do not speak the predominant language but do speak the same language--regarding city business be translated into the predominant language? Strictly read, this would seem [*1036] to be the result. The ordinance specifies that "all City functions . . . shall be conducted . . . in the predominant language of the community." n145

This absurd result is avoided, however, by a close reading of the ordinance. Throughout the ordinance, it is stressed that where "needed," a translation into the predominant language of the community would be made by the City. n146 In the above hypothetical situation, no such need would exist. Hence, it follows that the City would not be obligated to provide one.

Since the Predominant Language Ordinance refers to city officials, it is important to consider how the ordinance may affect their First Amendment rights in the workplace. The Equal Employment Opportunity Commission ("EEOC") has created a set of rules that recognize and protect an individual's right to speak the language of his national origin. n147 Specifically, English Only rules are permissible only to the extent there is a business necessity for such rules. n148 A business necessity is established by showing that a rule is necessary to the efficient and safe operation of the enterprise. n149

However, the EEOC's guidelines are not binding upon a court. n150 Thus, the Supreme Court has stated that, in the workplace, an employer has the right to enforce a limited, reasonable, and business-related rule requiring English only against a party who is able to follow it but refuses because of "individual
Cenizo is assuredly a legitimate government interest. Accessibility to the government for the citizens of El Cenizo is a legitimate government interest while being narrowly tailored to serve that purpose. The use of the predominant language is an attempt to create the widest possible base of participation in local government.

The crucial difference in El Cenizo's law is its second prong: needed translations into English must be provided by the City as requested and practicable. Since the first prong requires that all city functions be in the predominant language, those who do not speak the predominant language would, without more, be effectively left out of the political process because they would be unable to understand the language of the government. As we have seen from the foregoing discussion, this was the de facto situation in Arizona after passage of Amendment XXVIII.

The crucial difference in El Cenizo's law is its second prong: needed translations into English are provided as requested, subject to practicality.

Moreover, the ordinance furthers a governmental interest while being narrowly tailored to serve that purpose. The use of the predominant language is an attempt to create the widest possible base of participation in local government.

One means of increasing the base would be, as in Arizona, to regulate speech by mandating that officials and employees use the predominant language of the community, in this case Spanish rather than English. As we have seen, this would be unconstitutional. Instead, El Cenizo took a much more moderate step. In order to ensure that its citizens could understand and participate in the functions of local government, El Cenizo simply declared that the meetings would be held in the language that most every resident spoke and translations would be provided for those who did not. This is an efficient means of increasing the base: it provides for a translation if needed and eliminates the costs that were incurred previously with the translation from English to Spanish.

In a much earlier language law case, the United States Supreme Court struck down under the Equal Protection clause a Nebraska statute that prohibited the teaching of "any subject to any person in any language other than the English language." A teacher had been convicted of violating this statute by teaching a ten year old boy in German.

The El Cenizo Predominant Language ordinance has a similar civic purpose: to encourage public participation of the residents by being able to understand the proceedings at the City Council meetings. The ordinance, although mandating the use of the predominant language, Spanish, at all City functions and meetings also allows for translation as a matter of course for anyone, provided the person gives notice. The ordinance further provides that any translations shall be provided by the City and that all ordinances are to be written in English. Thus, nonSpanish speakers are protected by the ordinance as well, in contrast to the statute in Meyer.
of the United States Constitution. n178 The district court upheld the federal legislation holding that any potential federal intrusion upon the city was insufficient to violate the Tenth Amendment or the governmental principles of federalism. n179 The court also held that the lack of federal "political accountability" for the [*1041] enforcement of permissible federal regulation does not alone constitute sufficient grounds for invalidating a congressional enactment. n180

The appeals court affirmed the lower court's ruling, n181 holding that the federal legislation does not require that states or localities regulate an area of federal interest; rather they merely remove unlawful state prohibitions against voluntary cooperation with federal authorities. n182 Moreover, the court further found that §§ 1373 and 1644 do not interfere with local and state operations because they "nullify [Executive Order No. 124 which] singles out and forbids voluntary cooperation with federal immigration officials." n183

Because of the similarity between New York's and El Cenizo's safe haven laws, the judicial interpretation of §§ 1373 and 1644 is important for the small colonia. Specifically, the validity of El Cenizo's Safe Haven Ordinance--and all other similarly drafted safe haven legislation--is now jeopardized.

According to El Cenizo's Safe Haven Ordinance, elected officials and employees of the city are prohibited from "disseminating . . . and investigating or assisting in the investigation" of a resident's immigration status. n184 The ordinance thus prohibits El Cenizo's officials and employees from cooperating with the INS in a proper exercise of federal authority, i.e., the regulation of immigration. Federal action on this local ordinance is unlikely, however. At the time the ordinance was adopted, a spokesperson for the INS said challenging the El Cenizo ordinance was not an agency priority. n185 This leaves open the possibility, though, of action by individuals (for instance, a city employee who feels duty bound to report illegal aliens living in El Cenizo) who may seek injunctive relief from a court in order to cooperate with INS authorities without penalty.

V. Conclusion: Lessons from El Cenizo: No Longer a Pueblo Olvidado

In the two years following the passage of the Predominant Language and Safe Haven Ordinances, El Cenizo has lived through a major initial media firestorm. Yet, no one has filed a lawsuit challenging the ordinance, and the media furor has died down. However, the actions of [*1042] this community must
not be forgotten; rather, they should be examined, and lessons should be learned.

The first lesson from El Cenizo is that minority communities and communities of color can make their democracy come alive (even if it is with fear) and be successful in meeting their needs. The fear may be of bodily harm for its leaders and residents, of a lawsuit by others, including the federal government, or of being vilified by people with differing opinions. Yet minority communities should not let these fears stop them.

The second lesson is that minorities and persons of color should not be afraid of carving out their own cultural citizenship, of disturbing traditional notions of what it is to be an "American." The leaders and residents of El Cenizo did not pass these ordinances to make a statement; they passed these because they were needed for them to be able to be themselves, a Mexican-American community. They defined their needs and addressed them, and they are a better community because of it. They have met their needs in their own way.

The third lesson from El Cenizo is that there is power to be harnessed in those who may initially appear powerless. A remote community of low income Mexicans is hardly the place where you would expect these affirmations of participatory democracy to take place, yet it happened. This should encourage all other minority communities and communities of color to be diligent about identifying and taking care of their shared needs.

A final lesson is that the fear that these actions would be the beginning of a trend towards Balkanization has not taken place. The actions of the people of El Cenizo, as seen in their context, responded to very specific needs. We should not be afraid to allow our multi-cultural or minority communities to be American, each in their own way. That is the very essence of being an "American," to be free.

APPENDIX 1

City of El Cenizo
507 Cadena Avenue
El Cenizo, TX 78047

PREDOMINANT LANGUAGE ORDINANCE
ORDINANCE NUMBER: 1999-8-3(a)

UNDERSTANDING THAT ENGLISH IS THE PREDOMINANT LANGUAGE OF THE UNITED STATES OF AMERICA; THE CITY COUNCIL NEVERTHELESS HAS DETERMINED A NEED TO CONDUCT ALL OFFICIAL CITY MEETINGS AND FUNCTIONS IN THE PREDOMINANT LANGUAGE OF THE MEMBERS OF THE COMMUNITY. ANY TRANSLATION NEEDED SHALL BE PROVIDED BY THE CITY. ALL ORDINANCES SHALL BE WRITTEN IN ENGLISH.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL CENIZO, TEXAS:

Section 1 The necessity for stating that the City has no official language is officially declared.

Section 2 To declare the need to determine the predominant language used in the City and allowing for that determination to be found by an official survey.

Section 3 To officially declare that the results of the aforementioned survey found the predominant language used in the City to be Spanish.

Section 4 All City functions and meetings and notices thereof shall be conducted and posted in the predominant language of the community. If any City official conducting the meeting or function is unable to communicate in the predominant language of the community, then translation into the predominant language shall be provided as a matter of course.

Section 5 Translation into English, as practicable, shall be provided at all City functions and meetings for those people who do not speak the predominant language of the community. Notice of this need for translation should be [1044] communicated to the City secretary at least forty-eight (48) hours, prior to any official City function or meeting.

Section 6 In order to better conform with County, State and Federal regulations, all ordinances and resolutions written by and for the City shall be created in English. However, translations for these ordinances into the predominant language of the community shall be provided by the City upon request. Due to the ease of mistranslation, these translations are not legally binding upon the City and only the ordinance in its original format and language shall be binding upon the City.

Section 7 Translation, from English into the predominant language or from the predominant language into English, of all official documents and notices shall be provided to any person so requesting that information. The City will provide this information in a timely fashion so as to better serve the requesting party. The City reserves the right to charge a reasonable fee for these translation services.
Section 8 If any section or provision of this ordinance is found to be void; such finding shall not affect the remaining provisions or sections.

Section 9 This ordinance shall take effect immediately on its passage, approval and publication as provided by law.

DATE: August 3, 1999

AFFIRMED BY:
Mayor, Rafael Rodriguez
Commissioner, Gloria Romo

ATTESTED TO BY:
Commissioner, Flora Barton City Secretary, Elsa Degollado

APPENDIX 2
City of El Cenizo
507 Cadena Avenue
El Cenizo, TX 78047

SAFE HAVEN ORDINANCE
ORDINANCE NUMBER 1999-8-3(b)
EL CENIZO WAS CREATED FROM A LONG HERITAGE OF IMMIGRANT FAMILIES. IN ORDER TO CREATE BETTER UNITY BETWEEN THE COMMUNITY AND THE GOVERNING BODY THE CITY COUNCIL HAS ENACTED THIS ORDINANCE DISALLOWING ANY CITY EMPLOYEE OR ELECTED OFFICIAL TO DISCLOSE THE NATIONAL ORIGIN, IMMIGRATION STATUS, OR CITIZENSHIP OF ANY OF ITS RESIDENTS TO ANY AGENCY OR INDIVIDUAL. VIOLATORS ARE SUBJECT TO TERMINATION OR IMPEACHMENT.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL CENIZO, TEXAS:

Section 1 To generally declare the City of El Cenizo as a city of peace for all of its residents.

Section 2 To prohibit all City employees and elected officials from requesting or disseminating information concerning the citizenship or immigration status of any City resident, and from investigating or assisting in the investigation of such matters by any individual or agency.

Section 3 To prohibit the conditioning of any City benefits or services on immigration status unless required by Federal or State mandate.

Section 4 If any violation by a City employee or official is found, it will stand as grounds for termination or impeachment.

Section 5 If any section or provision of this ordinance is found to be void, such finding shall not affect the remaining provisions or sections.

Section 6 This ordinance shall take effect immediately on its passage, approval and publication as provided by law.

DATE: August 3, 1999

AFFIRMED BY:
Mayor, Rafael Rodriguez
Commissioner, Gloria Romo

ATTESTED TO BY:
Commissioner, Flora Barton City Secretary, Elsa Degollado

FOOTNOTE-1:
n1 Lecturer in Research & Writing, University of Missouri-Columbia School of Law. B.A. 1985, Princeton University; J.D. 1989, University of Pennsylvania. The author acknowledges the support of the University of Missouri School of Law and the kind assistance and encouragement of Gerardo R. Lopez and Regina Austin. I especially acknowledge the invaluable comments, edits, and thoughtful suggestions of Sylvia R. Lazos Vargas, a mentor and a friend. Without her expert and patient guidance, this article would not have been possible. I appreciate Kevin Johnson's insights. I also appreciate the suggestions of Jackie Berrien and Derrick Bell at the April 2000 Northeastern People of Color Conference as well as the comments of Fran Ansley and others at LatCrit V in Breckenridge, Colorado. An earlier version of this paper was presented at both of these conferences. Thank you also to Jamica Dowell and Patrick Morgan, University of Missouri-Columbia School of Law Class of 2002 and Andrea Russo and John Serafine, University of Missouri Columbia School of Law Class of 2000.

n2 El Cenizo, Tex., Predominant Language Ordinance, No. 1999-8-3(a) (August 3, 1999), For the full text of the ordinance, see infra Appendix 1.

n3 Id.

n4 Id.

n5 Id.

n6 Judith Torrea, El Cenizo Surprised by Reaction to Spanish-Language Move,

n7 Id.
n8 Id.
n12 Barbara Chavez, Radio Hosts Apologize Again, Albuquerque Journal, October 8, 1999, see also, Katy Bachman, Out of Sync, ADWEEK Nov. 15, 1999 available at 1999 WL 28108701 (discussing how radio hosts Don and Mike were busy apologizing for anti-Hispanic comments); see also, Telephone interview with Flora Barton, El Cenizo Commissioner, (March 21, 2000); McGhee, supra note 11. Ironically, the complaint itself was dismissed on the grounds that the remarks were not patently offensive or indecent, and the fine was for failure to notify El Cenizo that the phone call would be broadcast. Id.
n15 See Morales & Haederle, supra, note 14 (quoting El Cenizo Mayor Rafael Rodriguez discussing how now that meetings take place in Spanish, no one gets angry and residents ask many more questions).
n16 See El Cenizo, Tex., Safe Haven Ordinance, No. 1999-8-3(b) (1999), [hereinafter "Safe Haven Ordinance"]. For a full text of the ordinance, see infra Appendix 2.
n17 Id.
n18 Barton, supra, note 14.
n19 See generally Jorge L. Carro, Municipal and State Sanctuary Declarations: Innocuous Symbolism or


n23 See Barton, supra note 14.

n24 See Aynesworth, supra note 20; see also Norma Ortiz, Comment, The Dangers of Unguarded Discretion: The Unconstitutional Stops of Buses by Roving Patrols, 2 St. Mary's L. Rev. 289, 290 (2000).


n29 Also stopped at the Texas-Mexico border have been Mexican American judges, both federal (United States District Judge Filemon Vela) and state (Cameron County Judge Gilberto Hinojosa). See Ortiz, supra note 24 at 299. Furthermore, once stopped, Latinos and Latinas are four times as likely to be X-rayed by the U.S. Customs Service at the border as are non-Hispanic whites. Facts and Figures, Hispanic Online, June 2000, available at www.hisp.com/june00/panorama.htm. As a Latina, this author routinely carried her United States passport everywhere she went during her years as a Texas resident as a measure of security in case of an INS stop.


n31 See Aynesworth, supra note 20.

n32 See Barton, supra, note 20.

n33 Literally in Spanish, a colony. "Colonia" is a Texan term for a subdivision in an incorporated area with inadequate infrastructure located near the border. Border Low Income Housing Coalition, About colonias, at http://www.bordercoalition.org/colbc.html [hereinafter Colonias Profile].

n34 Torrea, supra note 6.


n36 Id.

n38 Id.
n40 Telephone Interview with Rafael Rodriguez, City Mayor, El Cenizo (Mar. 27, 2000).
n41 Id.
n42 Colonia Profile, supra note 35. The garbage collection system began on February 14, 2000, when the city purchased a used garbage truck on a payment plan from the City of Laredo. Telephone Interview with Rafael Rodriguez, City Mayor, El Cenizo (Mar. 27, 2000). The city is currently looking for a used ambulance. Id. The city contracts with the nearby town of Rio Bravo for its ambulance services. This results in a drain of city tax dollars to another community. Telephone Interview with Rafael Rodriguez, City Mayor, El Cenizo (Aug. 15, 2000).
n43 Border Low Income Housing Coalition, Mi Comunidad/Mi Vida (Oct. 24, 1999), at http://www.bordercoalition.org/youthweb/issues.html [hereinafter Mi Comunidad/Mi Vida].
n44 Id.
n45 Telephone Interview with Rafael Rodriguez, City Mayor, El Cenizo (Mar. 27, 2000). As with the ambulance services, the city contracts with the nearby town of Rio Bravo for its fire engine services. Id.
n47 Telephone Interview with Rafael Rodriguez, City Mayor, El Cenizo (Aug. 29, 2000) (discussing the fact that El Cenizo residents work hard and that even more would be willing to work if there were more jobs in the area south of Laredo).
n48 This fact is recognized in the preamble to the companion "Safe Haven Ordinance." See supra note 16. The preamble states that El Cenizo was created from a long heritage of "immigrant families." Id.
n49 See Mi Comunidad/Mi Vida, supra note 43.
n50 See Demographics, supra note 37 (25.3% unemployment rate, compared to 7.1% statewide unemployment rate).
n51 Telephone Interview with Rafael Rodriguez, City Mayor, El Cenizo (Mar. 27, 2000) (99% of the residents who commute to work daily travel 15 to 40 miles each way).
n52 See Ortiz, supra note 24, at 290.
n53 Id.
n54 Id.
n55 Telephone Interview with Rafael Rodriguez, City Mayor, El Cenizo (Aug. 15, 2000).
n56 Telephone Interview with Rafael Rodriguez, City Mayor, El Cenizo (Mar. 27, 2000).
n57 See Torrea, supra note 6.
n58 See id.
n59 Telephone Interview with Rafael Rodriguez, City Mayor, El Cenizo (Aug. 15, 2000).
n60 See id.
n61 See Barton, supra note 14.
n62 See id.
n63 See supra notes 24-1 and accompanying text.
n64 See Mi Comunidad/Mi Vida, supra note 43.
n65 See Cornell & Bratton, supra note 13, at 688 (discussing how language is part of culture).
n66 See Torrea, supra note 6.
n67 Id.
rather than in the interest of the oppressed groups that are objects of its policies. See Donald Macedo, Literacies Of Power 135 (Joe L. Kincheloe et al. eds., Westview Press 1994) [hereinafter Macedo, Literacies] (discussing how, under the cultural production model, linguistic minority students should be provided "the opportunity to become actors in the reconstruction process of a more democratic and just society").

n69 Macedo, Colonialism, supra note 68, at 21; see also Macedo, Literacies, supra note 68, at 133 (discussing "a democratic and liberatory education").


n71 Id.; see also Regina Austin, "The Black Community," Its Lawbreakers, and a Politics of Identification, 65 S. Cal. L. Rev. 1769, 1817 (1989) (discussing similarly how in the black experience, "only blacks who are bound by shared economic, social, and political constraints and who pursue their freedom through affective engagement with each other, live in real black communities") (emphasis added).


n75 Id.; see also Yxta Maya Murray, The LatinoAmerican Crisis of Citizenship, 31 U.C. Davis L. Rev. 503, 589 (1998) (discussing how "citizenship is not just a legal status, but an ideal vision of membership, equal status and belonging."). For a thought-provoking discussion of theories on equal citizenship and belonging in the United States, see Kenneth L. Karst, Belonging to America: Equal Citizenship and the Constitution (1989).


n77 See Morales & Haederle, supra note 14. It should be noted that the preamble to the ordinance itself recognizes that English is the predominant language of the United States. See El Cenizo, Tex., Predominant Language Ordinance No. 1999-8-3(a) (Aug. 3, 1999).


n79 See Silvestrini, supra note 74, at 45.

n80 See Garcia, supra note 10; see also Morales & Haederle, supra note 14.

n81 See Mertz, supra note 76.

n82 Macedo, Colonialism, supra note 68, at 22.

n83 Id. at 23.

n84 See supra notes 14-15 and accompanying text; see also Morales & Haederle, supra note 14.


n86 Frug, supra note 70, at 1070.

n87 Chomsky, supra note 85, at 6. This view is also echoed by Professor Gerald Frug who has stated that "popular participation seems to us to be chaos: it challenges not only our idea of property rights and sovereign power, but also our idea of the possible ways of organizing human activity." Frug, supra note 70, at 1070.

n88 Chomsky, supra note 85, at 6.

n89 Mayor Rodriguez has referred to El Cenizo as "el pueblo olvidado," meaning the forgotten town, because of its remoteness and its lack of services for its residents. Telephone interview with Rafael Rodriguez, City Mayor, El Cenizo (Mar. 27, 2000).


n93 Telephone interview with Rafael Rodriguez, City Mayor, El Cenizo (Sept. 23, 1999).


n96 Telephone interview with Flora Barton, Commissioner, El Cenizo (Aug. 18, 2000).


n99 Fals-Borda, supra note 97, at 168.

n100 Id. at 203.


n103 Id.

n104 Garcia, supra note 10.

n105 Alexander, supra note 102, at 52.


n107 Ambler Realty Co., 272 U.S. at 389.

n108 Id. at 390.

n109 See supra notes 9-13 and 20-22 and accompanying text.


n111 Holt Civic Club, 439 U.S. at 69.


n113 Frug, supra note 70, at 1068, 1151.


n115 See Warth, 422 U.S. at 498; see also United States v. Raines, 362 U.S. 17, 21 (1960) ("One to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."); Barrows v. Jackson, 346 U.S. 249, 255 (1953) ("Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party.").


n118 See Singleton v. Wulff, 428 U.S. 106, 114-6 (1976). This leading case of third party standing states that third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. . . Like any general rule, however, this one should not be applied where its underlying justifications are absent. With this in mind, the Court has looked primarily to two factual elements to determine whether the rule should apply in a particular case. The first is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the
outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.

Id.

n119 This analysis should be tempered by the most recent Supreme Court pronouncements regarding standing in the context of voting rights cases. See United States v. Hays, 515 U.S. 737, 744 (1995) (conferring standing to any citizen who can demonstrate personal injury based on a racial classification in redistricting case); see also Samuel Issacharoff & Pamela S. Karlan, Standing and Misunderstanding in Voting Rights Law, 111 Harv. L. Rev. 2276, 2277 (1998) (discussing how the Hays decision expands the pool of potential plaintiffs in reapportionment cases). If the Supreme Court extended the rationale of these voting rights cases to a challenge to El Cenizo's ordinances, a different result might ensue, possibly allowing nonresidents of El Cenizo to file actions challenging the passage of the two ordinances.


In the First Amendment context, "litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."

Id. at 392-93 (quoting Sec'y of State v. J.H. Munson Co., 467 U.S. 947, 956-57 (1984)).


A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. . . . A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment. This exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech.

Id. at 154-55 (1979) (citations omitted).


n123 Id. at 286.

n124 Soberal-Perez v. Schweiker, 717 F.2d 36, 42 (2d Cir. 1983).

n125 Soberal-Perez, 717 F.2d at 42.

n126 Id. It is worth noting that the English literacy requirement for naturalization became law after little debate during the McCarthy era as part of the Subversive Activities Control Act of 1950. See Perea, supra note 122, at 280.

n127 Sylvia R. Lazos Vargas, Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship, 60 Ohio St. L.J. 399, 442 (1999); see Perea, supra note 122 at 341 (discussing failure of proponents of "official English" since the 1980s to achieve a federal constitutional amendment); see also Jose Julian AlvarezGonzalez, Law, Language and Statehood: The Role of English in the Great State of Puerto Rico, 17 J.L. & Inequality 359, 392 (1999). The island of Puerto Rico has had both English and Spanish as its official languages since 1902, attesting to its history and politics. See id. at 360.

n128 Cheryl Harris, Whiteness as Property, 106 Harv. L. Rev. 1709, 1789 (1993).

UTAH is currently considering an English Only bill which has been under consideration for the last three years. See Denis Romboy, Notion of an official language is heavily favored by Utahns, Deseret News, Sept. 24, 2000, available at 2000 WL 26966484.

n130 See Ruiz v. Hull, 957 P.2d 984, 1002 (Ariz. 1998). The exceptions were extremely narrow, including to protect public health or safety, to protect the rights of criminal defendants or crime victims, and some limited educational exceptions. Id. See infra note 158 for the text of the exceptions.

n131 Ruiz, 957 P.2d at 1002.

n132 Id.

n133 Id. at 987.

n134 Id. at 997.


n136 Ruiz, 957 P.2d at 997.

n137 Id.

n138 See supra note 73 and accompanying text.


n141 Id.

n142 Id.

n143 Ariz. Const. art. XXVIII, § 1(3)(a)(iv).


n145 Id.

n146 Id.(emphasis added).

n147 29 C.F.R. § 1606.7(a) (1996) ("The primary language of an individual is often an essential national origin characteristic.").

n148 Id. § 1606.7(b).


n151 Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980). For a critical discussion of this and other case law on English Only in the workplace, see Christopher Ruiz Cameron, How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy, 10 La Raza L. J. 261 (1998).


n154 See supra notes 140-146 and accompanying text.


n156 Ruiz, 957 P.2d at 1001.


n158 The exceptions were as follows:

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving education instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

(c) to teach a student a foreign language as part of a required or voluntary education curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.

Ariz. Const. art. XXVIII, § 3(2).

n159 See supra notes 14-15 and accompanying text.


n161 Meyer, 262 U.S. at 396-97.

n162 Id. at 401.

n163 Id.

n164 Id.


The practice is that, even without notice, translations routinely take place at the City meetings on an as-needed basis. Telephone Interview with Rafael Rodriguez, City Mayor, El Cenizo (Mar. 27, 2000).


n167 See Aynesworth, supra note 20.


n172 See id.

n173 El Cenizo, Tex., Safe Haven Ordinance, supra note 16. It should be noted that the El Cenizo city officials did not know the impact of these federal laws when they passed the Safe Haven Ordinance and have indicated a willingness to bring the ordinance into compliance with federal law if so required. Telephone Interview with Flora Barton, Commissioner (Aug. 18, 2000).


n175 New York City Executive Order 124 (Aug. 7, 1989). The ordinance reads in part:

a. No city officer or employee shall transmit information respecting any alien to federal immigration authorities unless

(1) such officer's or employee's agency is required by law to disclose information respecting such alien, or

(2) such agency has been authorized, in writing signed by such alien, to verify such alien's immigration status, or

(3) such alien is suspected by such agency of engaging in criminal activity, including an attempt to obtain public assistance benefits through the use of fraudulent documents.

n176 Executive Order No. 124 was issued in an attempt to curb potential health problems for the entire city by encouraging undocumented immigrants to avail themselves of medical services as needed.
Further, officials hoped that if illegal residents were not afraid of being reported to the INS, the residents would be more likely to report occurrences of crime which would add to the safety of New York City. Finally, officials also hoped the order would protect illegal residents' attempts to get an education for their children by placing them in school since the number of such children being idle - an estimated 40,000-70,000 - would pose health and safety problems for both the children and the City. Mayor Koch's successors (including mayor Rudolph Giuliani) had continued to reissue the order until 1996. See Rudolph Giuliani, Speech, Conference on the New Immigrants (Minneapolis, Minn., Sept. 30, 1996) available at http://www.ci.nyc.ny.us/html/om/html/immi.html; see also, Rudolph Giuliani, Speech, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, (Sept. 11, 1996), available at http://www.ci.nyc.ny.us/html/om/html/welfare.html.

n177 City of New York, 971 F. Supp. at 791.

n178 Id.

n179 Id. at 795.

n180 Id. at 797. The court also held that, since the statutes did not interfere with the Tenth Amendment, they did not interfere with the Guarantee Clause's assurances of a republican government on the theory that the latter's reach does not exceed the former's.


n183 Id. It should also be noted that in LULAC v. Wilson, 1998 WL 141325 (C.D. Cal. 1998), the court held that provisions of California's Proposition 187 regarding classification, verification, notification, and reporting of illegal immigrants were preempted by the PRWORA.

n184 El Cenizo, Tex., Safe Haven Ordinance, supra note 16.

n185 Kolker, supra note 30.
James Donald, following Michael de Certeau's description of New York city's landscape in The Practice of Everyday Life, states that the city that people experience produces "an 'anthropological,' poetic and mythic experience of space," and later he adds: "In the recesses and margins of urban space, people invest places with meaning, memory and desire." n1

When the city is transferred to the border, however, film representation, meaning and memory become part of a distorted reality, a landscape filled with images related to fear, hybrid identities, and sexual and racial tension. n2 In fact, the space in between nations and cultures is usually recreated as a war zone; and its city becomes the place in which a dehumanized and distorted configuration of identity raises both sides' respective national fears. Why the hysteria and intense fascination with the space of the border? How does legal discourse participate since the 1940s in the arts and entertainment industry?

In the case of the U.S.-Mexico border, in particular, both nations project their fears onto this liminal territory through the criminalization of the hybrid identities. Film narratives during the 1940s and 1950s (and later on in the 1980s) point to the existence of a space in-between, in which the United States' worst fears and racial and economic distrust are projected. n3

It is my intention to look at how the theme of "crossings" is transformed into a discourse of criminality while targeting liminality and hybridity, and legitimizing the spread of rhetoric of fear around the issue of the border with Mexico. In order to do that I will analyze the work of two directors which I consider representative of different ways of using the space and the metaphor of the border: Orson Welles' 1957 film Touch of Evil, and Lourdes Portillo's documentaries La Ofrenda: The Days of the Dead (1988), and El Diablo Nunca Duerme/The Devil Never Sleeps (1994).

The analysis of Portillo's work demonstrates how the cognitive historical and cultural framework of the Chicana artist is substantially expanded beyond the southwestern border and problematizes the whole notion of borders. On the other hand, the concept of the "border" is problematic, and the projection of destructive desire on this geographic and symbolic area is particularly clear when analyzing the use of visual space in Orson Welles' 1957 film Touch of Evil. The original novel, Badge of Evil, written by Whit Masterson, takes place not in Los Robles (a bordertown in Mexico) but in San Diego. Critics have interpreted the director's decision to make a film about Los Robles, a fictional town in Mexico, as a shift in the text's emphasis: the "most fundamental theme, from the opening sequence on, is the crossing of boundaries," and the audience becomes complicit in "violent fantasies, sexual and racial." n4 As these changes take place in the script, legal language, sexual miscegenation and criminal suspects enter simultaneously the landscape of representation of these border crossings. In this sense, Orson Welles' Touch of Evil can be read, simultaneously, as one of the best cinematic examples of not only U.S. contemporary perceptions of the border, but also the criminalized mestizo identities it originates. Accordingly, we cannot talk about the border without recalling that the function of every border has always been to stop or at least regulate crossings. The policing of these borders within sexual, racial and economic lines becomes a crucial factor in this analysis. The importance of reenacting the sociohistorical meaning of "borders" along the lines of gender, race, class and sexual oppressions is intrinsically related to the regulation of liminality, hybrid identities, contact, and ambiguity.

I. Sexual Panic, Sexual Crossings: Touch of Evil

"Do you realize this is the very first time we have been together in my country?" (Susan's first words to Vargas after crossing the border.)

Sexual tension is rewritten in the film Touch of Evil, as Welles is perfectly aware of the fear of miscegenation and the distrust of racial mestizaje suggested by the opening scene. As the camera shows the beginning of the honeymoon between a Mexican man and an Anglo woman, the first three and
a half minutes of the famous opening sequence proved to be also a classic masterpiece of the criminalization of these sexual and border crossings.

The film begins with an irrational and distorted portrait of the border in a scene in which a newly wed couple (Susan and Vargas) is in the process of crossing to the U.S. for their honeymoon. There is some casual conversation, and then they cross to the American side. Susan asks: "Do you realize this is the very first time we have been together in my country?" Vargas replies: "Do you realize I have not kissed you in over an hour?" As Vargas, a "Mexican" detective played by Charlton Heston, approaches his lips to the lips of the Anglo-American wife Susan, played by Janet Leigh, this act coincides with a dramatic explosion, which literally becomes "the crime." The violent opening scene not only disrupts all predictable associations with a "normal" honeymoon, but also, as soon as their lips touch, a distorted new space, associated with the criminalization of all types of crossings, dominates this tale of sexual and racial murder. The juxtaposition of the image of the kiss between the Mexican male and the Anglo female with the explosion in the background recreates for the audience the hysteria projected onto the media by the McCarthyism of the 1950s, and its biological obsession with the danger of infection of the "American" body.

From the very beginning, the script presents an opposition between a vicious policeman, played by Orson Welles, and a virtuous Mexican official (Charlton Heston). Quinlan (the corrupt and racist policeman) appears just after the explosive opening sequence and from that point on, the city of the border becomes a dark Mexico, a nightmare in which space is no longer objective but rather charged with distrust and racial meaning. This tension rises as the city's liminal and hybrid space is transformed into a site of miscegenation and, as suggested by Terry Comito, of racial and sexual violence. In this context, the border becomes the opening in the body, and the Mexican-American becomes the viral contamination that undermines the biological immunity of the body politics of America.

An example of the interaction between sexuality and race is the important role assigned to the "imaginary rape" scene. With this scene, rapists' identities (Pancho's and that of the entire Grandi's family) are constructed as "Susan's own fantasies about swarthy rapists (with a leather jacketed lesbian thrown in for good measure)."

Thus, the language of criminality, associated with the hybrid Mexican-American, is incorporated into the film industry through one of the most successful genres of the last forty years: the crime thriller. In fact, this discourse reintroduces the Mexican American "problem" to the U.S. public arena as an internal "legal" issue. The "natives" of the border (the Grandi family) inhabit a landscape of ruined morals and viciousness, a landscape of "crossings" from which all criminality emanates. The Grandis represent, as a family, the "half-breed" groups that Quinlan despises. Appropriately enough, Quinlan decides to take "revenge" for his wife's death when he kills, with his own hands, the leader of the clan, Uncle Joe. The "Mexican" detective Vargas does not have a very different attitude toward the Mexican-American he encounters at the bordertown. For the Mexican official, the Grandi family is instantly suspicious since "all bordertowns bring up the worst of every country."

Not by chance, just a few years before the filming of the movie, Octavio Paz had published a piece of analysis of this border and hybrid identity from a Mexican perspective. In the Labyrinth of Solitude, published in 1950, Octavio Paz describes Los Angeles as the site of one of the extremes of Mexicanness; and the city that explains the existence of the "pocho" and the "pachuco," terms used to describe Mexican-American youth in the 1940s. Octavio Paz, referring to the "pachuco", affirms, "His dangerousness lies in his singularity. Everyone agrees in finding something hybrid about him, something disturbing and fascinating." This is the result of a "psychic oscillation between two irreducible worlds-the North American and the Mexican." Moreover, for both Welles' Touch of Evil and Paz's Labyrinth of Solitude, the border recreates the worst fears about miscegenation between "lo americano" and "lo mexicano." In fact, Welles uses film noir's aesthetic and moral ambiguity to create an almost intolerable tension in representing Los Robles's landscape of evil. The camera seems more concerned with establishing the alienating, disorienting space of the bordertown than with a descriptive and organized sense of reality. This is a significant element. Even though Orson Welles shows one of the most racist and scariest characters in the history of cinema, ultimately, the audience understands that the "touch of evil" comes from the corruption that has "contaminated" Quinlan. The impression left on the audience is that it is the space of miscegenation and mestizaje (the landscape of the border in which Quinlan loses his wife), which embodies the moral corruption and contamination all the characters try to avoid. Thus, the border becomes a symbol and a metaphor of a complex, sometimes contradictory; experience or what has been termed as hybrid and mestizo "border identities." In film, as pointed out by David Maciel and Maria Rosa Garcia-Acevedo in "The Celluloid Immigrant," this is reflected in the production of
cinema from both sides, since both seem to walk a very thin line between the fear of "the possible loss of mexicanidad by the Mexican-origin population in the United States", and the anxiety of "control of our border according to Hollywood." n11

The imagery of Welles' film stands in marked contrast with the seminal text on Chicano/a cultural production, published only two years after the release of Touch of Evil: Americo Paredes' With His Pistol in his Hand. n12 This study of the border ballad and the "corrido de Gregorio Cortez" is probably the first modern Chicano narrative to offer a response to earlier representations of border identity and cultural hybridism. Paredes recuperates for Chicano culture the project of a positive representation of the Chicano/a historical subject. Starting with Paredes, the notion of "cultural border" becomes one of the central elements used to delimit the process of self-configuration. Furthermore, the ambit on which Paredes develops the value system of the hero "adopts increasingly specific Anglo legal assumptions while constructing 'forms of resistance'." n13 If Welles during that period uses film noir and the language of criminality and legal discourse to address this reality, in a similar context of legality, Americo Paredes will use the corrido. Using the corrido as "the metanarrative" to address the legal injustice of the system on the protagonist, Gregorio Cortez, With his Pistol in his Hand will start reversing and reworking the language of film noir and crime thrillers, and the image of the hybrid identities of the border. n14

If Paredes emphasizes resistance and individuality within the American Anglo legal tradition, during the 1980s and 1990s a new wave of cultural production emerges to emphasize border identities as a "positive" experience of community and multiplicity, hybridity and liminality, and as an opportunity to produce and build a higher sense of self. Gloria Anzaldua's treatment of the border in Borderlands/La Frontera is a reaction to the border hysteria of the 1980s and can be compared to the border hysteria Americo Paredes was reacting to during the 1950s. n15 From this point of view, Paredes' and Anzaldua's works can be read as two of the most interesting Chicano/a cultural manifestos of the last fifty years.

In the next section I would like to look at how the cinema of Lourdes Portillo, responds to the hysteria of the McCarthyism of the 1950s and the neo-McCarthyism of the late 1980s when the border is again represented in the media as the "orifice" of contamination of the body politics of America.

II. Crossing Cultures: Crime Solvers in the Chicano Cinema of Lourdes Portillo

"When I dream of home . . . " (Lourdes Portillo's beginning of the narration of the film The Devil Never Sleeps)

A more insightful portrayal of the complexities of the experience shaped by border identities is the work by filmmaker Lourdes Portillo. Portillo's Chicana experience takes place mainly in California, as she moved from Chihuahua (Mexico) to Los Angeles in 1957. After graduating from the San Francisco Art Institute, she got her first worldwide recognition as a filmmaker in 1986, with the production of Las Madres: The Mothers of Plaza de Mayo (1986). Her most recent film is Corpus: A Home Movie For Selena (1999).

Portillo's work generates a visual language that rewrites the unsettling images offered by Octavio Paz's and Orson Welles' border identities. In her films, Chicana identity emerges simultaneously as a bridge between the different cultural "Mexican" experiences on both sides of the border, and as transgression of the homogeneity enforced by hegemonic forces in both countries. By taking as part of the cultural capital the spaces in between that escape the homogenizing control of both national states, her films become a vehicle to define both a cultural and an aesthetic policy. In fact, the crossing of cultures and languages becomes one of the most important characteristics of her work. Especially in two films, El Diablo Nunca Duerme/The Devil Never Sleeps (1994) (defined by some as a "crime thriller disguised as a documentary"), and La Ofrenda: The Days of the Dead (1988), the filmmaker addresses notions of criminality, and questions the representation of the border identities.

Like in Touch of Evil, the crossing of boundaries is the key theme in La Ofrenda. The film depicts how the Day of the Dead is celebrated in the state of Oaxaca (Mexico), and San Francisco (California). The public and private celebrations of the Day of the Dead portrayed by the film are an example of the kind of border crossings that can benefit the whole. Here, themes of ethnic, gender and sexual difference are surrounded by positive images of unity, peace and respect for a tradition and culture that does not recognize boundaries. In La Ofrenda, however, the movie makes no mention of borders; the locus of action is transferred from Oaxaca to San Francisco in an instant, without concern for the crossing of geopolitical boundaries. The director moves from the representation of tradition in Mexico to the way the same tradition is transformed and celebrated as culture in the United States. The camera shows a transition that flows smoothly and naturally. The way the camera flows from the Mexico side of the border to the United
States side of the border shows a "natural feeling", which makes sense considering the director's own identity is of both lands and cultures. The distortion is gone; the space in-between is not a sociopolitical orifice, but a nurturing space where ritual, tradition and culture meet.

The film La Ofrenda also addresses issues of cultural identity as it relates to the U.S.-Mexican border. If Touch of Evil shows the corrosive and destructive forces unleashed by the crossing of boundaries, La Ofrenda engages in such a crossing, adding a positive, celebratory tone to it. The metaphors of hybridity, border-crossings, transculturation and mestizaje become the space from which Portillo's films negotiate the reconstruction of identity while trying to short circuit or interfere with the purity-oriented theories of nationality, "evil," and "solitude." In fact, her new visual language questions crime thrillers' stereotypes as Chicano/a experience as Chicano/a experience is reworked as a new space that reafirms identity as a dynamic and constant motion between cultures. Portillo's border discourse comes to define itself as a new subject, a fluid and dynamic model of identity that rejects fixed or monolithic images of the Chicana experience.

The Day of the Dead not only aids in breaking down the geographical border, but also the border between life and death, and is shown to provide a forum for addressing other social stigmas. The celebration gives people the opportunity to cross gender boundaries, and transform themselves in front of the community: "In the general disorder of the fiesta, everyone forgets himself and enters into otherwise forbidden situations and places." n16 Linda Fregoso in Bronze Screen also makes an insightful observation about the hidden unspoken norms of Mexican...}

[444x319]{[*1057]}

An intimate relationship between the narrative and the audience is established from the very beginning as Portillo herself narrates in first person: "When I dream of home..." Her appeal to memory, however, is punctuated by interviews, pictures, and legal documents. Her cinematography reflects on the manner in which we search for the truth of the people, and the ordinary world of the community. Furthermore, by varying perspectives and voices, The Devil breaks through the artifice of a linear narrative as the audience plays a role in reconstructing the story. Through this process, the audience is actually acculturated into the community, becoming familiar with the customs and unspoken norms of Mexican culture. The crime investigation allows us to penetrate together into the realm of memory and politics, family life and history.

It is in this context that Portillo's work plays an important role: contesting the crime thriller genre and applying the unconventional use of the documentary format, which allows Portillo the convergence of personal memories and the experience of the community. The viewing process invites the audience to understand Portillo's family and cultural experiences, and transforms the crime solving process into a communal effort. Another important aspect of the reversing of the laws of crime thrillers' language, however, is the solution: The true extent of the crime and the real involvement of some of the criminals is never known. Portillo's work shows, adequately enough, how certain crimes committed against a community go unpunished. In standard crime thriller narratives, generally the criminal is punished and the
larger cultural value system is reaffirmed: justice is done. Few works are willing to step out into the real world and acknowledge that some murders are never solved. Portillo's work, however, is very willing to do this. Moreover, seemingly the only solution to the crime comes back over and over again: encouraging the pursuit of self-knowledge and information about and for the community. As the audience joins the narrator in the pursuit of truth, the act of questioning itself becomes the path toward acknowledgment of a history hidden by the manipulations of power. Left with pieces of a mystery narrative, the audience must enter her film, putting together fragments in order to form a picture of a Chicana's family life. In this way, the audience actually becomes a part of the work as its members interact with the different members of the family and draw conclusions. Really, The Devil Never Sleeps transforms the stereotypes of criminality assigned to Chicanos/as into a community-building action.

As a narrator, director and "crime solver" herself (she becomes her own character), Portillo seems to put a special emphasis on history as the hidden truth behind the story. On both sides of the border, the accumulation of evidence is never sufficient and the audience is forced over and over to reevaluate the dimension of truth, meaning and power in the history of this community. Through this challenge, the audience comes closer to the truth of the Chicana family life. In this way, the audience is forced over and over to reevaluate the story. On both sides of the border, the accumulation of evidence is never sufficient and the audience is forced over and over to reevaluate the dimension of truth, meaning and power in the history of this community. Through this challenge, the audience comes closer to the truth of the Chicana experience and becomes a participant as Portillo searches for the nature of power, family conflict and domination in Northern Mexico.

The real innovation of Portillo's aesthetics is the redefinition of the notion of border crossing within a range of political, autobiographical and cultural facts. Portillo's radical treatment of the crime thriller genre through documentary format and her own representation of the border experience restores, not without tension, both the cultural memories of the individual and those of the community. This is the kind of cultural production that, as John Hawley points out in Cross-Addressing: Resistance Literature and Cultural Borders, "explores the uneasy tension implied [*1058] in this intersecting of the global and the particular, the collective and the individual". n18 Furthermore, the aesthetics of The Devil and La Ofrenda become a call to construct "alternative stories" which challenge film representations of Chicano/a life in mainstream Hollywood. An idea to explore is that the Chicano/a artist internally creates a kind of diasporic space, which extends his sense of identity beyond that of the birthplace. Lourdes Portillo's films focus on the extreme ambivalence with which the border is represented and its mobility within subjective space. This ambivalence and subjectivity of the border should be interpreted, in this way, as a changing space as present in her daily life as it is the memory of the Chicano community.

This is the most appealing contribution to the crime thriller genre instituted since the 1940s. As Andre Bazin has noticed, ambiguity has dominated the genre, and especially the work of Orson Welles, almost from the very beginning, an "ambiguity in which aesthetics are nothing but the reverse of morality". n19 According to Portillo's Chicana cinema, the approach to the shaping and remaking of the cultural values of the community is not only centered by the language used in representation, but is firmly rooted in its conception of good and evil, its moral values and the search for the truth in history. Ultimately, the audience is exposed to a change not only in the aesthetics of the film (from crime thriller to personal documentary) but also in the values that its form of expression represents. As Portillo understands the dynamics of the genre, the "touch of evil" is rewritten as a Mexican cultural statement ("el diablo never sleeps or el diablo nunca duerme"), in the form of a calling for the audience to be alert, to watch out. Portillo's concern with truth, falsity, and the meaning of events during her multiple crossings is transformed into a transcendental act of awareness for her and her community. Lourdes Portillo's Chicana cinema offers a new visual language, a merging of the documentary's outer language with that of subjective and autobiographical self-awareness. Switching freely between cultural spaces, her work generates a new legal discourse, a space in which the audience can finally find the border as the cultural legacy of self-consciousness.

FOOTNOTE-1:


n2 I am using Canclini’s notion of hybridity, a term that conveys the reality of Latin America and the Chicano/a experience. It also goes beyond the more traditional terms used in the past in the context of Chicano/a Studies and Latin American Studies: "Occasional mention will be made of the terms syncretism, mestizaje, and others used to designate processes of hybridization. I prefer this last term because it includes diverse intercultural mixtures—not only the racial ones to which mestizaje tends to be limited—and because it permits the inclusion of the modern forms of hybridization better than does 'syncretism,' a term that almost always refers to

n3 In this article, I explore the relationship between film noir and the representation of the space of the border, a genre born out of the political instability of the 1940s and 1950s. For earlier representations of Mexican Americans and the legal system, see Steven Bender, Savage Fronteras and Tribal Boundaries: Chasing Success in Hollywood's Bordertown, paper presented at the LatCrit IV Conference.


n5 Id.

n6 Id. at 23.

n7 Orson Welles, perfectly aware of the Sleepy Lagoon case and the Zoot Suit Riots of 1943, recreates in Touch of Evil the hysteria of the press, the legal system and the police working together against the pachuco. In the press, it becomes the archetype of racial miscegenation portrayed as a principle of criminality. However, the film also explains the violence for the audience as later we are all able to understand Quinlan's hatred for the half-breed as a "natural" emotional response to his wife's death. Being a "pachuco" was automatically assumed to be a criminal act as evidenced by the so called pachuco "crime wave" and the coming "sailor riots" of June 3, 1943: "After the Sleepy Lagoon arrests Los Angeles police and the sheriff's departments set up roadblocks and indiscriminately arrested large numbers of Chicanos on countless charges, most popular being suspicion of burglary. These arrests naturally made headlines, inflaming the public to the point that the Office of War Information became concerned over the media's sensationalism as well as its racism." Rodolfo Acuna, Occupied America 256 (1988).

n8 Octavio Paz, The Labyrinth of Solitude 1314 (1950).

n9 Id. at 16.

n10 Id. at 18, n.3.


n12 Americo Paredes, With His Pistol In His Hands - A Border Ballad and its Hero (1958).

n13 Carl Gutierrez-Jones, Rethinking the Borderlands 104 (1995).

n14 Americo Paredes' use of the corrido as an epic narrative allows the Chicano/a to construct the figure of the hero within the cultural and literary tradition of the "border".

n15 See generally Gloria Anzaldua, Borderlands/La Frontera: The New Mestiza (1987).

n16 Susan N. Masuoka, La Ofrenda, Film Review, 53:1 Western Folklore 93 (1994).


As a law professor, one often gets the opportunity to sit on panels and publicly discuss legal issues. Just after an Albany jury acquitted the four New York City Police Officers who shot Amadou Diallo to death, I participated in a discussion panel at an eastern law school to discuss the case and the verdict.

One of the most memorable aspects of the panel discussion for me was a comment made by a law professor on the panel. This professor taught criminal law and had the reputation of being very socially progressive. Yet his response to the acquittal of the policemen was that "before 'rushing to judgement' in condemning the four policemen, we should all recognize the 'terrible whirlwind' that the police department was in."

This bizarre, apologetic response to the acquittal of four policemen seemed chilling considering that four policemen shot an unarmed person to death with nineteen bullets out of the forty-one shots fired in a Bronx hallway. It indicated something that I had not previously seen, but would come to see in a number of subsequent legal discussions: an increasing tolerance by very normal people of criminally abusive and illegal behavior by police, when the violence was directed at minority victims.

This past summer I sat on a panel at a national law conference on Racial Profiling with four other lawyers. As mine was the first presentation, I discussed racial profiling from a historical perspective. I explained how in ante-bellum America, racial profiling was used, in connection with slave codes, as a mechanism to oppress both enslaved and in particular, free African Americans. It was designed to limit their capacity to travel, to relocate, to assemble, to conduct funerals and even to be unemployed.

When African Americans were convicted of violating slave codes, which held them as a community of people who were a latent danger to society, they lost their freedom and were reduced to chattel status. I related this process to one of our society's current problems. With the spread of the "prison industrial complex," incarcerated minority youth can end up working for companies while imprisoned. Outside of prison, these same youth have very little chance of getting a job with these same companies, due in large part to the presumption of their being "hard-core unemployed."

The next panelist presented data about racial profiling of minorities in Europe. The third panelist brought forward very powerful statistical data about the widespread practice of racial profiling by police forces across the country. She presented an intriguing statistic which showed that only a small number of white police and white civilians believe that racial profiling is a serious problem in American society, despite the data.

Then, as if to accentuate this point, two lawyers on the panel who had successfully defended clients charged with racial profiling spoke next. Based on their successful defenses in court, these lawyers' presentations exhibited a certain contempt for the criticisms of racial profiling. They both implied that racial profiling was a defamatory tool often used by politically motivated "hustlers" against hard-working, dedicated police departments.

As our society continues to examine and engage in dialogue about race relations in America, it is critical that there be an openness among all parties to engage with more than the traditional narrative of the status quo. We must begin to engage with the stories and research of the racially victimized segments of America. In order to empower this public dialogue, new areas of research and scholarship must be developed. Latino Critical Theory in general, and the three articles in this section in particular, significantly contribute to this societal dialogue. These articles look at some of the most significant challenges facing American minority communities today: the relationship between minority social stereotypes and the violation of minority legal rights, constitutional violations of minority rights through illegal stops and searches, and finally, the complex issue of police in schools, where school safety must be balanced against the violation of minority youth rights.
Mary Romero's article, State Violence, and the Social and Legal Construction Latino Criminality: from El Bandido to Gang Members, explores an extremely important issue in American social analysis: if a minority community is generally perceived as a social menace, can police abuses and oppressive behavior directed at the minority community be seen as anything other than appropriate protection for the majority? Romero also examines the link between mass media and the proliferation of racist stereotypes of Latinos, which propagandized the majority into perceiving the Hispanic community as "the criminal other."

The article identifies for the reader the terrible conundrum which exists where a community, defamed for decades by a media establishment beyond its control, must deal with misconceptions about them held by both the majority society outside their community and the individuals who police them. Those individuals, for the most part, come from that outside majority and are burdened with the same stereotypical concepts. [*1061]

In David Seawell's Wardlow's Case: A Call To Broden The Perspective Of American Criminal Law, Seawell explores a very critical issue in our society's discourse on the relationship between police and minority communities: the ramifications of government-compiled crime statistics about minority communities and the determinations of definitions flowing from that data. Seawell exemplifies this through his analysis of how defining a community as "high crime" creates a slippery slope of questionable police practices such as racial profiling and illegal stops. This "tough on crime" approach by a municipality can also lead to the creation of special police task forces designed to operate in these "high crime areas," which can sometimes lead to excessive police encounters, this school police record will be taken into consideration.

Tragically, law-abiding people who reside in these police-defined "high crime areas," are subjected to a process where "the cop on the beat" is empowered to make judgement calls as to which residents deserve Fourth Amendment rights simply because they happen to live in a poor neighborhood. They are reduced to a subordinated status of "citizen suspects" based on their race, class and address, rather than from any criminal behavior on their part.

In Police In Schools: The Struggle For Student And Parental Rights, Norberto Valdez, Marcia Fitzhorn, Cheryl Matsumoto and Tracey Emslie address the crisis in American high schools. Recent violence by students has resulted in an increased police presence in high schools, but without the proper concern of school officials for the protection of students' rights in their encounters with police in the schools.

Their research on the Colorado school system very powerfully presents the tragedies that can result from teenagers in school being thrust into police encounters without an adult advocate. The study shows that this problem is magnified in cross-cultural encounters between police and minority students. When put into a national perspective, additional disturbing results can be seen. For example, student encounters with school police which "go wrong," can result in students developing police records or "being out into the system," for minor offenses. Should the student later have any subsequent police encounters, this school police record will be taken into consideration.

In New York City, in addition to police in schools, there are also police outside of schools, empowered to detain students who are more than ten minutes late for school and to cite them for truancy. A nefarious byproduct of this practice is that large numbers of minority students have police records for noncriminal acts. This practice triggered the New York suit, ColonBerezin v. Guiliani. n1 [*1062]

Therefore, in reading these articles, one will not only be exposed to important lines of inquiry into the range of complexities which American minority groups encounter in relation to the criminal justice system. They will also be able to greater appreciate the important research done by the Sentencing Project on the high incarceration rates of minority juveniles, the issue of racial profiling, and the impact of the prison industrial complex on minority communities.

For additional reading materials please see any of the following:

Garrett, Brandon, Standing While Black: Distinguishing Lyons in Racial Profiling Cases, 100 Colum. L. Rev. 1815 (2000).

Harris, David A., Driving While Black Matters: Racial Profiling On Our Nation's Highways, An American Civil Liberties Union Special Report.


FOOTNOTE-1:

n1 88 F. Supp. 2d 272 (S.D.N.Y. 2000).
LENGTH: 9005 words

ARTICLE: LACRIT V SYMPOSIUM; CLASS IN
LATCRIT: THEORY AND PRAXIS I A WORLD OF
ECONOMIC INEQUALITY; LACRIT AND
CRINIMAL JUSTICE SYSTEM; Police in Schools:
The Struggle for Student and Parental Rights

Norberto Valdez* Marcia Fitzhorn** Cheryl
Matsumoto*** Tracey Emslie****

BIO:

* Associate Professor of Anthropology and
  Coordinator of Latino/Chicano Studies at
  Colorado State University. He is active in
  social justice issues regionally, including
  police accountability to the public.

** B.A., Social Work. She currently is
  working in the field of child welfare and is
  involved in community activist groups.

*** A.A., Early Childhood Education. She
  is a community volunteer and
  Mexican/American homemaker.

**** A.B., English. She is a mother,
  farmer, and award winning editorial
  columnist.

The authors are concerned parents who
have or had children in the public schools.
Fitzhorn, Matsumoto, and Emslie are co-
chair's of the Student's Rights Advocates
group which has investigated and
influenced public policy since 1997 in
regard to civil rights issues concerning
police in schools. The group is currently
working to define jurisdictional conflicts
between school administrative discipline as
opposed to the filing of criminal charges
for student misconduct.

Introduction

Having police stationed in schools has the potential
for enormous unintentional consequences on upcoming
generations of children. Our research has shown a
possible connection between police in schools and the
over-representation of minorities in the juvenile justice
system. Nationally, there is growing awareness on the
issue of schools using police to handle the difficulties
of nonhomogeneous populations. The increasingly
institutionalized treatment of children eliminates the
need for parental partnerships and leaves students
without support. This is especially disturbing because
police are being used with younger and younger children.

Minorities face special challenges when their schools
act as an arm of the juvenile justice system. These
challenges include the lack of parental involvement,
labeling of students, and the use of the legal system
instead of other alternatives. Further analysis must be
conducted to determine whether their educational
opportunities are being compromised and whether this
has an impact on the success of minorities finishing
school.

Our case study of Northern Colorado police identifies
some of the causes of what is happening to students in
school. Our objective is to add to a small, but growing
body of literature on this topic. This would be
especially beneficial if we could identify obstacles in
the nationally recognized [*1064] alienation of the
Latino community from public schools that too often
result in their leaving school early.

Just two generations ago, a boy could leave school at
12, work all day for $1.00, and be considered the man
of the house. Over the years, the status of children has
changed dramatically. With fuller awareness of the
need for work restrictions, education, and protection
against child abuse, society has joined parents in
becoming the protector of childhood in the belief that
children are not just small adults.

With the recent rash of highly publicized juvenile
violence incidents, society is now conditioning some
of these protections. The potential legal liability and
ease of operation for the school as an institution has
begun to take precedence over the best interests of the
individual child. This change in focus has led to
increased compromises of children's rights in society's
training ground: public schools.

Law enforcement officers have unprecedented access
to children on the assumption of authority by school
administrators during class hours when parents are not
present. This effectively bypasses parents and devalues
parental involvement. Locally, at the discretion of
school administrators, high school children can be
questioned by the officers without another adult
present and without notification of parents. Although extreme cases hit the headlines, many stories are lost in anonymity. Following are some of these stories.

I. Background

What began as normal school days for three students were anything but normal by day's end. One student was in jail. One started the downward spiral that leads to dropping out. One was preparing for suicide.

Mike was a soft-spoken, intelligent young man in his senior year of high school. Raised primarily by his single, Hispanic mother, he had high hopes. He worked nights at a convenience store, attended school until noon and then went home to sleep and study. According to his principal, he was doing well in school.

On this particular November morning, Mike had scheduled an appointment with a career counselor after school to locate college scholarships. It ran late and he missed his regular city bus ride home. While waiting in the school commons area for the next available bus, his best friend came to him with a bleeding finger, unable to get anyone in the school offices to help him. They managed to get a bandage, then asked for antiseptic. A student aide took them to the nurse's office and left them there. When one of the secretaries heard the boys trying to open the locked cupboards, she notified an administrator, "Mr. North," telling him that the two boys were being disruptive. The subsequent police report [*1065] stated that Mr. North found the boys standing at the sink rinsing off the friend's finger. When Mr. North asked what they were doing there, Mike turned and began to explain. He was cut short by Mr. North's statement, "I wasn't talking to you." Mr. North then ordered Mike out of the nurse's station because, by his account, "there was no reason for Mike to be in the health office." Mike disagreed with this assessment.

Mike realized that his friend was not going to get help unless he left. As Mike headed on back to the Commons area, Mr. North asked him to wait for his bus outside. Mike answered, "No thanks, I'll wait in here." His school handbook (which each student, administrator, and School Resource Officer (SRO) is responsible for knowing) states that if the student does not have a scheduled class, he is allowed to remain on the lawns, in the media center, or in the student Commons area. A publication from the local District Attorney's office states that the student "must have been asked to leave because of involvement in committing or attempting to commit a disruption, interference, or impairment of the school's lawful mission or functions." Mike felt that he was within his rights to remain in the Commons area. Nevertheless, at this juncture, Mr. North called the police "rather than to argue with him," according to his own statement.

A short time later, a SRO, a back-up officer, a visiting DEA officer, and Mr. North confronted Mike who was sitting quietly with his friends and demanded that he leave. Mike asked three times if he was being arrested and was finally told that he would be arrested if he didn't leave immediately. According to both police and witness reports, Mike said, "OK, I will." At this point, the stories begin to differ. The SRO's report states that the officer pulled the chair out to assist Mike in leaving. The SRO also claimed that Mike pushed against him. Witnesses said that the other officer asked "Shall I take him down?" Mike and the witnesses state that while he was putting his book in his backpack, the officer pulled his chair out and grabbed his arm and that Mike tensed up. Whatever version is true, in the next thirty seconds, according to the officer's report, Mike was leg swept, placed in a chokehold, knelt on, and handcuffed. He was then frisked in sight of his friends.

In the police car, Mike was not informed of his Miranda rights, but was asked if he had any drugs and warned that he had better behave. Not until he was at the detention center was he finally told that he had been arrested for trespassing and resisting arrest. His parents were notified neither by the school nor by the police because Mike had recently turned eighteen. Because it was a Friday afternoon, Mike's mother was unable to raise the $1000 bail before the judge left, so he spent the next three nights in jail. On Monday morning, the mother of one of his friends loaned him money to post bail. Mike's mother was furious that she had not been notified earlier. She did not understand why the school's policy [*1066] was to call if he had missed a class, but not when he had been arrested and taken to jail.

Result: No disciplinary charges were ever brought by the school, but Mike still faced up to 6 months in jail. Due to the pressures of jail time, trial dates, and efforts on his own behalf, Mike ended up dropping out of school but continued to work to pay off the loan for his bail. His case was resolved in the summer of 2000 through a plea-bargain. Last fall, at the age of nineteen, he was back in school, determined to graduate. He still wonders why he was asked to wait outside for the bus, believing he had the right to remain in school.

Jared was an average high school student. His attitude toward authority was already colored by an incident with law enforcement during his sophomore year. In stopping an attack on a friend, he was charged with assault and required to do community service.
In his junior year, a rival school had been the recipient of a parcel of dead fish as a prank involving an upcoming football game. The SROs from both schools decided through descriptions and yearbook photos that Jared must be the culprit. The school district's policy allowed easy access to speak to Jared without parental notification or an advocate to be present for him. He was pulled out of class, not allowed to speak on his own behalf, ticketed for trespassing, and sent back to class. He fumed over his powerlessness at this new injustice throughout the school day. His parents were not involved in any of these events. Near the end of the school day, the same SRO pulled him out of class, asked for the ticket back, and tore it up, stating that he guessed they had the wrong person. It was later learned that another student was identified, a leader in the school community. He was given a chance to defend himself, and because he did not admit that he had done the deed, he was never ticketed.

Result: Jared's mother feels that his attitude began to harden against authority figures as a result of feeling labeled. Even after an attempt to apologize was made by the SRO supervisor, Jared dropped out of school permanently.

Our last example is Neal, 12 years old, with curly black hair, and a mischievous smile. He suffered from the effects of ADHD and was not doing well in his first year of junior high school. He did not feel comfortable interrupting school staff for his medicines, so his doctor was in the process of finding the proper dosage of a drug that could be given to him only once a day in his home.

On Monday, a school official discovered that Neal had a pack of cigarettes in his pants pocket. A school administrator notified law enforcement to ticket him for "possession of tobacco by a minor." The officer apparently impressed on Neal how bad it was to have a student dealing with medication issues. That night, Neal told his parents how sorry he was that he had acted responsibly and given Mike's friend some antiseptic or made it comfortable for Neal to take his medication? What if administrators had taken the time to calm these situations instead of allowing them to escalate? What if the SRO had taken the time to listen closely to these students in order to understand why they did what they did?

The potential liability of learning institutions in this age of litigation has caused these institutions to protect themselves instead of the interests of the child. The phrase in loco parentis expresses the idea that the school administrator stands in place of the parent for the child. When the local school district was asked about this phrase, its answer was that in loco parentis "means that the District must act on behalf of the student body, not individuals who have discipline problems or problems with the law." n1 This certainly causes a conflict of interest when administrators are expected to act in the place of parents and allow police contact while protecting students' rights and best interests.

It was recently suggested to the local school district that it adopt the guidelines for police questioning in an American Civil Liberties Union Handbook. n2 It states that when parents cannot be contacted "the principal must . . . end the interrogation when it becomes obvious that a formal charge is likely." n3 In response, the school district's lawyer refused to recommend the suggestion, stating that it would impose additional legal duties on administrators and expose the district to liability. n4 A similar issue is recognized in an article from the ABA Journal:

Helping kids to learn from mistakes often takes a back seat to law-and-order concerns. And, say some lawyers, psychologists and parents, the harshness of the penalties for seemingly innocuous offenses is often fueled less by genuine safety concerns and more by fear of lawsuits from those who might allege unequal treatment. n5

The current situation allows the administrator acting in loco parentis to permit police questioning, but the administrator will not take the responsibility to end the questioning. The District has also stated that it is not its responsibility to protect students' and parents' rights, even though it has initiated this formal partnership with law enforcement in schools.

These examples and issues demonstrate the difficulties of the intersection of law enforcement and schools in
today's society. This paper discusses what protections may be endangered, who is affected, and where it all started. A current case study of local policy as well as suggestions for policy change is also presented.

II. Definition of the Issue

In Colorado, a "child" is defined as a person under eighteen years of age. A child who is suspected or accused of committing a criminal offense is usually during a "custodial interrogation" (in police custody) when the child is suspected or accused of committing a criminal offense. Although neither "custodial" nor "interrogation" is defined by statute, they are defined by case law. Being "in custody" for the purposes of interrogation is defined as when a reasonable person in the juvenile's position would consider himself or herself deprived of his or her freedom of action in any significant way. Or, as is more commonly used, when a child does not feel free to leave or otherwise ignore the officer. Thus, the effort to protect children in the juvenile justice system begins here.

Nationally, children have the same rights as all citizens. This includes the right to be read Miranda warnings before a custodial interrogation by law enforcement officers. Miranda warnings are the well-known set of constitutional rights spelled out in a 1966 United States Supreme Court decision that protect citizens from self-incrimination by mandating advisement of their rights to remain silent and their right to counsel. Under Colorado law, children have the additional right to have their parents present before a custodial interrogation. Then the child is given his Miranda warning in the presence of his parent or guardian.

Scientific research has provided fuel to those calling for parental protection of children's rights. Recent neurological studies on the human brain have shown that the adolescent brain will not have the neural circuitry completed until the person is in their early 20s. A child does not have the "hardware" to process complex decisions, resulting in a juvenile mind that acts under a diminished capacity in regard to consequences. The current consensus is that children are involved in risky behavior, not because of faulty thinking, but because they evaluate the consequences of that behavior differently from adults. If not discounted, these poor decisions and outbursts can influence law enforcement officers and add to their evidence against the child. The question of whether children are of diminished capacity because they are undeveloped is one that must be taken seriously. This information indicates yet another possible consideration the need for parents to be present to govern childish reactions when being interrogated by law enforcement officers.

III. Demographics of the Issue

Although any child has the potential to become the focus of law enforcement interest, the number of children who actually do have contact is surprising. Data for 1997 shows that out of the 69.5 million juveniles in this country, law enforcement made an estimated 2.8 million arrests in that population. The arrests were for offenses ranging from violent crimes to vagrancy.

In Colorado, approximately 3.8 million juveniles had 460,300 delinquency charges filed. In Larimer County, there were an estimated 953 reported cases of delinquency among 226,000 juveniles. Each of these figures represents only the confirmed contacts where there was a documented arrest. The number of contacts where no charges are filed is not known, but an obvious conclusion is that they would significantly increase these figures.

Though all children are included in the data cited above, minority populations might well be bearing the brunt of today's generalized fear of our youth. National disparity in the juvenile justice system is documented by data that shows the number of cases between 1987 and 1996 involving white juveniles increased 39%, while cases involving black youths increased 68%. According to that report, nearly all Hispanic youth are included in the white category, so disparity cannot be documented at a national level for Hispanics.

It will become increasingly important to search out any disparity found in Larimer County in light of Hispanic population growth reported at 36% between 1990 and 1998. In the same article, Hugh Mowery of the PSD states that the number of Hispanics increased by 79% (or 1,100 students) since 1987. The need to discover solutions to overrepresentation of Hispanic/Latino youths becomes more urgent following the findings in a Colorado State University study completed this summer in Larimer County. The report states that although Hispanic/Latino youth constitute only 10% of the population, they currently account for 32% of closed probation cases. Although Barela-Bloom's research focused on signs that the juvenile justice system may punish minorities more harshly because of stereotyping, it is worth considering that this disparity may also begin earlier, at first contact with the juvenile, the custodial interrogation. Decisions are made at that point that can entangle the child in the juvenile system. Children need to have their parents there.

Taking their strong family-centered culture into consideration, the Hispanic population is especially...
vulnerable to actions taken outside the family structure. It is theorized that overrepresentation in the juvenile justice system disrupts families and neighborhoods and provokes further anger. n21 For those who live with a constant awareness of their minority status, action taken by society sends a different message than the one received by those from the dominant culture. What makes parental presence at the time of interrogation even more imperative is the lack of diversity training for local law enforcement officers.

A local police chief admitted that his department has not followed through on an agreement requiring all new officers to participate in cultural [*1071] diversity training, but he did not understand the need since discrimination complaints are few. n22 All of these factors contribute to the need for parents to be present at the earliest interaction between their children and law enforcement.

IV. History

A. Juvenile Justice Development

The need for juvenile law and juvenile courts was recognized at the turn of the past century. Illinois legislators enacted the first juvenile court law in 1899. Until then, children had not been differentiated from adults for the purposes of hearings, detention, sentencing, or prisons. n23 By 1919, all states but three had laws providing a special juvenile courtroom, separate record-keeping, and juvenile probation officers. n24 Phyllis Day notes that the first drafts of these laws were influenced by Jane Addams, Florence Kelly, and other Hull House workers, and in a sense, this expansion into juvenile law institutionalized the idea that the government stood in place of the parents (parens patriae). n25

By the 1930s, the juvenile justice system had made significant strides in protecting children with new children's codes, child labor laws, foster care, and protection for abused children. n26 The problem of how to care for poor children was well in hand. Attitudes toward children began a shift in the 1950s towards the "cherished" child, primarily under the tutelage of Dr. Spock. Although parents were increasingly held responsible for the success or failure of their child, children were beginning to be recognized as persons in their own right. The courts continued, without regard to the due process rights of children, in the paternal mindset of parens patriae, using their own judgment as to innocence or guilt. n27

The 1967 landmark Supreme Court decision, In re Gault, finally overcame the long-standing apathy towards modernization of juvenile courts. n28 This case established that children should not be denied constitutional rights afforded to adults in Miranda. n29 Rather, In re Gault gave children the right to fair treatment and due process of law, the constitutional privilege against self-incrimination, the right to be advised of their [*1072] right to be represented by counsel, and the rights of confrontation and sworn testimony of witnesses available on cross-examination. n30

Over the ensuing years, numerous constitutional and legal safeguards for the juvenile process have been created, as the courts attempt to identify the role of the juvenile justice system. n31 These changes are continually under attack. There are those who believe that justice has "gone soft" and welcome children being tried in adult courts. There are also those who believe that the justice system runs roughshod over the rights of the young and encourage a shift to a family court system. n32

B. International Laws

The United Nations' Convention on the Rights of the Child (1989) states many of the beliefs already prevalent in juvenile law, but it is important to recognize the universal nature of these beliefs. Relevant to the topic of this paper is part of the Preamble of the Convention's declaration: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection . . . . " n33

In addition, the United Nations' Standard Minimum Rules for the Administration of Juvenile Justice (1985) states under General Principle 7 that

basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings. n34

These resolutions appear to reinforce the current direction of juvenile law in the U.S., stating that "nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child . . . ." n35 [*1073]

C. State Laws

States also are not prevented from having laws that are more conducive to the rights of children. After In re Gault, judges and lawyers became aware of the need for a separate law code for juveniles and began developing a children's code of law to define the interaction between the juvenile justice system and children.
The Colorado Revised Statutes (C.R.S.), for example, contain such a code. One of its major accomplishments is to further protect the rights of children by supplementing the requirement for reading the "Miranda warnings" with the stipulation that a juvenile must be accompanied by a parent, guardian, or legal or physical custodian during a custodial interrogation. n36 This allows parents, who are ultimately responsible for their children, to help determine what is in the child's best interest concerning his or her constitutional rights.

D. Police in Schools

One complicating factor with children's rights has been the introduction of police into public schools. Originally introduced in the 1960s, police were a response to the increasing disruption in society. n37 Less respect and trust for law enforcement was one result when, for the first time, millions of people could watch televised reports of officers' brutal responses to the civil rights activists and Vietnam War protesters. This societal shift caused uncertainty and instability among youth. They became activists, using sit-ins, walkouts, boycotts, and bomb threats as means of expressing their frustration. Coping with all this anger induced a lot of fear. It became appropriate for law enforcement officials to project a more positive image to help maintain a stable society. Police were brought into the schools with the goal of developing rapport and obtaining the greatest possible change in the attitudes of youth. n38

These police programs have multiplied recently in the wake of several highly publicized violent shootings committed by children in school settings. Federal funds are being used to put a new wave of "school resource officers" in schools. n39 This has complicated the matter of children's rights by venturing into mostly uncharted territory, traditionally held to be the domain of school administrators and parents. Questions defining [*1074] constitutional rights in schools have been pressed all the way to the Supreme Court. n40

Locally, Fort Collins City Police officers were brought into schools by the School Resource Officer Program (SRO) in 1995. It was declared a successful example of an intergovernmental agreement by the Mayor and the City Council and welcomed by the Poudre School District (PSD) for bringing an additional caring adult into schools. But over the first years of implementation, complaints began to arise suggesting that perhaps all was not well. While there might be benefits to having a law enforcement officer in school, there were also some concerns. Administrators were being allowed to act in the place of parents when a child was being interrogated by an officer. This was not compatible with the children's code according to a local group of parents who eventually succeeded in having that function disallowed. n41 However, other changes made at the same time assert that children have the option to have their parents present when they are being interrogated by an officer and leave the responsibility to the child to make that determination instead of the officer. n42 The schools play no responsible roles in assuring that children's rights are not compromised. They trust the officer to use his or her discretion as to when an interrogation turns into a custodial one, which requires parental presence.

This raises the issue of whether custodial interrogation is implied when children are considered to be members of a "captive audience," whose attendance in school is mandated and where the authority of the administration cannot be avoided. n43 This issue is addressed in a letter to the PSD administrators (later disseminated to the authors) finding that a degree of control over students is inherent in a school setting and that it is appropriate for school administrators to protect the rights of students by making reasonable attempts to contact the parents. n44

In Vancouver, Canada, the school board was confronted with the same issues in 1969. n45 The British Columbia Civil Liberties Association urged legislation that would embody the following relevant principles:

no student should be interviewed at school by police without prior consultation with at least one of the student's parents or [*1075] guardians, such a parent or guardian should be present (as is required in the case of juvenile court) at such an interview, and in no case should a principal or teacher assume this parental responsibility . . . . n46

In Colorado, clarification on whether children's rights are compromised in school settings has yet to be decided either in case law or statute, but it may be necessary to clarify that issue soon.

V. Policy Analysis

In this analysis, two juvenile policies give conflicting direction. The first policy under consideration is found in C.R.S. § § 19-2-511.

(1) No statements or admissions of a juvenile made as a result of the custodial interrogation of such juvenile by a law enforcement official concerning delinquent acts alleged to have been committed by the juvenile shall be admissible in evidence against such juvenile unless a parent, guardian, or legal or physical custodian of the juvenile was present when the interrogation and the juvenile and his or her parent, guardian or legal or physical custodian were advised of the juveniles right to remain silent and that any
statement made may be used against him or her in a court of law, of his or her right to the presence of an attorney during such interrogation, and of his or her right to have counsel appointed if he or she so requests at the time of the interrogation . . . . n47

The second policy rests on the foundation set by the first. It is found in the PSD Publication SRO and Law Enforcement Guidelines.

When a student is being investigated for a criminal violation but the student is not under arrest, students will have the option of calling their parent(s) or guardian(s) prior to their interrogation . . . . Whether or not to postpone the interrogation until the parent arrives is ultimately the law enforcement officer's decision. n48

At issue is whether parental presence during a custodial interrogation is mandated or an option based on a decision either by the student or the officer. The responsibility is on the officer to recognize when an interrogation becomes custodial and to stop the questioning until the parents are present in order to assure that the evidence is admissible in court.

When the child is in school, the situation is legally similar to when the child is "on the street." It becomes the responsibility of the officer to [*1076] stop the questioning when he or she feels that the child may not feel free to leave or ignore the questioning. The SRO and Law Enforcement Guidelines shift responsibility to the child to determine when it is in his or her best interest to request parental presence or to walk away during an interview. n49 No adult is responsible for seeing that the officer complies with the custodial interrogation statute in a way that benefits the child, although the child remains in a stressful situation, a "captive audience" member. Contrary to C.R.S., n50 the guidelines governing interrogation by law enforcement officers in PSD also state that the child has an option to have parents present, which suggests that the child can waive that right. n51 The child's statement is based on a division of custodial interrogation into two types: "under arrest" and "not under arrest." n52

Officers, schools, and children are left to their own divergent interpretations of what constitutes custodial interrogation without a formalized statutory definition. Because the only consequence for the officer is that the court may suppress the child's statements, the officer may feel relatively free to continue the interrogation to the point of arresting the child without deciding to involve the parents. Ultimately, it is the child's right to have his or her parents present that has been violated, hindering the parent's protective ability.

VI. Proposed Policy Option

One solution to the need for parental protection of children's rights is a clearer definition of "custodial interrogation" in the C.R.S. and in the SRO and Law Enforcement Guidelines. n53 In recognition of the latest research showing that children operate under a diminished capacity in regard to consequences, it would be appropriate to define "custodial" and "interrogation" in the children's code.

Modern case law defines "custodial" as whether the child feels deprived of his or her freedom of action in any significant way. n54 The officer is given the discretion to make that immediate assessment, but the child must prove the deprivation in court. n55 Since it is reasonable to assume that no child would want to self-incriminate, the burden of protection should not be left to the child. Therefore, an amendment to C.R.S. should be added that outlines the interaction of an officer with an interest in [*1077] questioning a child and protects the child by not allowing interrogation until parents or counsel are present.

Such an amendment would likely cause a chain reaction to local regulations that are based on C.R.S. However, the SRO and Law Enforcement Guidelines should be changed immediately to come into compliance with the current C.R.S. The new policy should, at least, read in part that "when a student is being investigated for a criminal violation but the student is not under arrest, a school administrator shall notify parent(s) or guardian(s) prior to the interrogation."

One concern of note is that officers can simply circumvent custodial interrogation limitations by making criminal charges or ticketing and not interrogating the child at all. Attorneys have claimed that this is the best situation because the child has not in any way incriminated himself or herself before going to court. However, sending children to court without any chance to explain extenuating circumstances while in the presence of their parents violates a sense of fairness that children need to have fostered in their development. It also adds enormous stress and costs for the child and family, as well as adding a burden to the court system from situations that could have been better dealt with outside of the court systems. Moreover, particularly if wrongfully charged, sending children to court violates the purpose of the SRO and Law Enforcement Guidelines: to improve perceptions and relations between students and officers. For the sake of children and society, defining this new policy should not be taken lightly.

One approach to protect children's rights has been taken by a local parents' group, Students' Rights Advocates. n56 They have developed small cards, both
in English and Spanish, which explain appropriate behavior when being questioned by police. n57

Conclusion

Although the status of and protections for juveniles has improved over the last century, recent societal reactions to children have raised the question of whether we have come far enough. Enhancing the involvement of parents would continue the movement towards development of children's rights. This issue of custodial interrogation is important because decisions made at that stage have a lifelong influence on children.

The inclusion of law enforcement in the schools presents some grave concerns as expressed by Catherine Krebs who "advocates referrals of questionable student incidents to independent decision-makers, generally [*1078] psychologists or others trained to deal with adolescent behavior." n58 Irwin Hyman, a professor of school psychology, "agrees that more psychological services are needed." n59 As for where the money would come from, "we're turning our schools into a police state. Use some of the funds that are going for police officers, cameras and all of that." n60 In addition, using police in the schools adds the concern of the effect on minority communities where profiling and other examples of racial biases do not build a foundation of trust.

The larger issues of society can be directly traced to how our major social institution educates our new citizens about democracy. Hyman believes that using power and control instead of modeling democracy for our youth leads to the alienation and apathy seen in today's young voters. n61

Many voices today recognize that the juvenile justice system is not effective in changing the attitudes of children. The Colorado Juvenile Intensive Supervision Program, intended for the most serious offenders, has a dismal ninety percent recidivism rate. n62

The United Nations' Standard Minimum Rules for the Administration of Juvenile Justice identifies four pitfalls to the juvenile justice system related to its effects on children. First, General Principle 10 states that "contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to . . . avoid harm to her or him . . . ." n63 The commentary also states that "involvement in juvenile justice processes in itself can be 'harmful' to juveniles and therefore to 'avoid harm' should be broadly interpreted . . . ." n64

Second, General Principle 11.2 provides that "the police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings . . . ." n65 The commentary contends that "diversion . . . serves to hinder the negative effects of subsequent proceedings in juvenile justice administration." n66 In many cases, non-intervention would be the best response. "This is especially the case where the offense is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate [*1079] and constructive manner." n67 A related concern addressed by General Principle 8 is that criminological research provides evidence that young people are particularly susceptible to the detrimental effects of labels and stigmatization. n68

Third, the commentary for General Principle 13 recognizes that "the danger to juveniles of 'criminal contamination' while in detention pending trial must not be underestimated [and therefore it is important] to stress the need for alternative placements." n69

Finally, General Principle 19 declares that institutionalization shall always be a last resort. n70 The Commentary confirmed that progressive criminology has found little or no difference in the success of institutionalization. n71 In fact, it further states that, the many adverse influences on an individual that seem unavoidable within any institutional setting evidently cannot be outbalanced by treatment efforts. This is especially the case for juveniles, who are vulnerable to negative influences. Moreover, the negative effects, not only of loss of liberty but also of separation from the usual social environment, are certainly more acute for juveniles than for adults because of their early stage of development. n72

It seems clear that more effective methods of correction must be developed and involving the family as soon as a child first contacts law enforcement allows alternatives to be considered, encouraging a more holistic approach to the problems that have brought the child to this place. This is an arena worthy of social action. [*1080] Appendix A

[SEE TABLE IN ORIGINAL]

FOOTNOTE-1:


n2 See generally Janet Price et al., American Civil Liberties Union Handbooks for Young Americans: The Rights of Students 114 (1997).
n3 Id.
n4 George Haas, Informational Document (July 23, 1999) (document was prepared for the Poudre School District Board of Education).
n8 See generally Interview with Stephan Sneider, Deputy State Public Defender, Colo. (Nov. 23, 1999).
n9 See generally In re Gault, 387 U.S. 1 (1967).
n12 See generally id.
n14 See generally Laurence Steinberg, Adolescence (1985).
{n17 Id.
{n20 See generally Carla Barela-Bloom, Hispanic Overrepresentation in the Larimer County Juvenile Probation Department (1999) (unpublished manuscript, on file with author).
{n24 See generally Day, supra note 21.
{n25 See generally id.
{n26 See generally id.
{n28 See generally In re Gault, 387 U.S. 1 (1967).
{n29 See generally id.
{n30 See generally id.
{n31 See generally Rubin, supra note 23.
{n34 Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33,
n35 Convention on the Rights of the Child, supra note 33, at art. 41.


n39 Michael Romano, Cops To Walk New Beat: Schools, Rocky Mountain News (Denver), Sept. 20, 1999, at 20A.

n40 See generally Janet Price et al., American Civil Liberties Union Handbooks for Young Americans: The Rights of Students (1991).


n42 See generally Poudre School District (PSD), School Resource Officer (SRO) and Law Enforcement Guidelines (1999) [hereinafter PSD Publication].

n43 See generally id.

n44 Written communication, Susan Schermerhorn, Attorney, Poudre School District, Colo. (Oct. 4, 1999).


n46 Id.


n48 PSD Publication, supra note 42.

n49 See generally id.


n51 See generally PSD Publication, supra note 42.

n52 Id.


n54 See generally Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.").

n55 Interview with Amy Berkner, Attorney, (Dec. 3, 1999).

n56 See generally Appendix.

n57 Id.

n58 Tebo, supra note 5.

n59 Id.

n60 Id. (quoting Professor Irwin Hyman).

n61 See generally Tebo, supra note 5.


n63 The Administration of Juvenile Justice, supra note 34, at Gen. Princ. 10.

n64 Id. at Commentary to Gen. Princ. 10.

n65 Id. at Gen. Princ. 11.2.

n66 Id. at Commentary to Gen. Princ. 11.

n67 Id. at Commentary to Gen. Princ. 11.

n68 See generally id. at Gen. Princ. 8.

n69 Id. at Commentary to Gen. Princ. 13.

n70 See generally id. at Gen. Princ. 19.

n71 See generally id. at Commentary to Gen. Princ. 19.

n72 Id.
D: 911 what is your emergency?
C: Did sic you speak Spanish?
D: No, do you speak English?
C: No.
D: Do you have an emergency?
C: Police please.
D: Do you need Police?
C: Yes
. . . [Dispatcher contacts ATT interpreter] . . .
D: Can you find out what this ladies sic emergency is for the Police please?
ATT: Do you have an emergency ma'am?
C: Yes, my son of 16 years fought with my husband, but he left with a knife.
ATT: Is he fighting with a knife there right now?
C: No, he left running with a knife. [*1082]
ATT: 16 year old was fighting with his father and he left with a knife in his hand.
. . . [Caller identifies address and time teen left home] . . .
ATT: Describe your son?
C: Tall and thin.
ATT: Is he Hispanic?
C: Yes
. . . [Caller describes teen's clothes and persons with him] . . .
ATT: Has he been drinking tonight?
C: Yes
. . . [Caller identifies location of teen's stepfather] . . .
ATT: Do you know what kind of knife he has?
C: Uh, it's from the kitchen.
. . . [Caller describes the knife and teen's clothes] . . .
D: Is the officer at the door?
ATT: Yes
D. Okay, tell her she can go talk to the officer.
ATT: Go talk to the officer.
C: Thank You. n2

On November 15, 1996, at approximately 11:47 p.m., four Phoenix police officers responded to this emergency call from Julio Valerio's mother, Paulina Valerio. At 11:52 p.m. the officers confronted Julio and ordered him to drop the knife. At 11:54 p.m., an additional eight officers arrived and advised police radio that they had a subject armed with a knife, at gun point, behind the liquor store and requested a canine unit. Cornering Julio in a fenced area, the officers positioned themselves on both sides of a large dumpster to prevent his escape. One police officer attempted to spray Julio with Oleoresin Capsicum gas. Moving away from the spray, Julio stepped towards the officers. Six police officers wearing bullet-proof vests fired twenty-five rounds at Julio. At 11:55 p.m., Julio Valerio was pronounced dead at the scene by Phoenix Fire paramedics. n3

Waking up to the news on a Sunday morning, I listened to the news reports and wondered how a mother's 911 call for assistance had escalated into six police officers killing of her son in less than ten minutes. I [*1083] tried to imagine what these Phoenix police officers saw that night to warrant the use of lethal force.

Televised images of police officers and border patrol agents engaged in the act of corporeal violence, n4 along with the physical evidence of severe bodily injury or mutilation of the body from excessive lethal force, n5 has generated serious questions about the degree of military tactics and demonization of the "other" into everyday domestic policing in the United States n6 and prosecution. n7 Since the filming of the
Rodney King incident, there has been renewed attention on police violence in communities of color, n8 particularly among Black and Latino youth. n9 Nationally, communities tell the same stories with the same theme: race matters. n10 This social construction is particularly evident in recent trends [*1084] in the policing and incarceration of African American and Latino youth. n11 Characterization of this population as superpredators is socially constructed through a racial lens—the lens that reflects the images of White middle class youth as "our" children and Latino adolescent males as violent, inherently dangerous and endangering. n12 The focus of the racialized lens can be measured when their existence, their brown bodies, no matter how young or small, are circumscribed as dangerous, prior to any gesture, any raising of the hand, n13 defines a situation as in need of protection, a source of danger, a threat. n14 The academic spokesperson for this demonization process is John DiLulio who refers to inner city youth as "super-predators"—and describes these children as "growing up surrounded by deviant, delinquent, and criminal adults in chaotic, [*1085] dysfunctional, fatherless, Godless, and jobless settings." n15 The police shooting death of Julio Valerio is a case in point. n16

As depicted in the case of Rodney King, the publicity of the use of lethal and excessive force was transformed by the defense attorneys in an effort to legitimate state violence and rationalize everyday practices. n17 The video of a man being brutally beaten, was repeatedly used as evidence that Rodney King's black body was itself the source of danger and the threat of violence. n18 The defense's tactic of slowing down the video tape of the beating totally decontextualized the violence of this act and provided the path for white jurors to find that the police had acted reasonably. Legitimation of power, and the specific use of that power, becomes institutionalized through texts produced in the proceedings. n19 The process frequently begins at the level of the media. As the story breaks, [*1086] details and the "spin" given in the news report is usually from the police perspective. n20 Suspects' previous criminal record, or additional "facts," are provided to the media to support the use of excessive force. n21 Evidence collected becomes part of the internal investigation that is mediated textually, including transcribed interviews with officers, interviews police conduct with witnesses, and the description of material evidence. Police procedures on the use of lethal force, internal investigations, review committee reports and other documents compiled are formal representations of policing and state power. Documentary practices consist of standardized modes of monitoring, observing, coordinating, and classifying n22 that impose a specific order or understanding of events that reproduces a racialized form of rationality, objectivity or actualities. n23 Review committee reports may also be part of the documentary practices of the police bureaucracy. n24 The documentation of patterns or separate incidents become record, perspectives become legitimized, and agency is established. Classifying persons speaking as experts or as the "official" spokesmen for the State is an additional practice resulting in racialized patterns of inclusion and exclusion and legitimates categories invoked by the state. Police reports provide the means to establish erasure or inscription of agency that is essential in shifting responsibility of lethal and excessive force away from state and upon victims. n25 [*1087]

Cultural critics and legal scholars have connected the history of police violence to racism. n26 However, the singular focus on the African American experience n27 ignores the history of state violence against Latinos and renders invisible the link between white supremacy in the construction of Latino criminality. n28 In this article, I build on the work of LatCrits to broaden the scope of legal analysis and scholarship to reflect the experiences of police misconduct and racial profiling in Latina/o communities. n29 I examine the construction of Latino criminality n30 that is [*1088] enacted and mediated textually in the everyday organization in the police bureaucracy. n31 Analyzing data collected from texts created by the state to rationalize and legitimate the use of violence against youth of color reveals the social and political construction of Latino criminality. Police practices have immediate impacts on Latino communities. The Scottsdale Tribune reported that a review of police records show that the "Phoenix police have shot and killed more people per capita than their counterparts in the nation's largest cities over the past three years. . . . In the last three years, Phoenix police killed 25 suspects out of the 43 they shot. That translates into a kill rate of 58 percent." n32 Data includes established police guidelines for the use of lethal force, and information collected on police cases resulting in injury and death. Investigation of the structure and procedure of formal investigations delineates the process of erasure that conceals the racialized and gendered nature of police power. Part 1 begins with an overview of the history of social construction of Latino criminality, identifying racial, gender, class, sexual, and cultural aspects. Part 2 provides a discussion of the documentation or textual process that construct Latino criminality, including the bandido, gang member, drug user and dealer, and illegal alien. Statements by law enforcement officers, politicians, and judges establish a history of demonization of Latino youth and claiming an inherent criminality. Part 3 presents a detailed
analysis of the case study involving the fatal shooting of Julio Valerio, highlighting how legitimacy and power in the police bureaucracy is enacted and mediated textually, and exploring how documentary practices shape public debate. Part 4 summarizes legal and political efforts to stop state violence against people of color and suggest ways to change the textual process used to legitimate excessive force in communities of color.

Part I: History and Development of the Latino Criminal Stereotype

Taco Bell's use of "dinky", the heavily accented Chihuahua imitating the popular pose of Che Guevara, n33 is an updated version of the Latino male as a revolutionary bandit. n34 Unlike the Frito Bandido used to [*1089] advertise Frito Corn chips in the late 60s, corporations no longer construct racist caricatures by dressing the human body of the "other" but rather rely on their audiences understanding the symbols. The power of the Latino and African American criminal narrative is so dominant in American society that its use can be accomplished through images not embodied by Latinos or African Americans. n35 In the same way that we were able to read the racialized text presented in the "California Raisins" commercial, Taco Bell is able to rely upon the Latin American criminal trope without using the Latin American body image. n36 The Chihuahua stands in for the Mexican, the beret replaces the sombrero, and the cigar replaces the weapon. n37 The trope works because after decades of presenting specific stereotypes on the silver screen, n38 the popular racist narrative is easily called forth mass demographic change, such as the California Gold Rush, economic circumstances n51 or control through economic and political means, n52 a reign of terror followed the war and the signing of the Treaty of Guadalupe-Hidalgo. As an occupying force, the U.S. government had to be ready for possible uprisings; however, the primary interest of state repression was the dispossession of land and other resources. The history of conquest in the Southwest, and the extensive use of armed forces to subordinate Mexicans and Mexican Americans became subliminally grafted in the American psyche as a "foreigner," even though the land had once belonged to Mexico. While economic and political repression were extremely successful in dispossession and subordination of Mexicans living in occupied territory, n53 state sanctioned violence, which in the early 1900s took the form of lynching, has never entirely been replaced. n54 Resistance against the state violence carried out by the police, military, Border Patrol, and the Arizona and Texas Rangers has included insurgent movements, riots, and other forms of armed protest. n55 The armed resistance against the privatization of communal salt beds by Mexicans and Mexican Americans became known as the El Paso Salt War. n56 In Las Gorras Blancas, an insurgent movement against the privatization and fencing of communal lands in New Mexico united poor white farmers and Native Americans against Anglo carpetbaggers and the Hispano rico. n57 The list of social rebels that emerged after the Mexican American War are numerous and include Tiburcio Vasquez, n58 Juan Cortina, n59 Joaquin Murietta, Juan Flores, n60 Francisco "Chico" Barela, n61 Juan and Pablo Herrera, n62 and Gregorio Coriz. n63 The Mexican American War, n64 the Treaty of Guadalupe-Hidalgo, n65 Las Gorras Blancas, n66 El Paso Salt War, n67 Zoot Suit Riots, n68 and struggles up to the 1960's high school walkouts n69 all get depoliticized and the mythology of the Latino banditry masks protests and resistance to social and economic injustices. And thus, Che Guevara becomes one more
image of "El Bandido." n70 The media, politicians and law enforcement frequently used aspects of the [\*1093] bandido stereotype to frame demonstrations, protests, and other political activity during the Chicano Movement. Civil rights leaders and labor activists were frequently characterized as criminal and violent and state violence was sanctioned by the press and local officials. Civil rights activities carried out by Corky Gonzales and the Crusade for Justice, n71 Reies Lopez Tijerina and La Alianza Federal de Mercedes (The Federal Alliance of Land Grants), n72 and the union organizing activities by Cesar Chavez and the United Farm Workers n73 were frequently construed as Mexican and Chicano criminality.

Since WWII, Latino youth have been constructed as inherently criminal. n74 Although most of the time the construction of youth as criminal has fallen under the gang rubric, political activity in the late 60s and 70s was also treated as criminal activity. The specific focus on Mexican and Mexican American youth as embodying the bandido violent and treacherous character is well documented in the 1943 Zoot-Suit Riots. n75 The demonization of the youth by the press and police in Los Angeles occurred within days of the removal of the last Japanese to internment camps. n76 Mexican crime, Mexican juvenile delinquency and Mexican gangs became the new scapegoat group. n77 National and international attention of the targeting of Latino youth in Los Angeles occurred during the trial known as the Case of Sleepy Lagoon and from the work of the Sleepy Lagoon Defense Committee who continued two years after the trial to gain the freedom of the youth convicted. Latinos in the US military stationed throughout the world serving their country in the war effort donated money. n78 In response to political pressure, the press replaced the reference to Mexican and replaced it with "Zoot-Suit" and "Pachuco." n79 However, authorities (military and police) continued to treat Mexican youth as inherently criminal. n80

State violence against Latino youth received public attention during the Chicano Movement. n81 "Between January 1, 1965, and March 31, 1969, the United States Justice Department received 256 complaints of police abuse against Hispanics in the Southwest. Over a two-year span, the American Civil Liberties Union of Southern California filed 174 complaints of serious police brutality against Chicanos." n82 In 1970 the U.S. Commission on Civil Rights report concluded: "Mexican American citizens are subject to unduly harsh treatment by law enforcement officers . . . they are often arrested on insufficient grounds, receive physical and verbal abuse, and penalties which are disproportionately severe." n83 Given the continuous history of state violence against the Mexican American communities, the study was long overdue. n84 The Congress of Mexican American Unity and the Chicano Moratorium Committee requested UCLA Professor Armando Morales to "make an inquiry into the duration, depth and nature of the problem, and develop recommendations that would have the effect of reducing the conflict." n85 The study followed the 1970-71 East Los Angeles riots. n86 Examining police deployment [\*1095] practices in Los Angeles, Morales found a disproportionate number of police deployed in the predominately Mexican American community of Hollenbeck Division even though the incident of crime was greater in the middle-class community of Wilshire Division. n87 Comparing the findings from the U.S. Riot Commission Report to the 1970-71 East Los Angeles riots, Morales argued that "Chicano" could easily be substituted for "Black" and "barrio" for "ghetto." n88 Community/police conflict was not restricted to Los Angeles. Studies conducted by researchers and civil rights organizations, such as the Mexican-American Legal Defense and Education Fund, documented the number of Latinos who died while in police custody and were physically abused. n89 Research on the Brown Beret, student movement, and other Chicano youth activities have suggested that law enforcement targeted this population for surveillance and harassment. n90

The most widely distributed representation of Latino youth today is as a gang member. n91 Although the existence of gangs can be traced back to the Middle Ages in Europe and found throughout the world, n92 the War [\*1096] on Gangs launched over the last few decades by U.S. local police departments has targeted Black and Latino youth. n93 While there is a lack of consistency in defining gangs and gang members, n94 the public's acceptance of racialized versions has resulted in an over identification of gangs in low-income communities of color n95 and has rejuvenated the bandido image. n96 The link between immigration, poverty and urban life that social scientists highlight in theorizing about gangs, n97 appears in the popular racialized definitions acted upon by the media and public officials. n98 In the case of Latino youth, primary importance is placed on Chicano culture. n99

Next to the image of gangs, n100 Latino criminality appears in the American psyche as the "illegal alien" n101 and has become analogous to the "immigration problem." n102 Criminalization of Mexican immigrants stigmatizes the Latino community in the US and reinforces the bandido stereotype. In his 1948 book, American Me, B. Griffiths writes:

In police and sheriffs' stations throughout the state today, picture displays show Mexican "criminals" and
"bandits" of the early [19th century] days of California, and there are showcases with guns and other souvenirs that were used in the fights. Occasionally, too, you see a block-framed picture of a police officer killed by a Mexican in line of duty. Such facts and folklore become a real part of the rookie officer's indoctrination. Policeman and sheriff's deputies add stories of their personal experiences with "those sneaky greasers -- who knife you as soon as look at you." False arrests, unjustifiable beatings, and sometimes the tragic deaths of Mexican youths at the hands of officers who shoot first and think later are the natural consequences of the usual prejudice intensified by such training. n103

If we consider the videotape beating of two undocumented immigrants that occurred in April 1997, n104 Griffiths' description appears to capture contemporary experiences. n105 The meaning of the Justice Department's decision not to prosecute the two Riverside County sheriff's deputies in this case provides a significant training message to law enforcement officers. n106 While Proposition 187 has fueled anti-immigration sentiment in California, n107 images of criminality embodied in Latino immigrants is not limited to law enforcement in Los Angeles. In their April 1995 report, "Crossing the Line," Human Rights Watch described INS agents as employing "'Wild West' behavior entirely inappropriate for a professional, federal law enforcement agency." n108 The use of excessive force and racial profiling involves constructing Latino criminality to the immigrant profile and applied to INS policing practices. n109

Part II: Texts, Facts, and Latino Criminality

Power relations following the Mexican American War to the present have certainly included violence, coercion, and armed forces in the form of the Texas Rangers, the Arizona Rangers, the Border Patrol, as well as the military, and the local police. n110 The textual practices that constructed Latino criminality can be traced back to military and police reports to Washington, and later used by historians, to document official accounts of events occurring in the newly acquired territory. n111 Consequently, community perspectives are frequently discarded in public documents and are left to oral history. These textual practices are most evident in the treatment of insurgent movements in the Southwest. n112 Frequently Chicano resistance is attributed to the interference of outside agitators or manipulative leaders. n113 This characterization is accomplished by distorting the actual function of leadership roles in community mobilization and implying that Latino fatalism and ignorance demands outside leadership as a catalyst for action. Embedded in early academic writings is reference to inherent weakness for domination as a dominant cultural feature of New Mexican life. n114

The first group of historians engaged in documenting accounts of the transformation from communal to private ownership were primarily Anglo lawyers and politicians writing memoirs. n115 The next major writings on land documentation occurred after the depression. At this time, social scientists focused on the aftermath of drought and land loss. n116 Again, attention to value orientations resulted in defining the land grant issue as a consequence of cultural conflict between Chicanos and Anglos. The third major group of studies were written in response to Reis L. Tijerina's activities in northern New Mexico. n117 Sociological notions of cultural pluralism and assimilation had little political meaning to people struggling to retain their land. n118 Having constructed insurgents movements as riots and void of political consciousness, the construction of the lawless bandido became the primary character in historical accounts as well as a common feature in popular culture. n119

The process of constructing Latino criminality became an ongoing function of policing. n120 Investigations of the use of excessive force produced textual documentation of a violent Mexican character. Returning to the Zoot-Suit Riots, we find a report about the problem of Mexican youth written by Captain E. Duran Ayres, chief of the "Foreign Relations Bureau" of the LA sheriff's office. Characterization Latino youth as violent is presented in the following passage of the report:

When the Spaniards conquered Mexico they found an organized society composed of many tribes of Indians rules over by the Aztecs who were given over to human sacrifice. Historians record that as many as 30,000 Indians were sacrificed on their heathen altars in one day, their bodies being opened by stone knives and their hearts torn out while still beating. This total disregard for human life has always been universal throughout the Americas among the Indian population, which of course is well known to everyone. The Caucasian, especially the Anglo-Saxon, when engaged in fighting, particularly among youths, resort to fisticuffs and may at times kick each other, which is considered unsportive, but this Mexican element knows and feels is a desire to use a knife . . . to kill, or at least let blood. That is why it is difficult for the Anglo-Saxon to understand the psychology of the Indian and for the Latin to understand the psychology of the Anglo-Saxon or those from Northern Europe. n121
Over the next decade, racist statements by state officials continue to be made by high officials in law enforcement n122 and judges. n123

Contemporary cases of police violence conducted under the military language of the War Against Gangs and War Against Drugs are mediated through texts that rationalize and objectify the use of excessive and lethal force. Police violence is thus a reasonable response to criminality encapsulated under the category of Latino gang member. Military language if further warranted as conspiratorial qualities of gangs are added to the description by characterizing gangs as secretive, spreading to new neighborhoods, dealing in drugs, violence and other crime, organized and structured around a "secretive culture of colors, gang signs, and initiation rites." n124 Conspiracies call for "gang intelligence units", in addition to "the dissemination of workshops and educational materials designed to help adult recognize and interpret the gesture, clothing, graffiti, and other secret symbols of gang involvement." n125

In the following section, the case of Julio Valerio presents the use of excessive force resulting in the death of a sixteen year old in Phoenix, Arizona. The investigation that followed, along with the media coverage, provides data on the police department's rationalization of local racialized practices. Individual responsibility of police officers becomes invisible and police violence is mediated. What should be a factual investigation [*1102] becomes a justification adhering to guidelines. n126 When excessive force is investigated, police officers subjective discretion is ignored. n127 Police have free rein to stop and question citizens whom they deem suspicious under current interpretations of constitutional law. n128 Consequently the differences in policing from one socio-economic and racial community to another does not become part of the bureaucratic or organizational formal procedures. n129 The structure of the review process operates to erase the racialized and gendered nature of police power. Racial profiling, like police brutality, is not recorded nor becomes part of documented practices; and thus, the actual behavior and actions of racial profiling are denied, police violence is erased--reducing police action to rational decisions based on objective information about crime.

Part III: Case Study of Julio Valerio

The shooting death of Julio Valerio caught public attention in Arizona, not because the death of a Mexican youth under police pursuit is news breaking in the U.S., and certainly not in Phoenix, but because the police shooting involved six officers who claimed they fired to protect themselves from a 5'8 120 pound 16 year-old armed with a kitchen knife. The killing of Julio Valerio occurred after two other highly publicized shootings in Phoenix had established a pattern of racialized police violence in the community memory of South Phoenix residents. In January [*1103] 1995, twenty-two year old Rudy Buchanan Jr. was shot about 30 times by Phoenix officers who fired 89 times. Buchanan, who was of Hispanic and African-American heritage, had fired three times at police with a sawed-off shotgun. n130 Five months earlier, Edward Mallet, twenty-five, African-American and double amputee, died while resisting arrest after he was put in a neck hold by Phoenix officers. n131 In the Buchanan case, the department's Use of Force Board reprimanded four of the 13 officers who shot Rudy Buchanan; three officers were reprimanded for endangering fellow officers and a fourth was reprimanded for being too far from the target when firing. n132 No officers were disciplined in the Mallet case. n133 One of the officers was later involved with the shooting death of an autotheft suspect. The police department referred to the incident as "suicide by cop" because the suspect had indicated that he might shoot himself. n134 Both the Buchanan n135 and Mallet n136 families sought solutions in the civil courts when state prosecution was not forthcoming. n137 Community [*1104] members voiced their concerns for a pattern of excessive force used by police officers in the Black and Latino communities in Phoenix. n138

A. The Media Text

The incident began when Julio's mother, Paulina Valerio, called 911 requesting assistance because her son had left home, extremely upset and had taken a kitchen knife. n139 Upon arrival officers found a transient that had apparently been stabbed by Julio. Police claim a transient was attacked and stabbed by Julio; however, other witnesses reported that the transient attempted to take the knife away from Julio and the cut resulted from his attempt to grab the knife. n140 Police were unable to locate the transient after the incident. n141 Officers cornered the teenager along a brick wall and chain fence in a vacant lot behind a liquor store. n142 Three unsuccessful attempts were made at spraying pepper spray. n143 Approximately ten minutes of police responding to the incident, six of the ten officers surrounding Julio fired a total of twenty-five rounds. According to their own testimony, they felt their lives or the lives of their fellow officers were in danger. n144

Two quotes, which represent the opposing views on police responsibility, appeared in the Arizona Republic shortly after the shooting. The first quote is from the police spokesperson, and the second was made by the lawyer representing the Valerio family: 1) "If I'm going to perceive a lethal threat, I'm going to fire . . . .
What you have here is all six officers [*1105] perceived a lethal threat; n145 2) "How can six police officers with guns in their hands not have taken an action short of killing this young man?" n146 Establishing the perception of "lethal threat" became essential to the police investigation and the basis for "rationalizing" police action. The investigation needed to address several questions in order to be exonerated by the Mexican American community: 1) Why were police officers unable to disarm a sixteen-year old boy short of killing him? 2) Why did all six police officers shoot a suspect armed with a knife? 3) Why did the confrontation with an armed white man who stated his purpose was to shoot a police officer the week before, end peacefully--with the suspect unharmed? 4) How can police justify the action of "overkill" that not only resulted in Julio's death, but in the injury of two men and gunfire entering the windows and walls of the nearby apartment building? 5) What kind of threat did Julio pose that justified this kind of lethal force and disregard for human life? 6) What was the threat that justified killing within ten minutes of the police-suspect encounter? Why were officers unable to wait for the canine unit to respond? n147

The Mexican American community accused the police of racism. n148 In the attempt to discredit the claims of racism, police advocates noted the number of whites killed by police. "Of the twenty-seven police killings from 1990-94, thirteen of the dead were Anglo, eight Hispanic, one African-American and three Native American." n149 One editorial went so far as to argue that the recent death of a white inmate under the sheriff's supervision was evidence that police violence was not exclusively aimed at communities of color. n150 The police advocates fell short of claiming that Phoenix law enforcement was engaged in an equal opportunity practice of violence. n151 Accusations of racism were clearly implied in the call for police to distinguish between the incidents involving white males, armed with weapons much more dangerous than a knife, that did not have such tragic endings. n152 [*1106]

Criticism included questions about equal service and protection. Families in middle-class suburbia can call upon the police to assist in a family crisis--in a time that an adolescent child is in trouble, has lost control, and needs medical assistance to deal with an emergency and access to mental health services. However, the request from Paulina Valerio was responded to as a crime posing a serious threat to the community rather than a call for help or assistance in a family matter. n153

A police "spin" was evident in the initial newspaper account. n154 The morning after Julio's death, the Arizona Republic published an article entitled, "Police Kill Teen Armed With Knife", that relied on police sources. n155 The story began with the following sentences: "Clouds of pepper spray couldn't stop 16-year-old Julio Valerio. It took a rain of police bullets." n156 These sentences turned out to be a prelude to the rationalizations given for the police action. Lethal force was justified on the basis that Julio presented a "deadly threat" to police officers. Clearly the image of a distressed 120 pound sixteen-year old armed with a knife cornered by six police officers armed with four handguns and two shotguns is not extremely convincing. Consequently, Julio's image needed to be reconstructed into a bodily form that could only be apprehended and stopped with lethal force.

The police chief argued that Julio presented a different situation than the two other incidents that had occurred earlier that week in which armed suspects walked away unharmed. He argued that the police were unable to wait out the situation with Julio because he was on the move. n157 Thus, the chief was raising the specter of greater danger in the Valerio case. He also rejected that shooting Julio in the legs was an option because "the teen could have stumbled forward and killed an officer. The bottom line is, I don't want any of our officers placed in any undue [*1107] harm."

n158 Ed Stock, a weapons expert for the state Department of Public Safety, claimed that it was "unrealistic to expect an officer to fire a shotgun in the dark at a suspect's legs because 'He's shooting blind, he can't see the sights.'" n159 Making use of the media, a police spokesman emphasized additional factors that increased the danger of this situation: (1) Julio had already stabbed a transient before police arrived at the scene; (2) he refused to follow police demands to "drop the knife," (3) his drug crazed state made it difficult for police to subdue him with pepper spray; and (4) his movement prior to the shooting was depicted as provoking police and placing them in physical harm. n160 These points were elaborated by police spokesman and experts. The physical action that provoked police was described as a lunge forward with the intent to stab police or intent to throw the knife at police. n161 Therefore the six officers reasonably feared for their safety and the safety of their fellow officers.

Among the experts quoted in the media was a Tempe University psychologist, Stephen Carson, who provided the justification for six officers shooting at once at the suspect. n162 "Anytime your brain registers a life-or-death situation, your brain registers an ultra state of consciousness . . . . You go on automatic pilot. . . . What cops do is they revert to training . . . . In a shooting, they react to stop the threat as best they can." n163 Carson also stated, "You go to
each one individually and they had a legitimate fear for someone's life. How can you fault them for that?" n164

The following editorial illustrates the tone of editorials carried by the Arizona Republic:

All this happened in about a minute.

It would have been better if there were beanbag shotguns available. It would have been better if a police dog had been given the chance to take Valerio down with a bite instead of a bullet. The K-9 unit couldn't make it to the scene in time.

As a result, a 16-year-old boy with friends and a job and a mother who loved him wound up dead.

But no one else. No other citizens and no cops, which is the way it should be. [*1108]

It would have been better if everyone involved had lived, if everyone had made right moves, if life were like the movies and Clint Eastwood had answered the call from Julio Valerio's mother rather than the ordinary people who make up the Phoenix police. n165

However, even with the official spin dominating the newspaper, a strong opposition remained unconvinced in the community. Initial newspaper articles did not succeed in making a "rational" justification for killing Valerio. As long as Julio represented a confused sixteen year old and mothers sympathized with Paulina Valerio, the police department had to reconstruct the bodily image of Julio as posing a threat to ten officers, within sixty seconds of the time ten officers made the encounter. Julio had to be demonized into a drug-crazed knife-wielding gang member. n166

"Aggravated Assault on a Police Officer" is the official classification of the type of report filed by the internal investigation by the Phoenix Police Department report. n167

In the week following the shooting, the Police Union engaged in an attack on Julio's character and home life. n168 In order to rationalize the police action, rumors were circulated about gang membership and drugs. n169 Police released information about Julio's previous arrest record on August 19, 1996 for a minor in possession of a firearm and selling drugs. n170 He had been accused of "attempting to sell a $ 50 rock of crack cocaine to two undercover officers", but he was not prosecuted. n171 He was identified as once belonging to the gang Barrio Pobre and his gang name was El Tigre. n172 The police also released a portion of the autopsy report that indicated Julio had traces of alcohol, methamphetamine, cocaine, [*1109] and marijuana in his body at the time of death. n173

Inflammatory comments made by the President of the Phoenix Law Enforcement Association framed the debate away from the issue of excessive force and on gangs and drugs: "For their efforts, these officers are being vilified by opportunist politicians, whose support for a dope-selling, dope-smoking gang member is disgusting." n174 Not only did Julio become a demonized and dehumanized, sixteen-year-old Latino criminal, the police framed the debate to divide the community by depicting concerned community members as "anti-police" and "pro-gang." The chairman and chief executive officer of the Central Phoenix alliance defended Phoenix minority groups as law abiding, by going public and stating, "Not all minority group members or residents of crime-ridden neighborhoods believe Valerio's shooting was an act of racism." n175 A group of Phoenix residents headquarters. n176 Rally organizer explained the purpose as a way "to thank the police for coming into our communities and risking their lives every day to protect us. . . . We know the intensity and the fear involved in coming into a community where there are gangs and drugs and prostitution." n177 While public scrutiny and internal investigations required the police to provide a rationalization for the use of lethal force against Julio Valerio, the rally strongly suggested that social and legal constructions of Latino criminality were shared by some residents. n178

The demonization process to establish Julio as a "superpredator," posing a threat to six armed officers required focusing on Julio's behavior prior to the shooting, and depicting a chaotic, dysfunctional, fatherless family life. Police noted that prior to the shooting, Julio had been drinking with his step-father and afterwards he smoked marijuana laced with crack cocaine. n179 He had argued with his parents about smoking pot n180 and accused them of loving their other children, but not him. n181 Emphasis on Julio's past police record, and family circumstances, gained more and more publicity in the local paper, thus shifting the focus from [*1110] the police killing to Julio Valerio's police record and gang membership. n182 The tone of the news coverage, as well as the "expert" comments by the police union and police advocates, helped rationalize Julio's death as a consequence of the deadly threat that he posed to these six officers who shot him.

In response to the police department's character attacks, family members, Julio's teachers, and his neighbors attempted to counter the image of Julio as a drug-selling gang member from a dysfunctional family. Julio was the oldest of four children of Paulina and Lorenzo Valerio, immigrants from Southern Mexico, living in a rented one-bedroom apartment - the best living conditions a worker in a furniture factory could afford. n183 At the time of his death, Julio was enrolled at Metro Tech Vocational Institute of Phoenix, "where he took classes briefly before
taking a job at a west Phoenix furniture factory." n184 In the previous year he had received an award for being "outstanding in personal achievement" from the Youth at Risk program. n185 Teachers described him as "a very respectful boy" n186 who "had a hell of a lot of promise." n187 While family friends, social workers and teachers, did not try to deny that Julio was a troubled teenager, he was not the criminal that the police had portrayed. n188

B. Textual Dimension of Organizational Processes Mediated in Investigations and Final Reports

Two official reports were produced under the direction of the Phoenix Police Department, one from the Tactical Review Task Force and the other from the internal investigation. The Tactical Review Task Force, consisting of 11 police personnel and 10 citizens, was formed to examine tactics, training, and lesslethal weapons used by police department and to make recommendations for improvement. n189 The internal investigation was handled by the Legal and Professional Standards Division who issued the report of their investigation to the police chief two months after [*1111] the Tactical Review Task Force delivered their recommendations to the Police Chief. n190

1. Tactical Task Force:

After three meetings the task force issued a three page report. n191 Training recommendations included: 1) The need for emphasizing techniques to de-escalate explosive situations, including armed confrontations and defining the supervisor's role in confrontational situations; 2) Improvement for tactics included the development team/group tactics for confrontational situations emphasizing de-escalation, negotiation strategies, and tactics that emphasize peaceful resolution; 3) Strategies for increasing incentives for senior officers and supervisors to accept assignments on evening and night shifts; 4) Strategies for improving community relations, including a monthly report by the chief of police to the citizenry of Phoenix, and the establishment of a hot line to report both positive and negative police-community interaction; and 5) The, major emphasis of the report was the purchase of beanbag shot guns. n192

While the report was not critical of officers' behavior that resulted in the death of Julio Valerio, the recommendations suggest problems the task force identified. The presence of ten armed officers surrounding one suspect armed with a knife and the "a hail of police gunfire" n193 pointed to the lack of organizational tactic and command for confrontational situation. None of the officers took a position to de-escalate the situation but relied on armed force to resolve the confrontation. Although these problems appear in the internal investigation, they were included in the final summary and remained buried in officers' interviews. n194 [*1112]

2. The Internal Investigation

The shooting investigation was an internal investigation and concluded that the officers had followed police procedure. That is, the six police who fired responded with deadly force because Julio was within the distance that police officers are trained is dangerous and he was armed. n195 Analyzing the text of the police report reveals how legitimacy and power in the police bureaucracy is enacted and mediated through language, categories, the exclusion and inclusion of information into the final summary, and the how agency is attributed or erased.

The difficulty that the police had in communicating with the Pauline Valerio and her husband was quite apparent. From the 911 call to the time she heard the fatal shots, there was no Spanish speaking officer communicating with the family. n196 When the 911 was received, her call was transferred to the Spanish services provided the department from California. n197 The officers in Phoenix relied on the operator's translation of the conversation. Once an officer arrived to the Valerio home, none of the family was allowed to leave. At the same time the officers present did not speak Spanish. n198 Numerous requests for a Spanish-speaking officer was made. It was after the mother had heard the fatal shots that a Spanish speaking officer arrived to the home and informed her that her son was dead.

Spanish was also an issue at the site of confrontation. n199 Police interviews reveal that not all the officers were completely sure what language Julio was speaking. Since the dialogue between the Julio and officer was so limited and restricted to a few phrases, the officers could not be entirely sure of the suspect's comprehension of their commands. Several officers recognized that he had cussed at the police in Spanish and in English. All the officers used English when yelling the same command to him: "Drop the knife." n200 One officer reported he told Julio, "drop the knife, you're not going to win this fight . . .." n201 However, this was the extent of the dialogue. These certainly are not tactics for calming a suspect cornered between a brick wall, a chain fence, and a semi-circle of [*1113] police with drawn handguns and shotguns. No one attempted to talk (or even yell) at him in Spanish. n202

The racial identification of persons throughout the interview is fairly consistent. All persons of Mexican decent were referred to as Hispanic with the exception
The description of Julio given over the police radio to officers identified a Hispanic, thin, kid, guy, armed with a knife wearing a dark shirt and moving eastward from his home. At no time is he identified by tattoos or any other indicator that might suggest he was a gang member or that the suspect had a prior record. The situation is not defined as a gang activity, but rather as a family and domestic disturbance. However, the presence of a knife appears to be an important element in reconstructing Julio into an image of Latino criminality. A commonly held stereotypes of Latinos, particularly Mexicans and Puerto Ricans, is that they carry knives. The kitchen knife was never identified as a butcher knife in any of the radio communications prior to the shooting or in the final report. The first mention of the knife as a "butcher" knife appeared as a quote from police officers to the reporters. All the officers acknowledged that Julio was in a very agitated state. Yet none of the officers attempted to calm the suspect. In an interview with reporters, an officer described Julio's behavior as challenging and taunting towards them. In reference to the behavior they classified as challenging and taunting were verbal references to the officers' masculinity. Julio called them " putas" and yelled, "Come and get me. Fuck you cops. Shoot me. Shoot me." Officer Warner, one of the police who shot, stated it was like "he was begging us to shoot him." This last statement reveals how agency was shifted from officers armed with handguns, shotguns, and batons to Julio armed with a knife. This argument was made more directly the following summer when police responded to a situation where a woman, distraught over the death of her two sons, threatened to commit suicide. When police arrived she aimed the handgun at the officer and the officer immediately shot and killed the woman. The department referred to the incident as a "suicide by police."
While the final report (like the news coverage) highlighted the six officers who shot Julio, there were other officers in the semi-circle who did not shoot. This included officers who had their guns drawn at the time of the shooting but choose not to shoot. One officer acknowledged that the area was a known camp for transients and the nearby apartment building was described as made of "paper thin walls" and thus, was unsafe to discharge a weapon. Two apartments in the building were struck by officer's rounds causing broken windows and damage to interior walls. Although an infant was sleeping in the room struck at the time, there were no injuries. Another reason given by the other officers was the cross-fire. A few of the police interviewed acknowledged that the area behind the fence was a regular place for homeless. There were two mattresses and other material signs of their presence. The report concluded that officers had followed proper procedure.

Part IV: Summary

Constructing the Latino as a criminal becomes essential in order for the Phoenix Police to establish that the suspect had been shot rightly. Julio Valerio, a scared, skinny, pimply teenager, had to be portrayed as posing a lethal threat to officers. The formal representation of the "objective" facts were first introduced into the public record through the media, and then reaffirmed through carefully timed reports. Both the media, and summary of the final report, minimized the lack of command and procedure followed during the confrontation and the officers' inability to use any strategy other than shooting a scared and overwrought teenager. These facts were obscured by the emphasis given to the ways that Julio posed a threat to the officers. Emphasis was shifted away from the as a family or domestic disturbance to an incident involving a gang member and drugs. Attention was placed on Julio's character, his previous arrest record, and family circumstances. Julio Valerio was quickly transformed from a thin Hispanic kid armed with a knife, wearing a dark shirt, and moving eastward from his home, to a drug-crazed-gang-member, wielding a butcher knife, threatening everyone in sight, and with the strength of a super-predator capable of killing armed officers by lunging forward or throwing a knife 13 feet. The police were successful in constructing the Latino criminal. Segments of the Mexican American community became silenced because they did not want to appear as supporters of gangs, drugs, or crime. They also feared to be perceived as anti-police. The image of the Latino criminal posed a major obstacle for community mobilization because the image focused the discussion on the general issues of gangs and drugs rather than on police violence and police procedure for policing and serving communities of color. Consequently, the message that concerned residents hold police to a higher standard of behavior and expect police to conduct themselves in a professional manner was erased from the record. Other expectations that were minimized by constructing the Latino criminal were: police officers should be trained and competent to disarm a sixteen year old boy with a knife through use of baton or another type of non-lethal weapon, police officers should be competent negotiators; and have the verbal and other interpersonal skills to do conflict resolution.

Having constructed the Latino criminal as an inner-city super-predator, the only "rational" solution to the Valerio shooting becomes purchasing stun guns. Rather than proposing Spanish language and communication skills, the requirement for stun guns becomes part of the police bureaucracy. The purchase of new weapons, or the addition of training to use the new weapons, still does not address the original questions posed by community members: How is it that six armed police officers (all taller and bigger than the suspect) accompanied with four additional officers in a well lighted area feared for their lives or the life of their fellow officer? What did they see that night? Only a paramilitary framework that defines Latino youth as the enemy and reconstructs victims of color into one of criminality explains Julio's death.

At a meeting at one of the community colleges, a Chicana mother expressed fear for her twelve-year-old son's safety. She described the clothing and hair cuts that many of our youth wear and he is six feet tall and two hundred pounds--a big kid--but a kid nevertheless. The fear I heard expressed stemmed from the recognition that Chicano youth have been demonized as super-predators. How could any Latino family ever turn to the police again to assist them in a family crisis; in a time that an adolescent child is in trouble? The motto, "to serve and protect" becomes a farce.

The question remains: What was it that the police saw through their racially saturated field of visibility that solicited their deadly response? How was a cornered sixteen year old with a butcher knife seen as a deadly threat by six armed officers?

The incredible outpour of support for the police demonstrated in the blue ribbon rally confirms that the racially saturated field of visibility or the kind of "seeing" that the police acted upon that night is shared with members of the larger community. The editorials and cartoons printed in the local newspaper
demonstrated the degree to which Mexican youth are demonized. While the image of the Mexican male has shifted over the last 150 years from the bandit to the gang member, the image remains one of a criminal.

FOOTNOTE-1:
n1 Professor, School of Justice Studies, College of Public Programs, Arizona State University. I benefitted from comments on this paper received at the "Work in Progress" session at LatCrit V from Thomas D. Russell, Sylvia Lazos, Frances Ansley, Jane Rutherford, Alejandro Covarrubias, Robert Maes, and Norberto Valdez. I want to recognize the very helpful comments and feedback Sylvia Lazos provided after the session. Kevin R. Johnson graciously offered critical comments on a draft of this paper. Thanks to Kevin R. Johnson, Christopher David Ruiz Cameron, and George A. Martinez for encouraging me to write about my community work with the Committee for Equal Protection and Service. I profited immensely from my work with members of Students United for Justice and the Committee for Equal Protection and Service. I want to acknowledge the importance of Alfredo Mirande and Larry Trujillo's classic writings on el bandido and Armando Morales' research on Mexican Americans and police conflict in framing the history of state violence.


n3 See id. at 1.


n6 A national day of protest has been organized by a diverse coalition of organizations and individuals with the specific concern surrounding police violence: "we came together out of our concern that the peoples resistance to Police Brutality needed to be taken to a higher level nationwide." October 22 Coalition, at http://www.unstoppable.com/22 (last visited Oct. 31, 2000). The Stolen Lives Project lists more than 1,000 people who were shot down in the streets, beaten or pepper sprayed to death by police and other law enforcement agents since 1990. Most of the victims were unarmed and committing no crime against anybody. See id. at http://www.unstoppable.com/stolenlives.


n9 See Felicia R. Lee, Young and in Fear of the Police; Parents Teach Children How to Deal with Officers' Bias, N.Y. Times, Oct. 23, 1997, at B1.

n10 See Ogletree et al., supra note 8. The major findings of the NAACP Commission Study on police conduct in minorities communities were: "racism is a central part of police misconduct," id. at 21, "citizens experience police abuse in a wide variety of forms," id. at 29, "police departments have only begun to address police abuse and have failed to track or discipline officers who are repeat offenders," id. at
44, "civilians seldom prevail in complaints against police officers," id. at 52, "there seems to be a correlation between the race of the officer, the race of the citizen, and the incidence of abuse," id. at 70, "there is an 'Us versus Them' mentality in police-community relations," id. at 74, "police departments are beginning to respond to the needs of the community in police training programs," id. at 96, and "racism has a detrimental effect on law enforcement." Id. at 101; see generally Jody David Armour, Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in America 5 (1997) (discussing the existence of racial fear and its role in justifying police action); David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 12 (1999) (describing that African-American skepticism of the criminal justice system is "not shared by the white majority"); Randall Kennedy, Race, Crime and the Law ix (1998) (exploring the crossroads between race relations and the rules that govern the criminal justice system); Katheryn K. Russell, The Color of Crime: Racial Hoaxes, White Fear, Black Protectionsm, Police Harassment, and Other Macroaggressions xiv (1998) (discussing the public perception of the criminalization of race); Jerome G. Miller, Search and Destroy: AfricanAmerican Males in the Criminal Justice System 5-8 (1996) (discussing that statistics across the nation show the overwhelming disparity between white and nonwhite incarceration rates).

n12 Judith Butler attributes the difference in police behavior observed in immigrant and color communities as the result of "racially saturated field of visibility." Judith Butler, Endangered/ Endangering: Schematic Racism and White Paranoia, in Reading Rodney King/Reading Urban Uprising, supra note 8, at 15.

n13 Sgt. Anthony Miranda, the president of the Latino Officers Association, reported that the problem of racial inequity in law enforcement is so prevalent that he counsels "young people on how to deal with the police." Ana and Eddie Hernandez stated that even after taking steps to coach their son in tactics of protective mechanisms to avoid vehicle stops, "their son Eduardo had been stopped at gunpoint by the police three times. Each time, they said, he was in a vehicle that the police suspected of carrying drugs." Lee, supra note 9.

n14 Based on the findings from his study of the determinants of deadly force, David Jacobs and Robert M. O'Brien, concluded " Political or threat explanations for the state's use of internal violence suggest that killings committed by the police should be greatest in stratified jurisdictions with more minorities. . . . Separate analyses of police killings of blacks show that cities with more blacks and a recent growth in the black population have higher police killing rates of blacks, but the presence of a black mayor reduces these killings." David Jacobs & Robert M. O'Brien, The Determinants of Deadly Force: A Structural Analysis of Police Violence, 103 Am. J. Soc. 837 (1998).


n16 This case follows the stages of police brutality that Kathryn K. Russell refers to as the "Roundabout":

. There is an incident of alleged police violence against a person of color.
. Expressions of outrage by members of the minority community are followed by
calls form calm by the authorities (e.g., mayor, police chief).

. The authorities publicly classify the incident as an "aberration" and note that most officers do a good job and that the public should not rush to judgment.

. There are some attempts to portray the victim of the alleged police abuse as flawed or less than innocent. Attention may be drawn to a prior criminal record or the fact that the victim was engaged in deviant behavior at the time of the alleged assault.

. Community protests by the affected minority group (e.g., rallies) are met with further calls for calm by the authorities.

. A grand jury declines to issue a criminal indictment. No trial is held, and none of the officers involved in the assault is held accountable.


n18 See Judith Butler, Endangered/Endangering: Schematic Racism and White Paranoia, in Reading Rodney King/Reading Urban Uprising, supra note 8, at 15-18 (arguing how the Rodney King's body was itself made into the treat during the trial); see generally Stanley Fish, How the Right Hijacked the Magic Words, N.Y. Times, Aug. 13, 1995, at 15 (arguing that the defense strategy showing the Rodney King videotape in frame-by-frame slow motion minimized the actual harm done).

n19 Statistics from a section of an investigation conducted by Charles J. Ogletree et al. entitled "Citizens rarely prevail in police investigations" shows that only 13 percent of the 127 complaints of excessive or inappropriate force in the Virginia Beach Police Department were sustained; only 4 cases of 65 complaints between 1986 to 1990 in the St. Louis County Police Department were sustained; only 6 percent of the complaints in the St. Louis County Police Department prevailed. Ogletree et al., supra note 8, at 65-66. Further, the Christopher Commission reviewed thirty-four hundred complaints of excessive force and improper tactics from 1986-1990 and only 3 percent had been sustained. See id. at 66. Similarly, the St. Clair Commission found only 5.0 complaints sustained in the Boston Police Department. See id. at 66-67.

n20 In response to high-profile police killings of minority youth in Phoenix, police respond by placing a system in place for "telling the true story" in the next controversial police shooting. Louis Sahagun, American Album; Phoenix Spreading New Type of Police Line, L.A. Times, June 12, 1997, at A5.

"Under a new marketing bureau, the police department aims to balance press coverage that it believes too often highlights distraught relatives and neighbors, outraged minority activists -and the alleged mistakes of officers involved in violent confrontations." Id.

n21 See Russell, supra note 16.

n22 See generally Dorothy E. Smith, Texts, Facts, and Femininity: Exploring the Relations of Ruling 12 (1990) (discussing that agencies of control have institutionalized procedures for interpreting behavioral information that identifies individuals as members of certain classes).

n23 For instance, the reference to "experts" in the media also produce texts by other interested parties (such as representatives from the Police Union or Associations) who shape the categories used to create documentation for the record.

n24 Everyday management of social control and domination occurs through political and economic power processed in the bureaucratic form of organizations, such as the criminal justice system and the welfare system. Max Weber called our
attention to social relations in bureaucracies, which he analyzed as rational legal forms of domination. This specific mode of governing "separates the performance of ruling from particular individuals and makes organization independent of particular persons and local settings." Smith, supra note 22, at 213. The media, police reports and investigations, government forms and documentation and other textual practices are the everyday processes of ruling apparatus in our community.

n25 Patricia J. Williams believes that the police officers' claims that Rodney King was in control of the beating is a prime example of how this logic works. Williams discusses the meaning of agency as applied to the Rodney King beating and points to how experts "create" the facts. See Patricia J. Williams, The Rules of the Game, in Reading Rodney King/Reading Urban Uprising, supra note 8, at 51; see also Magee, supra note 17, at 213-14 (discussing the "good cop paradigm" and how the myth of the good cop demonstrates the erasure of agency and the promotion of anti-black male sentiment).

n26 See Houston Baker, Scene ... Not Heard, in Reading Rodney King/Reading Urban Uprising, supra note 8, at 48; Judith Butler, Endangered/Endangering: Schematic Racism and White Paranoia, in Reading Rodney King/Reading Urban Uprising, supra note 8, at 15-18; Kimberle Crenshaw & Gary Peller, Reel Time/Real Justice, in Reading Rodney King/Reading Urban Uprising, supra note 8, at 56; Mike Davis, Uprising and Oppression in L.A, in Reading Rodney King/Reading Urban Uprising, supra note 8, at 150; Thomas L. Dumm, The New Enclosures: Racism in the Normalized Community, in Reading Rodney King/Reading Urban Uprising, supra note 8, at 179; Melvin L. Oliver et al., Anatomy of a Rebellion: A Political-Economic Analysis, in Reading Rodney King/Reading Urban Uprising, supra note 8, at 119-20; Patricia J. Williams, The Rules of the Game, in Reading Rodney King/Reading Urban Uprising, supra note 8, at 53-55.


n28 See, e.g., Anatomy of Racism xi-xxiii (David T. Goldberg ed., 1990) (showing discussions of racism as being focused solely in the relationship between whites and blacks); Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 3-6 (1992) (discussing racism as a divide between whites and blacks and criticizing the status of Latinos as a separate race); Cornel West, Race Matters 28-9 (1993) (showing the singular focus of racism as affecting only blacks as furthering the plight of the black race).

n29 LatCrit perspective is committed to the methodology of storytelling, interdisciplinary knowledge, human rights, and the specific roles and places of Latina/o voices, communities and interests. See generally Elizabeth M. Iglesias, International Law, Human Rights, and Laterit Theory, 28 U. Miami Inter-Am. L. Rev. 177 (1996) (arguing that theories of international law support the continued subordination of domestic racial minorities); Kevin R. Johnson, Some Thoughts on the Future of Latino Legal Scholarship, 2 Harv. Latino L. Rev. 101 (1997) (discussing the need to make Latino race issues more visible to escape the typical myopic view of race); Rachel F. Moran, Neither Black Nor White, 2 Harv. Latino L. Rev. 130 (1997) (contending that the typical Black-White model of race
relations accounts for the ignorance towards Latino civil rights); Francisco Valdes, Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience--RaceCrits, QueerCrits, LatCrits, 53 U. Miami L. Rev. 1265 (1999) (discussing the history and current perspective of "outsider jurisprudence").

n30 The focus on the black/white paradigm in civil rights discourse has made discussions of Latino criminal justice issues virtually invisible. See Dinh, supra note 27, at 1289; Margaret E. Montoya, Of "Subtle Prejudices," White Supremacy, and Affirmative Action: A Reply to Paul Butler, 68 U. Colo. L. Rev. 891, 895 (1997) (describing that Paul Butler's work on jury nullification focuses exclusively on African American males).

n31 This analysis builds on sociologist Dorothy Smith's analysis of texts as a source of exploring power relations. In this case, I am focusing on the texts produced from police and other law enforcement investigations related to state violence. See Smith, supra note 22, at 120-25.


n34 Latino entrance into the U.S. legal and judicial system began as conquered subjects of the particularly violent Mexican-American War. Acuna's reference to the southwestern United States as "occupied America" captures the essence of the history from which the Latino criminal stereotype originated. See Rodolfo Acuna, Occupied America: A History of Chicanos (1981) (providing an in-depth history and analysis of Chicanos' history in the United States).

n35 See Charles Ramirez Berg, Stereotyping in Films in General and the Hispanic in Particular, in Latin Looks: Images of Latinas and Latinos in the US Media 118 (Clara E. Rodriguez ed., 1998) (making a similar observation in his discussion of "one of the most disturbing turns Hispanic cinematic imagery has taken is its degeneration into an unrecognizable, nonhuman form" and pointing to recent science fiction films and their depiction of "Aliens," he argues that the destruction and struggle to send extraterrestrial "back where they came" may be representations of Hispanics aliens, naturalized and undocumented); see generally Dorothy E. Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 156-59 (1997) (discussing, for example, the media's exaggerated creation of the image of a black crack mother crack baby).

n36 At the same time, the placement of white faces changes the meaning and interpretation of the same behavior or symbols. As Brent Staples noted, "Playing at gangsterism may be harmless for suburban white kids who roam the mall. But in places like Bedford-Stuyvescant, the same postures and clothing can get you killed." Brent Staples, Dying to Be Black, N.Y. Times, Dec. 9, 1996, at A16. While we know that white middle class adolescents dress in flat pants and t-shirts as they listen to Death Row and Interscope rap music, the police do not perceive them as a threat. Yet the same clothing, music and behavior embodied by African American or Latino youth has been used to justify police violence. See also Malcolm W. Klein, Street Gang Cycles, in Crime 230 (James Q. Wilson & Joan Petersilia eds., 1995).

n37 Although state violence against Mexico has been well documented, the image of the violent Mexican remains part of our popular culture. The Mexican American War is particularly noted for its state-sanctioned violence. See Carey McWilliams, North From Mexico: The Spanish-Speaking People of the United States 101 (Matt S. Meier ed., Greenwood Press 1990) (1948). McWilliams also quotes Lieutenant George C. Meade's description of the acts included: "driving husbands out of houses and raping their wives. . . . They will fight as gallantly as any men, but they are a set of Goths and Vandals without discipline, making us a
terror to innocent people." Id. at 101. Anti-Catholic feeling is documented in the extensive desecration of churches and violence against nuns and priests. Irish immigrants fighting for the U.S. were so appalled by the anti-Catholic violence, "two hundred and fifty" switched sides and formed the "San Patricio battalion" and fought with the Mexicans. Id.; see also Acuna, supra note 34, at 14-17 (recounting additional eyewitness accounts of the violence). In his review of Mexican American representation in film, Chon Noriega links the "greaser" image to "American thought and popular culture since the 1820s, when Anglo Americans first settled in Texas, then the northernmost state of Mexico." Chon Noriega, Citizen Chicano: The Trials and Titillations of Ethnicity in the American Cinema, 1935-1962, in Latin Looks: Images of Latinas and Latinos in the US Media, supra note 35, at 91.

n38 See, e.g., Boulevard Nights (Warner Bros. 1979); Defiance (Am. Int'l 1979); Walk Proud (Universal 1979) (depicting the Chicano youth as gang affiliated and the hardships of breaking free from the gang lifestyle).

n39 Charles Ramirez Berg dates the cinematic roots of the bandido "to the villains of the silent 'greaser' films," and continuing into the westerns. "Typically, he is treacherous, shifty, and dishonest. His reactions are emotional, irrational, and usually violent; his intelligence is severely limited, resulting in flawed strategies. . . . From the halfbreed villain in Broncho Billy and the Greaser (1914) to Andy Garcia's sadistic Cuban American gangster in Eight Million Ways to Die (1986), the Hispanic bandit is a demented, despicable creature who must be punished for his brutal behavior. Other versions of the bandit stereotype include Latin American rebel leaders, corrupt dictators, and inner-city youth gang members." Charles Ramirez Berg, Stereotyping in Films in General and the Hispanic in Particular, in Latin Looks: Images of Latinas and Latinos in the US Media, supra note 35, at 113.


n41 See, e.g., Back Roads (Warner Bros. 1981); The Big Fix (Universal 1978); Boulevard Nights (Warner Bros. 1979); Colors (Orion 1988); Mi Vida Loca (Cineville 1993); Walk Proud (Universal 1979); West Side Story (United Artists 1961); Zoot Suit (Universal 1981) (depicting Latino males as gang members). See, e.g., American Me (Universal 1992) (depicting a gang leader's continued role as drug lord from prison).

n43 See, e.g., Above the Law (Warner Bros. 1988); Code of Silence (Orion 1985); 8 Million Ways to Die (TriStar 1986); Miami Vice (NBC television broadcast series); Q & A (TriStar 1990); Running Scared (MGM 1986); Scarface (Universal 1983); Stick (Universal 1985) (providing examples of Latinos being depicted as drug dealers).

n44 See, e.g., La Bamba (New Visions 1987) (containing a musical biography of Ritchie Valens).

n45 These themes even are common among "Latino" projects such as Edward Olmos's film American Me. Directors and producers know these themes sell. Joan Moore argues that the premise that gang membership is passed from father to son that is depicted in the film is inaccurate. See Joan Moore, Going Down to the Barrio: Homeboys and Homegirls in Change 114 (1991).

movement, which is quite absent of the racist caricature, bandido, used by Stavans).

n47 This erasure of history is documented in the American psyche in the portrayal of Mexicans as "foreigners" even though the land had once belonged to Mexico, and U.S. citizens were the immigrants.

n48 As an occupying force, the U.S. government had to be ready for possible uprisings but the primary interest of state repression was the dispossession of land and other resources. See generally, Acuna, supra note 34 (discussing the history of Mexican Americans as a conquered people and recounting the use of military and border patrol before and after the Mexican American War).

n49 See generally, Acuna, supra note 34 (providing an in-depth history of the conquest of the Southwest).

n50 McWilliams, supra note 37, at 101.

n51 See id. at 102.

n52 See id. at 63-80.

n53 See id. at 122-24.

n54 See Acuna, supra note 34, at 30, 35, 43, 45, 59, 101, 105-06, 108-09, 112, 114, 117 (documenting the Chicano history, including patterns of repression and injustice).

n55 See id. at 109-12. Resistance also included nonviolent responses such as the journalistic efforts of Francisco P. Ramirez's in Los Angeles. See id. See generally, Alfredo Miranda, Gringo Justice (1987); Robert J. Rosenbaum, Mexicano Resistance in the Southwest: "The Sacred Right of Self-Preservation" (1981) (recounting Mexican resistance to American encroachment).


n58 See Acuna, supra note 34, at 33, 113-14.

n59 See id. at 33-36. Juan N. Cortina, also known as the Red Robber of the Rio Grande, led an organized revolt against "gringo" oppression against Mexicans in Texas. See id.

n60 See id. at 111-12.


n62 The brothers were believed to be the primary organizers behind Las Gorras Blancas in New Mexico. See Mary Romero, Class Struggle and Resistance Against the Transformation of Land Ownership and Usage in Northern New Mexico: The Case of Las Gorras Blancas, supra note 57.

n63 See generally Americo Paredes, With his pistol in his hand: A border ballad and its hero (1958) (recounting the story and legend of Gregorio Cortez).

n64 See generally Acuna, supra note 34.

n65 See id. at 17-20.

n66 Las Gorras Blancas, the insurgent movement against the privatization and fencing of communal lands in New Mexico, included a class platform that tried to unite poor white farmers and Native Americans against Anglo carpetbaggers and the Hispano rico. See Robert J. Rosenbaum, Las Gorras Blancas of San Miguel, 1889-1890, in Chicano: the Evolution of a People 128-36 (Reanto Rosaldo et al. eds., 1973); Andrew B. Schlesinger, La Gorras Blancas, 1889-1890, J. Mex. Am. Hist. 87-143 (1970); see generally Robert W. Larson, New Mexico Populism: A Study of Radical in a Western Territory (1974); Robert J. Rosenbaum, Mexicano Resistance in the Southwest: "The Sacred Right of Self-Preservation", supra note 55 (recounting the history of Las Gorras Blancas).
See Mary Romero, El Paso Salt War: Mob Action or Political Struggle, supra note 56, at 119-43 (stating that the armed resistance against the privatization of communal used and maintained salt beds by Mexicans and Mexican Americans became known as the El Paso Salt War).

See generally Acuna, supra note 34; Mauricio Mazon, The Zoot-Suit riots: The Psychology of Symbolic Annihilation (1984); McWilliams, supra note 37, at 215-31 (providing accounts of the riots).

See generally Carlos Munoz, Jr., Youth, Identity, Power, the Chicano Movement (1989); Vigil, supra note 46 (discussing the Chicano student and power movements of the 1960's).

See supra notes 33-34.

See generally Vigil, supra note 46 (documenting the rise of the Crusade for Justice Chicano movement in the 1960's).

See generally Peter Nabokov, Tijerina and the Courthouse Raid (1969) (discussing the Tierra Amarilla insurrection).

See generally John G. Dunne, Delano (1967); Peter Matthiessen, Sal Si Puedes: Cesar Chavez and the New American Revolution (1969); Ronald B. Taylor, Chavez and the Farm Workers (1975) (recounting the farm workers movement and experience towards unionization).

See generally Alfredo Mirande, Gringo Justice, supra note 55 (asserting that Chicanos have been the victims of "prejudicial and discriminatory treatment" as well as a double standard of justice).

See generally McWilliams, supra note 37, at 22031 (detailing the events during the riots); Mazon, supra note 68 (providing accounts of the riots).

See generally McWilliams, supra note 37, at 22031.

See id. at 227.

See id. at 231-33.

Id. at 215. See also Alfredo Mirande et al., Chicano Urban Youth Gangs: A Critical Analysis of a Social Problem?, 3 Latino Studies J. 17 (1992) (noting that by 1943, public officials and law enforcement began describing Mexican youth as gang members).

See Mazon, supra note 68, at 79 (arguing that the riots were perceived as a military exercise, noting alleged conspiracy on the part of zoot-suiters and depicting servicemen as engaged in "Landing Parties," "Mopping up operations," "Taxicab brigades," "task forces," "blitzes," "punitive expeditions," "guerrilla warfare," and "civil war"); McWilliams, supra note 37, at 244-58.

See Armando Morales, Ando Sangrando (i am bleeding) 22-23 (1972). Morales' study was extremely important in documenting a consistent history of police misconduct towards Mexicans throughout the Southwest and Midwest, namely Chicago.

Alfredo Mirande, Gringo Justice, supra note 55, at 149 (internal citations omitted).

U.S. Commission on Civil Rights, Mexican Americans and the Administration of Justice in the Southwest, iii (1970). Testimonies presented indicated that:

law enforcement officers discriminated against Mexican-Americans. Such discrimination includes more frequent use of excessive force against Mexican-Americans than against Anglos, discriminatory treatment of juveniles, and harassment and discourteous treatment toward Mexican Americans in general. Complaints also were heard that police protection in Mexican American neighborhoods was less adequate than in other areas. The Commission's investigations showed that belief in law enforcement prejudice is widespread and is indicative of a serious problem of police-community relations between the police and Mexican-Americans in the Southwest.

Id. at 13.

Professor Morales begins his chapter on "Patterns of Police Brutality" by noting:

there is not one police officer in the United States that has ever been prosecuted in the federal courts for assaulting or killing (these acts would constitute a violation of a person's civil rights under
color of law, Title 18, U.S. Code Section 242) a person of Spanish-surname since the inception of these statues in 1872, revised in 1940, and again in 1964. The principle reason that there are no court convictions is that police administrators, prosecutors, county and federal grand juries, judges and the general public, have been dangerously overprotective of police in police brutality cases.

Morales, supra note 81, at 20; see also McWilliams, supra note 37, at 112 (quoting an article by George Marvin in World's Work, describing anti-Mexican attitudes before WWI:

The killing of Mexicans . . . through the border in these last four is almost incredible. . . . Some rangers have degenerated into common mankillers. There is no penalty for killing, for no jury along the border would ever convict a white man for shooting a Mexican. . . . Reading over the Secret Service records makes you feel almost as there were an open game season on Mexicans along the border.).

n85 Morales, supra note 81, at V.

n86 Mirande points out that the riots did not draw the same attention as the shooting at Kent State even though thirty-five persons were shot by police in the confrontation on January 31, 1972. See Alfredo Mirande , Gringo Justice, supra note 55, at 22. After the Zoot-Suit Riots, this period of confrontations between Mexican American youth and the police has drawn the attention of Chicano Studies scholars; see generally Acuna, supra note 34 (analyzing confrontations between police and Mexican American youth in "Occupied California"); Alfredo Mirande , Gringo Justice, supra note 55 (discussing confrontations with police throughout the 1970s), Morales, supra note 81 (providing extensive discussion of Mexican American - police conflict).

n87 See Morales, supra note 81, at 52.

n88 See Morales, supra note 81, at 91. Morales listed twenty-five circumstances present in three of the riots, including: major outbursts precipitated by routine arrests of ethnic minorities by white police; police coming to symbolize white power, white racism, and white repression to ethnic minorities; a widespread perception among ethnic minorities of the existence of police brutality and corruption, and of a double standard of justice and protection -- one for ethnic minorities and one for whites; deaths and casualties resulting from the force used against ethnic minorities by police and National Guard units. See id. at 99.


n90 See Vigil, supra note 46, at 81-159 (discussing student protests in Denver, Colorado and the activities of the Brown Beret); Munoz, supra note 69, at 86.

n91 See supra text accompanying notes 37-39, 41.

n92 Surges of academic and public interest in gangs occurred in the 1890s, 1920s, 1960s and late 1980s into the 1990s. The last three surges have included extensive attention on Mexican and Mexican American youth. See Scott H. Decker & Barry Van Winkle, Life in the Gang 12-16 (1996); see generally J. Gilbert, A Cycle of Outrage: America's Reaction to the Juvenile Delinquent in the 1950s (1986) (discussing the interrelationship between mass culture and negative views of youth); Malcolm W. Klein, The American Street

n93 See generally, Miller, supra note 10 (explaining that black males between 18 and 35 have an inordinate likelihood of encountering the criminal justice system at some point in their lifetime); Marjorie S. Zatz, Chicano Youth Gangs and Crime: The Reaction of a Moral Panic, 11 Contemp. Crises 129-58 (1987).

n94 Jose Lopez and Alfredo Mirande describe the ubiquitous definitions public officials use for Latino gangs as "encompassing groups as diverse as paramilitary organizations and occult worshipers, on the one hand, and neighborhood children socializing at McDonald's after curfew, on the other." Jose Lopez & Alfredo Mirande, The Gangs of Orange County: A Critique and Synthesis of Social Policy 19 Aztlan 128 (Spring 1988-1990); see generally Patrick Jackson, Moral Panic and the Response to Gangs in California, in Gangs 257-75 (Scott Cummings et al. eds., 1993) (exploring that the image of gangs consisted of drug traffickers using children to carry out their crimes); Zatz, supra note 93, at 129-58.

n95 See Maureen Harrington, Abuse of Mexican Immigrants Nothing New, Activist Says, Denv. Post, Apr. 21, 1996, at 8. Harrington's interview with an activist described an occurrence frequently recalled in community meetings I attended in Phoenix following the Valerio shooting: "I worked in northwest Denver, at the Pecos Community Center, and I saw Hispanic teenagers get harassed by police unfairly. They would stop them, make derogatory remarks about their heritage, take their pictures and say they were in gangs, put them on lists, when they weren't." Id. In his critique of gang scare created by the War on Gang, Joel Best quotes a January 1996 news story reporting a presentation at a gang-awareness seminar in Marion, Illinois: "There is no such thing as a wannabee. That's a copout. A wannabee will be." Joel Best, Random Violence: How we Talk About New Crimes and New Victims 72 (1999), See generally C. Ronald Huff, Denial, Overreaction and Misidentification: A Postscript on Public Policy, in Gangs in America 310-17 (1991) (arguing that cities deny, overact to, and then misidentify gangs).


n97 See Decker & Van Winkle, supra note 92, at 2.

n98 See Alfredo Mirande et al., Chicano Urban Youth Gangs: A Critical Analysis of a Social Problem?, supra note 79 (noting that by 1943, public officials and law enforcement began describing Mexican youth as gang members)

n99 One of the longest ongoing field research has been conducted by Joan Moore, in collaboration with Chicano exconvicts in East LA. This collaboration may influence the attention given to culture in theorizing about distinctive characteristics of Chicano gangs, particularly the argument that gangs had a life-long role for the members and communities, adult gang members performed a role in the intergenerational transmission of gang membership within neighborhoods, and the existence of prison gang culture in the barrio. See Joan Moore, Going Down to the Barrio: Homeboys and Homegirls in Change, supra note 45; Joan Moore, Homeboys: Gangs, Drugs, and Prison in the Barrios of Los Angles (1978); see also Ruth Horowitz, Honor and the American Dream (1983) (studying a gang in a Chicano community in Chicago during the late 70's); Felix Padilla, The Gang as an American Enterprise (1992) (studying a Puerto Rican gang in Chicago in the 80s); James Diego Vigil, Barrio Gangs: Street Life and Identity in Southern California (1988) (examining Chicano gangs in LA in the late 70s). These researchers situated their analyses of gangs and gang members in the context of Hispanic culture and the marginality of ethnic groups in the larger culture. More recently, researchers have argued that local factors, especially economic and demographic ones, are
important variables in explaining the emergence and nature of gangs. See John Hagedorn, People and Folks (1988). Similarly, Sanchez-Jankowski argues that street culture is a response to the underclass conditions within which gangs operate. Martin Sanchez-Jankowski, Islands in the Street (1991).

n100 However, the category of gang and immigrants is not mutually exclusive: "Much of the literature about crime among Mexican immigrant communities . . . has focused on gang activity." Tony Waters, Crime & Immigrant Youth 32 (1999).

n101 In an interview on law enforcement abuse of immigrants, Angelo Velasquez, director of operations for Rocky Mountain Service, Employment, Redevelopment, recalled a presentation she gave to Boulder police officers and identified the following stereotypes they expressed: "Mexicans are seen as thieves, dirty, engaging in criminal conduct." Harrington, supra note 95, at 8.

n102 See generally Jorge A. Bustamante, The 'Wetback' as Deviant: An Application of Labeling Theory, 77 Am. J. Soc. 706-18 (1972) (discussing how the transformation of this group of foreign laborers by the law criminalizes the behavior of Mexican immigrants entering the U.S. and influences on the immigrant worker's interaction with law enforcement and employers that maintains a process of exploitation and the success of the anti-law entrepreneur). Borrowing from Keith Aoki's analysis of the Asian immigrant experience, we can update the list of "wetback" as deviant to include: "(1) immigrants as a threat to valuable U.S. natural resources, (2) immigrants as a threat to moral and physical public health, and (3) immigrants as natural disasters." Keith Aoki, "Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes, 4 UCLA Asian Pac. Am. L.J. 2, 60 (1996).

n103 Waters, supra note 100, at 172 (citing Beatrice. Griffiths, American Me (1948)).


n106 One article reported:

'The message came through that you can target certain groups as long as you are targeting them not because of their race but because of their immigration status,' said Thomas Saenz, the Los Angeles counsel for the Mexican American Legal Defense and Education Fund. 'It was an open invitation to discriminate against people who fit the broad, sweeping profile of undocumented workers.'

Stern, supra note 4.


n108 David Adams, Videotape of Beating Isn't Just One Image, St. Petersburg Times, Apr. 6, 1996, at 1A; see also Maureen Harrington, supra note 95; More Police Violence on Video; Whether Alien Bashing or Not, Attack was Outrageous, Buff. News, Apr. 4, 1996, at 2C.

n109 See generally Robert S. Chang & Keith Aoki, Centering the Immigrant in the Inter/National Imagination, 85 Cal. L. Rev. 1395 (1997) (examining the racialized
space of U.S. race relations that Asian and Latina/o immigrants enter); Kevin R. Johnson, Race, the Immigration Laws, and Domestic Race Relations: "A Magic Mirror" into the Heart of Darkness, 73 Ind. L.J. 1111 (1998) (stating that race is central to immigration laws and impacts inter-ethnic relations).


n111 A case in point is the correspondence about Las Gorras Blancas that Baron Bradford Prince, New Mexico's territorial governor, accumulated during his term. Correspondence include Anglo merchants and lawyers, as well as the native elite (los ricos), complaints to the governor about damage to their property from Las Gorras nightly raids. Bradford's correspondence to Washington includes efforts to downplay the level of resistance against statehood in New Mexico. Correspondence with local authorities documents attempts to establish Las Gorras to outside influences from the labor movement. Attempts to claim that Las Gorras was conspiring against the U.S. government rather than against landgrabbers and carpetbaggers in order to justify calling in federal troops. See Mary Romero, Class Struggle and Resistance Against the Transformation of Land Ownership and Usage in Northern New Mexico: The Case of Las Gorras Blancas, supra note 57, at 1-2.

n112 See generally Acuna, supra note 34; Robert J. Rosenbaum, Mexicano Resistance in the Southwest: "The Sacred Right of Self-Preservation", supra note 55 (discussing insurgent attempts in the southwest).

n113 See Mary Romero, El Paso Salt War: Mob Action or Political Struggle, supra note 56, at 122.

n114 For example, Margaret Mead identified the trait as the patron system: "leadership is provided through the patron system, whereby the leading man in the community, whether because of his financial status, his knowledge of the outside world or his personal power, assumes a position of responsibility for the villagers." Margaret Mead, Cultural Patterns and Technical Change 174 (1955). Frances Leon Swadesh, in her challenge to the Kluckhohn-Strodtbeck analysis of Hispanic values, is one of the first New Mexican historians to explain patrons in an historical context:

The emergence of patrons as a powerful class appears to date from the mercantile development stimulated by the Santa Fe Trail. Patrons became particularly powerful as a result of the junior partner status to which they were elevated during the Yankee military occupation and appear to be, at least in part, a product of Anglo-American domination, just as Indian "chiefs" were created by Army officers and employees of the Bureau of Indian Affairs for easier administration of those Indians among whom chiefdoms had previously been unknown.

Frances L. Swadesh, The Social and Philosophical Context of Creativity in Hispanic New Mexico, 9 Rocky Mtn. Soc. Sci. J. 1, 12 (1972). Swadesh's description of patrons is similar to the reference of "comprador" used in China: "Now in China, the name of the principal native servant, employed in European establishments, and especially in houses of business, both as head of the staff of native employees, and as intermediary between the house of its native customers." Oxford English Dictionary 741 (2000).

n115 See, e.g., George B. Anderson, Complete History of New Mexico: Its Resources and People (1907); Hubert H. Bancroft, History of Arizona and New Mexico (1889); Frank W. Blackmar, Spanish Institutions of the Southwest (1891); Helen Haines, History of New Mexico from the Spanish Conquest to the Present Time, 1530-1890 (1891); L. Bradrod Prince, Historical Sketches of New Mexico (1883); W. G. Ritch, Aztlan: The History, Resources and Attractions of New Mexico (1885); Ralph E. Twitchell, Leading Facts of New Mexico History (1912) (documenting the transformation from communal to private ownership in their memoirs).
n116 See, e.g., Herbert O. Brager & William Blackmore, A Case Study in the Economic Development of the West (1949); Ruth Laughlin, Caballeros (1947); George Sanchez, Forgotten People: A Study of New Mexicans (1940); Blandian Seagle, at the End of the Santa Fe Trail (1949) (referring to the aftermath of drought and land loss).


n118 Radical perspectives were frequently used to explain the dynamics involved. The racial perspective studied the change from feudalism to capitalism in the Southwest, identified the different class interests, and used a class analysis to analyze the consequent conflicts. The investigation discussed the colonial process, as well as the changing economic and political relations between and within groups. However, social scientists are not the only ones attempting to make sense of changes occurring in land ownership and usage. The decedents have been engaged in an everyday process of defining the land grant issue based on the interpretation of their predecessors, their own experiences and class interests. Although subjected to the traditional perceptions of history presented in literature, media and social policy, the decedents have their own oral and written history and community experiences.

n119 See, e.g., Broncho Billy and the Greaser (1914); High Noon (1952); The Ox-Bow Incident (20th Century Fox, 1943); The Treasure of the Sierra Madre (Warner Brothers, 1948) (portraying lawless bandito characters).

n120 See generally Alfredo Mirande, Gringo Justice, supra note 55 (discussing policing and the Latino culture).

n121 Id. at 160. It is not surprising that excerpts from the report were quoted on Radio Berlin, Radio Tokyo, and Radio Madrid as evidence that Americans held similar beliefs as Adolf Hitler.

n122 See Morales, supra note 81, at 22 (quoting Chief of Police William H. Parker's statement before the U.S. Commission on Civil Rights in 1960: "Some of these people [he had been talking about Mexican-Americans and Latin-Americans here] have been here before we were, but some of them are not far removed from the wild tribes of Mexico").

n123 See id. at 43 (quoting a court transcript of "Judge Gerald S. Chargin of the Santa Clara County Juvenile Court, in passing sentence on a seventeen year old Mexican American on September 2, 1969 charged with incest":

Mexican people, after 13 years of age, think it is perfectly all right to go out and act like an animal. We ought to send you out of the country -- send you back to Mexico. You belong in prison for the rest of your life for doing things of this kind. You ought to commit suicide. That's what I think of people of this kind. You are lower than animals and haven't the right to live in organized society -- just miserable, lousy, rotten people. Maybe Hitler was right. The animals in our society probably ought to be destroyed because they have no right to live among human beings.

n124 Best, supra note 95, at 82.

n125 Id.

n126 See, e.g., Mydans, supra note 17 (providing an example of this after-the-fact justification in the Rodney King incident as police justified the beating by invoking police department guidelines for subduing threatening civilians, based on officers' subjective judgement, which include choke holds and wielding a baton).

n127 See Magee, supra note 17 (discussing the existence of the good cop paradigm and the negative perception of black men that prevail in police misconduct and brutality investigations).

In his study of police officers in two urban and three suburban police agencies in northwestern Indiana, Dennis Powell's findings indicated:

There are significant differences among police agencies concerning how they use their discretionary powers, and these differences are influenced by the racial mix of both the community being policed and the police agency itself. Considering these findings, it also seems appropriate to suggest that there may be considerable amount of racial discrimination prevalent within policing.

Dennis Powell, Race, Rank, and Police Discretion, 9 J. Police Sci. & Admin. 383, 388 (1981); see also National Criminal Justice Commission, The Real War on Crime 161 (Steven Donziger ed.) (making the link between police discretion and the difference between "minor inconvenience to the destruction of life and property"); Roberts, supra note 35 (arguing that discriminatory, subjective law enforcement in minority communities counts for higher rates of arrest in these areas and is not related to higher propensity for law breaking); Magee, supra note 17 (providing a discussion on deference, discretion and esteeming police and their decisions); Gregory H. Williams, Controlling the Use of Non-Deadly Force: Policy and Practice, 10 Harv. BlackLetter L.J. 79 (1993); Gregory H. Williams, Police Discretion: A Comparative Perspective, 64 Ind. L.J. 873 (1989) (providing an analysis of police discretion in foreign criminal justice systems).


See Monica Davis, Vehicle-Theft Investigation Turns Into "Suicide by Cop": Police Shooting Appears Justified, Official Indicates, Ariz. Republic, Aug. 27, 1999, at B5. The concept of "suicide by cop" or "police assisted suicide" appears in the discussion of the Julio shooting and continues to be used by Phoenix police. The concept is obviously an attempt to shift agency from police to victim. See Victoria Harker, Mom Sues Police Over Son's Death; Contends Officers Erred in Failing to Calm Him, Ariz. Republic, Nov. 15, 1997, at B1.

See Chris Fiscus & Christina Leonard, Phoenix, Buchanans Settle Suit; $ 570,000 in Police Shooting Case, Ariz. Republic, Mar. 18, 1999, at B1. In March 1999, the City Council settled a lawsuit with the Buchanan family and paid $ 570,000. See id.

See Dennis Wagner, Mallet Parents: Aim was to Vindicate Son, Ariz. Republic, July 3, 1998, at A17. In July 1998, a jury awarded a $ 45 million settlement to the Mallet family. However, this was reduced to $ 5.3 million under a settlement that included an admission of police blame and an agreement to improve policies and training. The parents of Edward Mallet "said that their wrongful-death lawsuit was never about money: They fought City Hall and the Phoenix Police Department because they believed their son was a victim, they needed officials to admit it, and they wanted a promise of change." Id. His mother is quoted as saying, "The admission of liability, to me, is priceless . . . I feel like my son has been vindicated. This proves that everybody is human and everybody makes mistakes, even the police . . . . If this prevents it from happening again, I'll be satisfied." Id.

See Paul Chevigny, Edge of the Knife: Police Violence in the Americas 94 (1995) (stating:

Although formally the burden of proof is no more than the usual standard in civil cases of a "preponderance of the evidence," in practice disciplinary bodies
use a higher standard. An example is the rule of thumb that the complainant does not prevail unless she has some way of corroborating the complaint, usually through the testimony of another witness. No such rule is used in ordinary civil matters; although a case is obviously stronger if it is corroborated, trials in which the jury has to decide whether the plaintiff or the defendant is telling the truth are conducted every day, and juries sometimes decide against the defendant on the word of the plaintiff alone. But in police disciplinary matters for civilian complaints, the police respondents win virtually all the time, unless they fail to give a legally sufficient explanation of their actions or the complainant is able to corroborate her side of the case. Thus damages may be and often are awarded in civil actions against the police although, in the parallel review board investigation, the complainant's case had been found "unsubstantiated.");

see generally Thomas M. Riordan, Copping an Attitude: Rule of Law Lessons from the Rodney King Incident, 27 Loy. L.A. L. Rev. 675, 765-66 (1994) (suggesting that the events surrounding the Rodney King beating sends the message that the system is flawed).


n139 Transcript of police radio call indicates a request is made for a Spanish-speaking officer at the Valerio home: "Have a 101 screaming. Says it was her son. We need a Spanish speaking officer to calm her down and control her." Phoenix Police Report, supra note 2.


n143 See id.


n145 Id.

n146 Id.

n147 See generally id. (explaining the events that took place on the night of the shooting).


n149 See Muller, supra note 148.


n151 See Muller, supra note 148 (stating that "in a 1993 study of police shootings in several major cities, Phoenix ranked third in the number of police slayings per 100,000 population, but last in woundings").

n152 See Richard De Uriarte, Big Stories Stoke Community's Emotions, Ariz. Republic, Nov. 24, 1996, at B1 (quoting one reader as stating:

"I'm afraid to call the police," . . . . Referring to a peaceful resolution of a hostage crisis at a north-central Phoenix office last Friday . . . . "Why is it that on the north side, the police negotiate for hours with a paranoid man with a gun? And on this side of town, they don't give a
16-year-old Hispanic with a knife more than a minute?"

Jim Walsh, Delivered From Harm by a Purse, Ariz. Republic, Oct. 25, 1995, at B1 (stating that Kenneth Dale Edwards attempted to rob Carl's Jr. restaurant and was struck by an employee in the head with a purse. He remained in the restaurant while the employee safely escaped. Edwards, a suspect in nine other fast-food robberies, had a two and half hour standoff with a police SWAT team until they arrested him); Brent Whiting, Peaceful Surrender Ends Hostage Crisis, Ariz. Republic, Nov. 16, 1996, at B1 (stating that Thomas Baisley, armed with two handguns, held a real-estate investor hostage for 5 1/2 hours and upon his surrender, Baisley was immediately given a psychological evaluation).

n153 See Parents Question Police Killing of Son, supra note 138 (reporting that "the incident began when police officers responded to a domestic violence call at the Valerio's home, when he was arguing with his parents about smoking pot").

n154 See Williams, supra note 140.

n155 Id.

n156 Id.

However at the time of the shooting, Julio was not "on the move" but was cornered by ten police officers. All the officers involved in the shooting noted that the area where they had cornered Julio had good lighting. See, e.g., Phoenix Police Report, Interview with Officer Chad Goulding #5743, supra note 2.

n157 Jerry Kammer et al., Knife-Wielding Boy was Riddled With Bullets; Family Critical of Police in Teen's Death, supra note 144.

n158 Id.

This transformation was evident in the defense attorneys for the police in the Rodney King case. The video of a man being brutally beaten repeatedly was used as evidence that Rodney King's black body was itself the source of danger and the threat of violence. See Butler, supra note 8, at 15. While lacking the evidence of a video, in this case, internal investigations of police violence conclude with similar arguments: the body was itself a source of danger or threat of violence justifying the use of excessive and sometimes lethal force.

n159 Id.

n160 See id.; Williams, supra note 140.

n161 Phoenix Police Report, Interview with Officer Scott Burgess #5757, Officer Robert Pitts #5707, Officer Robert Corueil, supra note 2.

n162 See Jim Walsh, No Evidence of Pepper Spray Found on Teen's Body; Police Chief Suggests Wind Blew it Away, supra note 142.

n163 Id.

n164 Id. See also Thompson, supra note 128, at 986 (discussing categorization, schemas, and stereotyping in the context of quick evaluations and judgments in police work).


n166 This transformation was evident in the defense attorneys for the police in the Rodney King case. The video of a man being brutally beaten repeatedly was used as evidence that Rodney King's black body was itself the source of danger and the threat of violence. See Butler, supra note 8, at 15. While lacking the evidence of a video, in this case, internal investigations of police violence conclude with similar arguments: the body was itself a source of danger or threat of violence justifying the use of excessive and sometimes lethal force.


n168 This is a typically respond by police and city officials. See Russell, supra note 16.

n169 See Jerry Kammer et al., 200 Marchers Protest Teen's Killing; Police Face FBI Probe in Death From Gunfire, supra note 138.

n170 See id.

n171 See id.


See Jerry Kammer et al., 200 Marchers Protest Teen's Killing; Police Face FBI Probe in Death From Gunfire, supra note 138.

See Jim Walsh, Police Feel 'Vilified,' Lash Back; Teen's Death Sparks Call for More Training, supra note 174.

Id.

See Jerry Kammer et al., Knife-Wielding Boy was Riddled With Bullets; Family Critical of Police in Teen's Death, supra note 144.

Id.

Williams, supra note 140.

Jerry Kammer, Artist, Loner, Troubled Kid: Life of Conflicts Cut Short, supra note 172.

See Jerry Kammer et al., Knife-Wielding Boy was Riddled With Bullets; Family Critical of Police in Teen's Death, supra note 144.


See Phoenix Police Report, supra note 2.


Tactical Review Task Force Report, supra note 191; see also Jerry Kammer et al., Knife-Wielding Boy was Riddled With Bullets; Family Critical of Police in Teen's Death, supra note 144. Prior to the shooting, police already used a beanbag round that is fired from a shotgun to stun, but not kill, a suspect during a confrontation. "Although at least one officer in each patrol squad was supposed to be equipped with a beanbag gun, no officer[] certified with the weapon was available at the Valerio incident." Id. Early on, police chief Garrett stated, "I think the deployment of the beanbag would have made a difference in this incident. . . . I think the beanbag round is an important tool we need to expand." Id. The entire focus of the Valerio case has been on the purchase of new equipment for the police department - bean bag shotguns. After all the meetings and reports the end result thus far has been to equip police with non-lethal weapons. In the end, $ 250,000 was issued for new equipment to order 639 shotguns that fire a non-lethal cloth sack filled with...

n193 Jerry Kammer et al., Knife-Wielding Boy was Riddled With Bullets; Family Critical of Police in Teen's Death, supra note 144.

n194 See generally Phoenix Police Report, supra note 2.


n196 See Phoenix Police Report, Interview with Lorenzo Mendoza-Salazar and Pauline Valerio, supra note 2.

n197 See Phoenix Police Report, Attachment 1 Phoenix Police 911 Call, supra note 2.

n198 See Phoenix Police Report, Interview with Lorenzo Mendoza-Salazar and Pauline Valerio, supra note 2.

n199 See Mark Shaffer, Bilingual Officers at a Premium, Ariz. Republic, Oct. 23, 1997, at B1 (reporting that "out of 2,606 Phoenix police officers, only 7 percent speak Spanish. . . [an estimated 250,000 Mexican natives live in the metropolitan area] . . . earlier this year, a department review committee investigating the shooting death of Phoenix teenager Julio Valerio ordered the double the number of bilingual officers hit the streets within two years").

n200 Phoenix Police Report, Interview with Officer Robert Pitts #5707, supra note 2.

n201 Phoenix Police Report, Interview with Officer Armando Saldate #5718, supra note 2.

n202 See generally Phoenix Police Report, Interview with Officer Chad Goulding #5743, supra note 2, at 5, line 36 (stating that "I couldn't tell if he was speaking Spanish or English").

n203 See Phoenix Police Report, Interview with Officer Armando Saldate #5718, supra note 2.

n204 See Phoenix Police Report, Attachment 1 Phoenix Police 911 Call, supra note 2.


n207 See id.

n208 See Armando Morales, supra note 81. Armando Morales states in his study, Congress Roybal urged President Nixon to demand FBI Director J. Edgar Hoover's resignation over racist statements made in the December 14, 1980 issue of Time where he said 'You never have to bother about a President being shot by Puerto Ricans or Mexicans. They don't shoot very straight. But if they come at you with a knife, beware.'

Id. at 44. The opinion of police officers seemed to be unanimous that the Mexicans' chief offense was carrying concealed weapons, especially knives.

n209 See Williams, supra note 140.

n210 See Jerry Kammer et al., Knife-Wielding Boy was Riddled With Bullets; Family Critical of Police in Teen's Death, supra note 144 (reporting that:

Paulina Valerio complained that after police responded to her emergency call, they would not let her accompany them onto the streets to calm her son. . . . 'They detained us here, like prisoners in our house,' she said. 'I asked them to please let me go to see my son, so I could calm him down. That is why I called them. . . . Then I heard the shots, and I screamed').

n211 See id. This was also a theme in several of the interviews with police officers in the Phoenix Police Report. See Phoenix Police Report, Interview with Officer Robert Coruel #5655, supra note 2

n212 See Phoenix Police Report, Interview with Officer Ronald Warner #5756, supra note 2.
Had Julio Valerio lived to be arrested, he likely would have been charged with possession of a deadly weapon. The range of objects that may be defined as deadly weapons by the police appears to be highly subjective and circumstances that become racialized are more likely to be characterized as life threatening. See Pearl Stewardt, Black and Blue: The Oakland Cop Who Would be King, in Inside the L.A. Riots, 58, 60 (Don Hazen ed. 1992).

The new paradigm of policing must be based on the principle that police are first and foremost servants of the people. Their job is to function at the behest of and in partnership with communities to carry out a special mandate to maintain peace and security consistent with the Constitution.

"Marta Ruiz, wife of the manager of the Grande Vista Apartments nearby, says she can account for one of the missed rounds. She said a bullet pierced the window of the bedroom where her 3-year-old son lay sleeping").
work. Such a shooting can expose a police agency to great civil liability”).
INTRODUCTION

Sam saw Timothy, turned, and ran. Timothy saw Sam run, followed, and caught him. Timothy frisked Sam and found a gun. Sam went to a suppression hearing, a trial, a sentencing hearing, and finally jail. n1

The events above began shortly after noon on September 9, 1995, at 4035 West Van Buren Street, Chicago, Illinois. Sam is Sam Wardlow, a 44-year-old African-American man and previously convicted felon. Timothy is Officer Timothy Nolan, a white member of the Chicago Police Department. The reading primer-simple actions of these two dramatis personae have been described and argued in four forums and for as many years since they occurred. These events culminated in a final performance in the grandest judicial venue this country has to offer: the United States Supreme Court. Before the performance, legal dramaturgists and critics from all over the country submitted thirteen reviews through briefs of amicus curiae to help instruct the nine-person audience. While many of the reviews focused on the plot of the case, there was a great deal of rhetoric concerning the setting. Only two, however, discussed the racial and cultural identities of the principal characters.

It is the discussion of setting and identity that concerns this present paper. Officer Nolan and the Illinois District Attorney's office argued that the events occurred in a "high-crime area." n2 This fact, combined with the flight of Mr. Wardlow, they say, justified the officer in stopping the suspect. n3 They frame this argument pursuant to the guidelines established in Terry v. Ohio, n4 stating that location plus evasion gave an officer articulable reasonable suspicion to believe that criminal activity was afoot. n5 The trial court ruled in favor of the state. Sam was sentenced to two years on the charge of possession of a handgun by a felon. n6 The Appellate Court of Illinois reversed the conviction on limited grounds, n7 and this decision was affirmed by the Illinois Supreme Court. n8

The first part of this paper sets the framework for the Fourth Amendment analysis. In order to understand the concepts argued and decided in Wardlow, it is first necessary to understand the underlying legal precedent. This section will trace the history of "stop and frisk" jurisprudence, highlighting cases that have focused on location and evasion analysis.

The second section argues against the reasoning of the State of Illinois, its amici, and all the reviewing courts, as all believe, either explicitly or implicitly, that the issue of location should be meaningful in determining articulable reasonable suspicion under Terry. The issue of location should be eliminated from Terry analysis for three reasons. First, the statistical "objective" data relied on to determine a high-crime area, while possibly an effective tool for safe, efficient police work, is too ripe for racially discriminatory abuses in the courtroom. Second, the subjective bias of police officers perpetuates the discriminatory impact. Third, the use of location in this area will heighten the animosity between inner-city police forces and the racial minorities within their districts.

The final section will focus on the aspect of flight. The use of flight in Terry analysis, while difficult to eliminate from consideration, has problems in the light of racially biased policing in high-crime areas. I will discuss whether or not, for minority populations, there can be such a thing as unprovoked flight. I will also argue that the concept of flight pursuit cuts against one of the foundations of Terry. As Justice Stevens pointed out in his dissent, flight is less indicative of wrongdoing in a high crime area.

I. Terry to Wardlow

The primary issue in Wardlow is one of suppression -- that is, whether the gun found on Sam Wardlow by Officer Nolan was properly admitted into evidence during the bench trial, or if it should have been excluded because it violated the Fourth Amendment's protection from unreasonable searches and seizures. The gun constituted the entirety of the physical evidence presented at the trial, and both the prosecution and the defendant stipulated to the facts of
the case as described by Officer Nolan. If the gun was admitted properly, Sam's conviction should stand; if the gun was unreasonably obtained, the conviction should be vacated. [*1121] Due to the factual stipulation, the appellate court and all subsequent courts reviewed the issue de novo. n9

During Wardlow's appeal, the prosecution argued that the subject's flight and location in a high-crime area were satisfactorily specific facts that justified pursuit, detention and frisk of Sam and his effects. n10 The appellate court disagreed and limited the holding to the issue of flight. n11 The court found no support in the record that Sam was located in a high-crime area at the time of his flight. n12 Therefore, the court relied on Illinois precedent, holding that flight alone is insufficient to justify a Terry stop. n13 The appellate court stated in dicta that if the area of arrest could be proven to be a high-crime area, a stop might have been justified. n14 Thus, the appellate court recognized the legal significance that a high-crime area could have on a determination of articulable reasonable suspicion. However, the court was unable to determine if the area of 4035 West Van Buren fell into that category.

Both courts analyzed the stop under the Terry stop rubric of the Fourth Amendment. The Supreme Court of Illinois did not perceive the same confusion over high-crime areas as the lower court. The court ruled that flight alone in a high-crime area does not justify an investigatory detention and affirmed and expanded the limited holding of the court of appeals. n15

In 1968, the United States Supreme Court announced its decision in Terry v. Ohio. n16 With Terry the Court performed a retreat on traditional Fourth Amendment search and seizure law. By placing the government interest in crime prevention and the private interest to be free from intrusion on the balance, the Warren Court gave the stamp of reasonableness to certain seizures made with suspicion that did not rise to the level of probable cause to arrest. n17 Technically, the decision in Terry represents nothing more than an additional exception to the warrant requirement of the Fourth Amendment. But Terry casts the warrant requirement in a new light. As Justice Douglas points out in his dissent, the ruling in Terry allows a police officer on the street to perform an act that a judge or magistrate could not authorize, as all warrants must issue from probable cause. n18 [*1122]

The defense in Terry sought to exclude from evidence a gun found on the defendant because it was found and seized in violation of the Fourth Amendment reasonableness clause. n19 Detective McFadden of the Cleveland Police Department discovered the gun on Terry in a search of his person. n20 McFadden suspected Terry and two associates of casing a store in preparation for an armed hold-up. n21 McFadden based this suspicion on a lengthy observation of Terry and his associates. n22 McFadden watched as Terry and another man walked back and forth in front of a store window a dozen times. n23 As Terry left the scene, McFadden stopped the two men and patted down the outside of their garments. n24 McFadden found a pistol in Terry's breast pocket. n25 After classifying the stop as investigatory, the trial court convicted Terry of carrying a concealed weapon. n26 The Court of Appeals affirmed and the Supreme Court of Ohio dismissed Terry's appeal. n27

The prosecution in Terry argued that the requirement of probable cause was too rigid for police to respond adequately to the dangers posed on the urban streets. n28 As a result, state legislatures began enacting statutes that authorized police stop and frisk procedures on grounds less than probable cause. n29 Terry has been described as a judicial response to the increased violence of the inner cities and the pressing public demand for increased law and order. n30 The response by the Court created a reduced standard of suspicion for on-street detentions and a greater deference to the decisions of the beat cop.

The balancing test in Terry originated from the 1967 administrative search case, Camara v. Municipal Court. n31 Camara concerned the inspection of a residence by a municipal health agency without a warrant. n32 The Court found the administrative search unconstitutional, but in so doing defined the Fourth Amendment concept of reasonableness. n33 Without citation, Justice White wrote that determining reasonableness requires a squaring of the need to search with the burden of invasion upon the subject [*1123] of the search. n34 One year later the Terry Court applied this test to determine the reasonableness of a warrantless seizure.

To strike the balance between the two interests, Terry applied an objective standard by which police officers could perform limited searches based on reduced suspicion. n35 This objective standard has come to be known as reasonable articulable suspicion.

Reasonable articulable suspicion as stated in Terry is a guide for police officers and courts to determine what constitutes a reasonable stop and frisk under the Fourth Amendment. To prove that the stop and frisk was reasonably warranted, the detaining officer must be able to point to articulable facts and their rational inferences. n36 In deciding whether to admit or suppress the fruit of Terry stops, trial judges must ask, "would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" n37
While the standard of reasonable articulable suspicion is more flexible than the arrest standard of probable cause, it is limited. The standard is not the functional equivalent of a gumshoe's hunch. Moreover, unlike other warrant exceptions, an officer's good faith is insufficient to keep evidence from being suppressed absent reasonable articulable suspicion. n38 Since Terry, the Court has found occasion to decide cases where factors supporting stop and frisks did not rise to the level of reasonable articulable suspicion. n44

Brown v. Texas n40 involved the stop and search of a man in an area of El Paso, Texas, with a high incidence of drug trafficking. n41 However, the arresting officers could not point to any specific facts that led them to believe criminal conduct was taking place. n42 The officers merely stated that the defendant was in a high-crime area and "looked suspicious." n43 The Court found that mere presence in a high-crime area, without more, does not justify a finding of articulable reasonable suspicion. n44

Following Terry, courts applied the reasonable articulable suspicion standard to the search and seizure cases before them. However, it was another thirteen years before the U.S. Supreme Court provided guidelines [*1124] to determine the presence of the objective standard. While Terry and its progeny defined reasonable articulable suspicion, the definition proved elusive without a practical test for determining which facts were articulable enough to be considered in Terry cases. n45

In United States v. Cortez, the Court finally articulated the test for determining reasonable articulable suspicion: totality of the circumstances. n46 That is, under this test, all facts at the officer's disposal at the time of the detention are taken into consideration. n47

The defendants in Cortez were found guilty of six counts of transporting illegal aliens. n48 Border Patrol Officers in Arizona stopped the defendants' van based on a two-month investigation of border crossings, which began with analysis of footprints in the sand. n49

Cortez opens the door to all information an officer can marshal to support the basis of his suspicion. The facts supporting the suspicion can be purely benign or extrinsic to the particular suspect. n50 The Court refrains from viewing the facts as a detached scholar, but rather from the perspective of law enforcement professionals. The Court believes that certain factors, seemingly innocuous to the layperson, give rise to a reasonable suspicion to the trained eye and mind of a professional police officer. Cortez recognizes and accepts that the Terry standard allows for probabilities and rarely relies on hard certainties. n51 Based on Cortez, courts must analyze Terry decisions on a case-by-case basis without a bright line rule. n60

Doctrinally, Illinois v. Wardlow is not earth shattering. Both parties to the controversy besought the Court to establish one per se rule or another and the Court unanimously refused both requests. n52 The Court neither expanded nor contracted the scope of the totality of the circumstances test. It weighed all factors as stated by officer Nolan against Mr. Wardlow's private interest, and in a 5-4 decision, ruled in favor of Officer Nolan's actions. n53 The factors of location and evasion were found to equal reasonable articulable suspicion. n54

One basis for the majority's decision was Officer Nolan's characterization of the area in which Wardlow was stopped. Taking its cue from the Illinois Supreme Court, the U.S. Supreme Court concluded that the area of 435 West Van Buren represented a high-crime area. n55 As [*1125] discussed above, location alone does not rise to the level of reasonable articulable suspicion. n56 However, the Court recognized in Adams v. Williams that an individual's presence in an area known for a high incidence of crime can be a factor in determining the validity of a Terry stop. n57 The character of the area in Adams played a factor in determining the propriety of the search and not the initial stop. n58 In Wardlow, the reasonableness of the stop was the sole issue; the Court did not reach the validity of the search. n59 Nevertheless, the nature of a given area has been used to determine the objective standard for a stop.

A. High-crime Areas

The legal recognition of a high-crime area for the purpose of Terry stops is significant. If articulable reasonable suspicion can be seen as a group of specific factors that lower one's expectation of privacy and diminish the personal freedom from police intrusion, then the expectation of privacy is automatically a notch lower for residents of high-crime areas. This is true even if mere presence alone doesn't justify a detention. n61 The high-crime area label should be stricken from the totality of the circumstances analysis in Terry decisions as not cognizable in a legitimate manner. It is open to racial manipulation by the officers who utilize it and injurious to the communities which receive the label.

B. Who Lives In A High-crime Area?

"If an honest citizen resides in a neighborhood heavily populated by criminals, just as the chances are high that he might be one, so too are the chances high that he might be mistaken for one." n62 In their Brief of Amicus Curiae in support of the State of Illinois to the U.S. Supreme Court, a caucus of law enforcement...
organizations attempts to explain what constitutes a high-crime area for law enforcement purposes, and the method by which a location receives such a distinction. n63 The organizations point to numerous bits of data that when compiled allow the enforcement agencies to pin point geographical areas that have tendencies towards certain types of criminal activity. n64 This datum includes arrest [*1126] statistics, citizen complaints, officer observations and numbers of crimes committed. n65 The brief goes on to show how these quantitative and qualitative factors have been demonstrably useful to law enforcement agencies around the country in their efforts to curb crime. n66 Also included are statistical reports of crimes committed in Chicago, broken down by police district. n67 The brief concludes that the 11th District of Chicago, the District having the thirteenth highest crime rate in the city, is a highcrime area. n68

The NAPO brief seems to state that this is an obvious conclusion. The assumption is where a geographical location has a worse crime rate (even marginally) than half of the other districts in a given locale, it is a highcrime area.

Difficulty in labeling high-crime areas poses a legitimate problem to accepting the designation as a specific factor. However, even if it were possible to objectively determine the criteria in a neutral manner, it would not necessarily mean that the criteria would produce a race-neutral result. In many situations of racial jurisprudence, objectively neutral standards have been seen to produce a racially disadvantaging result. n69 The purported objective standard of location is nevertheless open to racial discrimination due to the current inability of defendants to raise claims of disparate racial impact, and the practical impossibility of demonstrating the disparate impact of Terry stops.

In her article, Race and the Fourth Amendment, Tracy Maclin discusses the pervasive reluctance of courts to entertain arguments of disparate racial impact in terms of the Fourth Amendment. n70 Professor Maclin—who also authored the ACLU's Brief of Amicus Curiae in support of Sam Wardlow—focuses her attention on the impact of racial profiling in traffic stops and automobile searches. n71 She shows that for years highway patrols have disproportionately targeted minority drivers for pretextual traffic stops in an effort to curb drug trafficking on the eastern seaboard. n72 Judges have traditionally disfavored deciding Fourth [*1127] Amendment issues on grounds of racially based police motives due to a perceived lack of the relevance to race in the overall standard of reasonableness. n73

Some might argue that this court practice is justifiable. The argument might suggest that criminal cases are solipsistic in nature, focusing on the individual and that the alleged crime statistics only demonstrate aggregate probabilities. In this sense, whether or not a law enforcement agency typically discriminates against minorities is immaterial as to whether or not the specific defendant looked reasonably suspicious to the individual officer. The only time evidence should be suppressed is upon a clear showing of racial discrimination on the part of the specific officer. However, this argument fails when considering the relevance of the high-crime area label. If the Court allows evidence or factors not specific to a defendant, like presence in a high-crime area, they depart from only looking at the individual and his crime, and look instead to the probable suggestions from his environment or surroundings. Under this view, officers may use the character of the suspect's environment to justify a stop, but the suspect cannot use the character of the officer's environment to refute the justification.

In other words, "the Court's Fourth Amendment logic should not be unidirectional." n74

C. Intelligent Bayesians in Blue

Anticipating possible race based arguments, the NAPO brief offered a conjunctive solution to the racial problems of high-crime designation. The NAPO contends that through strict statistical analysis and officer experience with the day-to-day workings of the area, the alleged racial injustices will be laid asunder. n75 The first provision of the conjunction was discussed above. This section argues that relying on officers to determine what neighborhoods are highcrime areas allows geographic locations to be labeled highcrime due to the racial makeup of the population.

In Negrophobia and Reasonable Racism, Jody Armour describes various manifestations of post civil rights racism. One of these manifestations Armour calls the Intelligent Bayesian. n76 According to Armour, the Bayesian justifies his racist viewpoints based on statistical data and economic decision-making. n77 The Bayesian argues that his race-based stereotypes are merely substitutes for other factors that statistically coincide with race. n78 The only reason race is utilized by the Bayesian is because it is [*1128] easier to ascertain someone's race than education, income or social status. n79 The Bayesian contends that his world assessments are reasonable because they are statistically justified. n80 Under this view, race need not be the factor that the stereotype rests on; instead, it could be any of the factors that are most readily determinable. Armour suggests that if a Bayesian is cognizant of the correlation between poverty and crime, he will be more on guard in locations that demonstrate lower economic health, and race becomes a non-issue. n81 While Armour goes on to refute this
argument in ways that will be addressed in section D, it becomes necessary to analyze whether or not race can become a non-issue in the question of high-crime areas.

Richard Delgado examines how American society has fabricated stereotypes about crime. n82 Delgado argues that the white majority has assigned and reinforced the stereotype that blacks, especially young men, are inexorably linked to violent and interpersonal property crimes, to justify exertion of control over the group. n83 While Delgado's reasoning is novel, the concept of "black crime" is not. Delgado effectively points out that the equation of blacks and crime is as pervasive in American culture as teenagers and consumerism. n84 Even the NAPO brief recognizes the high correlation between crime and minority groups stating, "many high-crime areas are in or near urban neighborhoods with large racial or ethnic minority populations." n85 The NAPO brief does not refer to the correlation between poverty and crime. Even if a Bayesian does factor economic status into the assessment of high-crime areas, it is not likely that economic determinations will displace racial stereotypes, due to the pervasive social recognition and acceptance of the latter.

The NAPO brief contended that police officers relying on their heightened training and ability to evaluate situations are better trained than the general public to ascertain the likelihood of crime in the urban arena. n86 This might suggest while Bayesians might exist in the civilian members of a community, the training of law enforcement officers effectively diminishes the likelihood that they exist among those who serve and protect our cities. Police work is a demanding and dangerous occupation. Our law enforcement officers are required to make instantaneous decisions with dire consequences attached to their actions, especially in cases involving flight of a potentially dangerous person like the case of Mr. Wardlow. If the Intelligent Bayesian argument makes any [ *1129 ] sense at all, it does so in its ability to streamline the decision making process. Therefore, the public should expect a greater representation of Bayesians within communities called on to make such rash and important decisions. Moreover, as the police have greater access to the demographic and criminal statistics involved in the creation of the Bayesian's argument, the justification for the racist inclination is substantial.

If the above argument is true, it is difficult to fault our police forces for such a prevalent problem in our society when the very nature of the job increases their susceptibility to fall victim to racist tendencies. We should not, however, legitimate these practices by giving these rash and possibly discriminatory decisions the power of law. Therefore, when the case moves from the street to the relative serenity of the courtroom, our legal system should attempt to counteract the discriminatory and injurious harshness of the urban landscape. This can only be accomplished through a refusal to recognize arbitrary and racially laden distinctions like high-crime areas.

D. What's at Stake?

Fuck tha police, comin' straight from the Undergroun'

A young nigga’ got it bad 'cause I'm brown. n87

The previous two sections have focused on the use and application of high-crime areas with regard to parties in the criminal justice system. Now it is time to look at how high-crime distinctions impact the communities themselves, especially the law-abiding members of those communities. This section discusses how high the cost of perceived arbitrary law enforcement actually is on minority communities. The high-crime area designation will further compound these perceptions and costs. The costs and their exacerbation are so injurious as to render the high-crime label inherently unreasonable.

The writings by the authors in this field have polarized on the axis of how much of the nation's resources should be spent curbing crime in neighborhoods that intersect a high crime rate with a high population of racial minorities. "Law and Order Cheerleaders" n88 like Randall Kennedy espouse the view that minority communities actually benefit from heightened police scrutiny because minorities are the usual victims of minority crime. n89 On the opposite end, Critical Race theorists argue that efforts by law enforcement agencies that target minority communities stigmatize those communities and generate a cultural resentment towards the officers and the courts. n90 This stigmatism is so prevalent, it has caused scholar Paul Butler to call for rational subversions of the criminal justice system. n91

In Wardlow, these two viewpoints found their way into competing briefs of Amicus Curiae. Predictably, the already oft-cited NAPO brief embraces the Cheerleader argument, while the brief authored by the NAACP views law enforcement efforts in a more skeptical light. The NAPO brief basically takes its argument from the views of Randall Kennedy, and states that minorities express a greater concern about crime and are more commonly victims of crimes than whites. n92 Therefore, since minorities are concerned about crime and are victimized by crime, it is logical (though unstated in the brief) that minority communities generally favor police cracking down on crime in their neighborhoods. This argument is obtusely paternalistic. The NAPO fails to establish a
causal link between their statistical research and the solution they support. As discussed below, practices of law enforcement that are based on indicators external to the criminal actors themselves, actually adversely affect a minority community's relationship with the criminal justice system, and fosters a lionization of the criminals.

Regina Austin terms this phenomenon the politics of identification. n93 Austin points out that black communities regard the behavior of its members in terms of racial progress. n94 Austin admits that members of the black community recognize that crime stigmatizes the community and impedes upon the social progress of the race. n95 However, the community also realizes that the criminal aspects are within the community and tend to equate criminal behavior with race resistance. n96

The basis of a high-crime area merely perpetuates this lionization. The identification of criminals in the black community, and their equation with race resistance, stems from a group recognition that the majority society has unfairly used indicators beyond community control, like race, to identify certain behavioral patterns within the community. This stigmatization is arbitrary, and therefore the community members lose faith in the societal agents that appear to perpetuate the stigma, namely the police. n97 The Eazy E quote that heads this section is a manifestation of that loss of faith. Just as race is beyond a person's control, so too is a person's residence in a high-crime community. Due to the politics of past and present racism, minority members are often forced to live in povertystricken, crime-riddled communities, and this segregation continues despite race-neutral policies. n98 Therefore, the high-crime area designation as a basis for increased legal justification of police, and diminished expectations of privacy for residents, only perpetuate this distrust and the politics of identification.

While the loss of trust in governmental agencies represents an intrinsic evil to society, Professor Armour shows that the effects can go beyond the community's perception of state actors and infect the very political structure of the community itself. Armour describes the "chilling effect" the stigmatization of high crime has on group participation in community affairs. n99 Law abiding blacks who fear being identified as criminal tend to avoid public places, and when they do venture out, the self expression necessary to be an active member of society is stifled, lest they appear threatening. n100 Therefore, the label of high-crime area can have a multitude of adverse impacts upon large minority populations.

The racially disadvantageous effects described are merely risks associated with the high-crime label. However, risks can render probabilistic data—even data that appears to be rational-unreasonable. n101 This final argument goes to the heart of the issue in Wardlow, because reasonableness is the foundation for all Fourth Amendment analysis that does not involve a warrant, including Terry stops.

Armour illustrates how a rational probability can be unreasonable, depending on the risk associated with the probability. He does so with a hypothetical scenario concerning his "temperamental Rottweiler." n102 If he chains the pooch up in the yard three hours before he goes to bed, and his wife asks at bedtime if the dog is restrained, his affirmative response is both rational and reasonable. n103 Even if the dog has gotten off the leash in the yard the intervening time, the only consequence of him not checking is minor property damage to the patio furniture. n104 However, if the same situation exists not at bedtime, but just prior to a one-year-old child entering the back yard, the rational response that the dog is chained becomes unreasonable due to the risk of severe injury to the child. n105

This example illustrates how high-crime is a delineation can at once be a rational manifestation of statistical probabilities on its own, and when combined with the risk of unequal racial application, it can be an unreasonable factor in predicting crime or threat.

II. Flight

The decision in Wardlow has two aspects, location and evasion. The Court states that Sam was legally stopped because he was both in a high-crime area and fled unprovoked upon seeing the cops. n106 While this paper has primarily focused on high-crime areas, it was the flight aspect of the case that gathered headlines across the country. Therefore, negligence follows the omission of the subject from a discussion of this case.

As argued above, the concept of a high-crime area should not be considered a circumstance in the totality of the circumstances of Terry analysis. This argument is more difficult to make with regard to evasion. Unlike high-crime area, fleeing police presence is a conscious action by the person who flees. The behavior is specific to the person who undertakes it, and is reflective of an internal intention, however benign the intention might be. The idea that police officers and courts reviewing arrests should consider flight appeals to our commonsense. The Court unanimously held that a person's "unprovoked flight" can be a factor in reasonable articulable suspicion. n107 This section shows the problems that the flight factor creates.
The Court repeatedly categorized Mr. Wardlow's flight as unprovoked, without citing a distinction between provoked and unprovoked flight. The Court's analysis suggests that Officer Nolan did nothing to cause Mr. Wardlow to run, and if Officer Nolan had pulled a gun and began firing it into the air, Mr. Wardlow's flight would have been provoked. This interpretation follows the logic of courts who look only at cases in terms of the actions of the specific defendant and the specific police officer discussed in Section Two, supra. If, however, courts cast a broader view on the term "unprovoked" and incorporate matters such as biased policing and the relationship between minority citizens and the police, it is difficult to conceive of an unprovoked flight from a police officer by a minority resident of inner-city America.

A. Statistics from the Inner City

On December 22, 1994, Officer Francis Livotti choked Anthony Baez to death. On August 9, 1997 five officers from New York City Police Department's (NYPD) 70th Precinct raped and tortured Abner Louima with a broom-handle in the precinct bathroom. Each incident involved violence against a person of color by white members of the NYPD. These incidences brought anger and protest from the minority communities of New York City. They also brought about an investigation into the practices of the NYPD by the New York Office of the Attorney General (OAG).

On March 18, 1999, OAG began investigating the practices of the NYPD, and specifically focused their efforts on "stop and frisk" practices. The report looked at 175,000 forms filled out by police officers whenever a "stop and frisk" was performed for a 15 month period in 1998 and 1999. OAG then utilized statistical analysis and regressions to determine the role of race on the practice of "stop and frisks" within the city. While probably coming as little surprise to the minority populations of New York City, the report categorically concluded, "minorities--and blacks in particular--were 'stopped' at a higher rate than whites relative to their respective percentages within the population." In New York City, blacks comprise 25.6% of the population, yet approximately half of all the stops were performed on black residents.

In New York City, blacks were more than twice as likely to be stopped on suspicion of committing a violent crime and carrying a weapon than whites, and were stopped a staggering 62.7% of the time by the NYPD's Street Crime Unit--the same unit that shot 41 bullets at Amadou Diallo. However, even though the minority populations of New York were subject to greater numbers of stops, the stops were less likely to lead to a finding of probable cause to arrest than the stops of whites.

On March 18, 1999, OAG began investigating the practices of the NYPD, and specifically focused their efforts on "stop and frisk" practices. The report showed that in precincts of predominately minority populations, the police performed a greater number of stops. In precincts with a majority of white residents, the disparity between minority make-up of the community and the stop rates for minorities is even greater. The nine precincts with the greatest numbers of stops per capita were composed of populations in which whites were the minority. In precincts where whites constituted a majority and blacks and Hispanics comprised less than 10% of the total population, blacks and Hispanics constituted 53.4% of people who were stopped. This shows that minorities who lived in predominantly minority neighborhoods faced stops occurring more frequently than whites in their neighborhood, while minorities living in predominately white areas were stopped at a rate two to three times greater than their representation in the community.

Though the results of the report are drastic, they do not account for underreporting by police units of the number of people stopped and searched. Nevertheless, the report confirmed the suspicions and emotions of many within the minority communities of New York. The report, while only concerning the Metropolitan area of Gotham City, lends credence to the strong criticisms of police/minority relationships throughout America.
unprovoked. Instead, it was a justifiable response to an unjust system.

Conclusion

The case of Sam Wardlow illustrates the difficulties our country faces in maintaining the effective enforcement of our criminal laws. The criminal system as a whole needs to broaden its perspective; if we are to cure the systems racial ills, criminal courts must look beyond the caption of the case. The case of Sam Wardlow has greater significance than its primer-simple facts suggest. Wardlow is not about one man running from another. It is about the neighborhoods where we live, and the toll crime has taken on them. It is about how we make decisions, and how we ask police officers to perform some of the most difficult tasks our nation requires. Our criminal courts must begin to take into account the practices of police officers and the effects those practices have on our communities and our very idea of criminality.

FOOTNOTE-1:

n1 People v. Wardlow, 701 N.E.2d 484, 485 (Ill. 1998).
n3 See id.
n4 392 U.S. 1 (1968).
n5 Petitioner's Brief, supra note 2, at 17.
n6 Wardlow, 701 N.E.2d at 484.
n7 Id.
n8 Id. at 489.
n9 Id. at 485.
n10 Petitioner's Brief, supra note 2, at 19.
n12 Id. at 67-68.
n13 Id. at 68.
n14 Id.
n15 Wardlow, 701 N.E.2d at 488-89.
n16 392 U.S. 1 (1968).
n17 See id. at 22.
n18 Id. at 38 (Douglas, J., dissenting).
n19 See id. at 5.
n20 Id. at 7.
n21 Id. at 6.
n22 Terry, 392 U.S. at 6.
n23 Id.
n24 Id.
n25 Id. at 7.
n26 Id. at 4.
n27 Id. at 8.
n28 Terry, 392 U.S. at 10.
n32 Id. at 525-26.
n33 Id. at 536-37.
n34 Id. at 534-35.
n35 Terry, 392 U.S. at 27.
n36 Id.
n37 Id. at 21-22.
n38 Id. at 22.
n41 Id. at 47.
n42 Id.
n43 Id. at 52.
n44 Id.
n46 Id. at 417-18.
n47 Id.

n48 Id. at 416.
n49 Id. at 413.
n50 Id. at 418.
n51 Cortez, 449 U.S. at 418.
n53 See id.
n54 Id. at 124.
n55 Id. at 124.
n58 See id.
n59 Wardlow, 528 U.S. at 124 n.2.
n61 Brown, 443 U.S. at 52.
n64 Id.
n65 Id.
n66 Id. at 21-26.
n67 Id. at app. at 1.
n68 Id. at 19.

n71 Id. at 340-41.
n72 See id. at 350 (showing that on a highway where minorities composed 24.3% of the drivers committing traffic violations, they were subjected to 72.9% of the total traffic stops and auto searches).

n73 See id. at 338.
n74 Id. at 374.
n75 NAPO Brief, supra note 63, at 27.
n77 See id. at 36.
n78 See id.
n79 See id.
n80 See id.
n81 See id. at 45.
n83 Id. at 511.
n84 See generally id.
n85 NAPO Brief, supra note 63, at 23.
n86 Id. at 16.
n87 N.W.A., Fuck Tha Police, on Straight Out of Compton (Priority Records 1988).
n90 See Jody David Armour, Bring the Noise, 40 B.C. L. Rev. 733, 735 (1999) (while touring a prison Armour comments on the "deep sense of connectedness and sympathy that law-abiding blacks feel toward their wayward sons and daughters, brothers and sisters, fathers and mothers, friends and cousins, as well as toward blacks they don't know personally but with whom they share a common plight in a racially oppressive society."); Paul Butler, (Color) Blind Faith: The Tragedy of Race, Crime, and the Law, 111 Harv. L. Rev. 1270, 1280 (1998) (stating that "[the effect of increased law enforcement] is severe. It contributes to the growing legal disenfranchisement of African-Americans, to the poverty of children, and to the breakup of the family.").

n92 NAPO Brief, supra note 63, at 23.


n94 Id. at 1772.

n95 Id. at 1773.

n96 Id. at 1774.

n97 See Brief of Amicus Curiae National Association for the Advancement of Colored People Legal Defense & Educational Fund at 16 [hereinafter NAACP Brief], Illinois v. Wardlow, 528 U.S. 119 (2000) (98-1036) ("Many black Americans are disaffected and suspicious. They are not confident that the police will be fair.").


n99 See Armour, supra note 76, at 52.

n100 See id.

n101 See id. at 50.

n102 Id. at 48.

n103 See id.

n104 See id.

n105 See id. at 48-9.

n106 Wardlow, 528 U.S. at 124.

n107 Id.

n108 See id.

n109 See Greg Wilson, Choke Victim is Honored, City Renames Bronx Street in Memory of Anthony Baez, N.Y. Daily News, July 31, 2000, at 1.


n112 See id.


n114 Id. at 1.


n116 See id.at 2-3.

n117 Id. at 3.

n118 Id.

n119 Id. at 3.

n120 See Alice McQuillan, Patrol Units Big on Gun Arrest, N.Y. Daily News, February 5, 1999, at 5.

n121 See Executive Summary, supra note 115, at 4.

n122 See id.

n123 See id. at 8.

n124 See id. at 3-4.

n125 See id at 3.

n126 Id at 3.

n127 See Richard Perez-Pena, Police May Have Understated Street Searches, Spitzer Says, N.Y. Times, March 23, 1999, at B4 (stating that the Attorney General himself suggested that more stops took place than reported by police).


n129 See, e.g., NAACP Brief, supra note 97, at 16.

n130 See id..
If knowledge is only and always partial, how can we develop social movements based on theories and praxes for seeking justice? Consistent with LatCrit tradition, the articles in this cluster raise this question about partiality. Specifically, the authors apply various critical tools to examine both our study of poverty and our policy discourse regarding anti-poverty programs. They especially criticize one primary analysis of poverty - "the feminization of poverty" - for leaving out other perspectives. As Kendal Broad succinctly states it, "our understandings of poverty and its 'feminization' are only partial knowledges." n1 Athena Mutua concurs that feminization of poverty is "only partially accurate" as a construct, "capturing the dynamics of poverty in some communities but not others." n2 To remedy the partiality within poverty discourse, each of these authors seeks to bring previously under-appreciated perspectives to the fore. Kendal Broad highlights queer and transgender people; Lisa Sun-Hee Park focuses on pregnant immigrant women; Athena Mutua emphasizes poor people of color; and Laura Padilla concentrates on Mexican American women. Taken together, these article provoke thought about four aspects of partiality: disintegration, exclusion, predilection, and bias. In general, I suggest that while naming ongoing harms of disintegration and exclusion, the authors also recognize their own predilections and attempt to advance the elimination of bias.

The authors rightly criticize the practice of isolating gender from experiences of race, orientation, immigration status, parental status, age, ability, class or other aspects of life. More specifically, the authors criticize the exclusion of particular groups from our understanding of poverty. Kendal Broad asks why we have not included queer and transgender perspectives in our exploration of poverty. Broad urges us to "create new knowledges that do not essentialize gender and presume heteronormativity." n3 Lisa Sun-Hee Park suggests that we must consider how welfare and immigration reforms have "essentially criminalized motherhood for low-income immigrant women." n4 Park points to how the vagueness of the prohibition on an immigrant becoming a public charge has been applied to chill immigrant women's use of the public Medicaid system in California. n5 Similarly, Athena Mutua argues that poor men of color and others are excluded from poverty discourses revolving around women. n6 Mutua comments on the work of Broad and Park, as well as that of Elvia Arriola, n7 and argues that a multidimensional analysis of poverty will illuminate its full dimensions. n8 Finally, while Laura Padilla does not address poverty as a separate topic in her article, she addresses the exclusion of Mexican American women from public leadership, exploring examples of how they overcame their exclusion to spear social change in East Los Angeles and Argentina and urging more participation in both grassroots activism and dominant culture. n9

The articles are less persuasive in supporting their claims that the perspectives they raise have been excluded from poverty discourse. The feminization of poverty construct itself emerged as a critique of how gender had been ignored in the study of poverty. n10 Thus, those who urged a focus on gender laid much of the foundation for critical analysis of poverty discourse on which these authors build. Also, many poverty scholars have explored how various racial minority groups and immigrant populations experience poverty. n11 Nonetheless, the focus on white heterosexual mothers undoubtedly has obscured the experiences of many other poor people, including communities of color, immigrants, and sexual minorities.

If this were all to them, then these articles simply would fall within a powerful trajectory of scholarship making the case against discrimination and exclusion. But there is more. What's more is the self-consciousness contemplated and encouraged by LatCrit and other critical scholarship to reflect on our complicity with the very forces of discrimination we condemn. This selfconsciousness calls us to awareness and caution about the tools we use to engage and criticize dominant discourse.

The authors below demonstrate the self-consciousness by acknowledging various levels of discomfort with their own isolation of groups defined by particular
traits, even thought they do so in order to make their case against the exclusion of such groups within dominant poverty discourse. This selfconsciousness about our participation in perpetuating systems of subordination brings awareness of our own predilections and biases. For example, Broad openly identifies her own situated standpoint as part of her effort to understand what it means to participate "as an activist scholar in a 'politics of difference.'" n12 Padilla acknowledges the dangers of essentialism even as she frames her analysis on commonalities shared by Mexican American women. n13

As a group, these articles underscore the importance of a multidimensional perspective on understanding poverty. Of equal importance is their contribution of centering the study of poverty within LatCrit discourse. They also invite reflection about how we use our own partiality to criticize the partiality of other.

FOOTNOTE-1:


n3 Broad, supra note 1, at 1160.


n5 Id.

n6 Mutua, supra note 2, at 1172.


n8 Mutua, supra note 2, at 1175 ("Therefore, an approach that seeks to understand the multidimensional nature of poverty and promotes anti-essentialist, anti-subordination principles and practices might better unravel the ties that bind people in poverty and be more inclusive, permitting shared agendas for building coalitions.").

n9 Laura M. Padilla, Re/Forming and Influencing Public Policy, Law and Religion: Missing From the Table, 78 Denv. U. L. Rev. 1223 (2001).


n11 See, e.g., Kenneth J. Neubeck & Noel A. Cazenave, Welfare Racism: Playing the Race Card Against America's Poor 17-38 (2001) (conceptualizing a recentered perspective on welfare that builds upon the critical race theory of scholars such as Dorothy Roberts and Patricia Hill Collins and upon previous class-centered, gender-centered, and state-centered perspectives on welfare).

n12 Broad, supra note 1, at 1153, 1156-57 (describing herself as a "non-Latino/a white academic feminist gender bending dyke" and as a "white feminist sociologist").

n13 Padilla, supra note 9, at 1225 ("I acknowledge the complexity and risks of group description but nonetheless assert that Mexican American women's common history of colonization and shared cultural background influences their inclination to participate (or not) in the formation and implementation of public policy, law and religion.").
In this piece, I am exploring what it means to participate as an activist scholar in a "politics of difference." In so doing, I am reading LatCrit as an intellectual legal "movement" enacting a "politics of difference" by embodying ideals of difference, intersectionality, interdisciplinary, and coalition. n1 I participate in this "politics of difference" by asking how social science and legal scholarship might produce postmodern, partial, and critical knowledges through interdisciplinary efforts in two ways. First, I take an intradisciplinary focus to examine the link between identity politics and constructions of situated sociological knowledges, suggesting means by which to continue creating critical knowledges in a politics of difference. Second, I take an interdisciplinary approach by writing as a sociologist to a LatCrit audience, offering one model by which we might conceive of disciplinary crossing in the production of critical theory. In other words, in this work, I am assuming that we are all players in a politics of difference, albeit differently situated actors, acting and creating knowledges from multiple and varying standpoints. My interest in this piece is to address how we might work in coalition across our situated standpoints and disciplinary knowledges. [*1142]

Specifically, this work is asking how we (as activist knowledge producers) can make the move from "identity politics" to a "post-postmodern politics of difference and identification." n2 I answer this question from my own lens of social science by examining the challenges to sociological understandings of the feminization of poverty presented, and possibly resolved, by postmodernism. The first part of this piece illustrates how sociological and activist knowledges (feminist and transgender) about the "feminization" of poverty are each situated standpoints sometimes acting as dominant discourses. n3 The second part of this essay argues that it remains important for us to create situated knowledges from our outsider standpoints, but to do so without reproducing hegemonic discourse, we must work (politically) in coalition and (epistemologically) create interdisciplinary borderlands. Building off theories of postmodern politics, n4 I assert that we must construct coalitions through "migration" into strategically intersectional "outsider within" positions. n5

I. "Feminizations" of Poverty

I begin with some questions. Why do we not speak of transgender people of color or queer Latina/os when we address the "feminization of poverty?" How is it that the "feminization of poverty" has become understood as an example of "female" subordination curiously distinct from racialized and sexualized subordination? How might we attend to these subjugated knowledges from our own locations within a matrix of domination? Specifically, how can I, a white, non-Latina/o, middle class, U.S.-born-and-raised, and gender bending dyke participate in dialogue about the racialized feminization of poverty in the U.S.? In other words, how can a white dyke living in a rabidly heteronormative culture speak to a phenomenon defined in terms of the presumed "failure" of modern day heterosexuality for people of color (replete with white supremacist, capitalist, patriarchal stereotypes of single motherhood, welfare
babies, and attendant ravages of poverty)? And, how
do I speak about the poverty faced by many "women"
(and I mean that in the broadest sense of the term) of
color, knowing that my "outness" and gender bending
are, in many ways, symbolic of my race/class
privilege? Are we not speaking across differently-lived
specificities of oppression? I am asking how we
participate in anti-subordination efforts across our
multiple intersections.

I am interested in asking questions about how we can
participate in a politics of difference--cognizant of
intersectionality, multiplicity, and interconnectedness--
while also carrying those aspects of "identity politics"
that still resonate within our selves, communities, and
lives. Importantly, single-identity political processes are
now understood as perpetuating, in fact reifying,
etlitis and marginality. For example, the works of
U.S. feminists of color highlight the limits of a politics
based on one identity and call for a politics of
difference by challenging mainstream, white, middle
class feminism that erases race and class and by
challenging ethnic nationalism that erases gendered
experiences of racism. Yet, because "the American
political environment makes a stable collective identity
both necessary and damaging," the "era" of identity
politics is not exactly over. n6

I begin this inquiry with the recognition that a politics
of identity--whereby collective political and cultural
identities are constructed through political struggle and
commitment--is still viable and necessary in sociopolitical and cultural models of ethnic identity
and interest-group politics. n7 Why else would the
"Lat" be a part of "LatCrit"? In my opinion, the task
has become one of defining and enacting a politics of
difference, clarifying the distinctions from a politics of
identity. Another way to think of it is as striving to do
a better "identity politics," which "does not mean
finding the best definition of our identities so as to
eliminate problems of membership and goals; it means
continual shuffling between the need for categories and the recognition of their incompleteness." n8 In many ways, I read the work of
LatCrit as engaging the complicated move from
identity politics to a politics of difference. As such, I
see this work engaging the move from identity to
difference by exploring the means by which two
movements based on differences of identity/oppression
(Feminist movement(s) and the Transgender
movement) can work in coalition to address a
manifetsation of multiple oppressions--namely the
"feminization" of poverty. Simply stated, my questions
at the beginning of this work were asking how we can
do coalition/alliance work, especially how we can
work in coalition across our multiple intersections and
concrete experiences of oppression.

In so doing, I am also asking these questions to
highlight the epistemological conundrums we face in
post-modernity-puzzles of subjectivity, knowledge and
politics. Postmodern theories raise questions of
universalism, essentialism, foundationalism and
dichotomous thinking that are helpful to anti-
subordination efforts and critical theorizing. n9 As I
understand it, LatCrit embraces postmodern concerns
through four emphases: 1) production of partial,
specific, and subjugated knowledges; 2) construction
of transformative knowledge applicable to concrete
social change; 3) anti-essentialist/intersectional ideals;
and 4) coalitional/community organizing. n10 While
LatCrit is a movement based in critical legal theory, it
is my understanding that it is also a movement striving
toward an interdisciplinary focus. In that spirit, this
work takes a critical sociology perspective to address
similar theoretical and political questions. In
recognition of the epistemological limits of objectivity,
I begin this work with personal questions because they
serve to contextualize my place within the work,
marking my situated standpoint. Because this work is
exploring how we work together from our multiple
marginalities, as outsiders--differently situated-within,
my questions at the beginning were raising the general
question of this piece: how we can speak from situated
standpoints in coalitional/allied anti-subordination
efforts. n11

I focus on the feminization of poverty because it
represents a matrix of domination that has been both
erased and silenced by dominant discourse and also
inadequately addressed by identity-based politics.
There are other issues that are similarly situated, but I
engage this issue because it is one that has been
characterized (by law, social science and media) so
centrally as the fault of heterosexual, poor women of
color while simultaneously portrayed as separate from
the everyday experiences of transgender individuals.
To me, an issue assumed to be the purview of one
LatCrit group but not another seems the ideal
challenge for two movements concerned with the
intersections of race/class/gender/sexual identities and
oppressions, yet situated quite differently. If the
feminization of poverty is a "natural" issue for feminists but not for the transgender movement, the
question of how theoretical/political ideas from the
transgender movement can be applied to an analysis of
the issue becomes quite engaging. In my mind, it
makes the challenge of talking about intersectional
coalitions/alliances quite salient.

I speak here as a non-Latino/a white academic
feminist gender bending dyke who has spent a great
deal of time striving to sociologically understand social
movement processes and, specifically, the ways in
which transgender activists manage, negotiate, plan,
and succeed in border crossings. n12 In this piece, I begin exploring how gender-based movements (feminist and transgender movements) can work/theorize in coalition/alliance. In particular, I focus my discussion on feminist and transgender/queer activism, movements that theorize/act from differently situated outsider-within locations that "produce distinctive oppositional knowledges that embrace multiplicity yet remain cognizant of power." n13 I begin by discussing our current knowledge about the "feminization of poverty," illustrating the way that it has been constructed by sociological knowledge as an issue about poor women, with little recognition of the sexual and gendered components of "feminization." I suggest that a critical race feminist understanding of the "feminization of poverty" racializes our understanding of the issue, but still does not address the multiple ways in which we might see a "feminization" of poverty in terms of gender/sexuality. Assuming that the theory/activism relationship does not have to be one dimensional (producing theory to lead activism), I next look to transgender activism to inform our theoretical understanding of how we might expand the domain of "feminization." In particular, I identify the way that one part of the transgender movement has sought to problematize the stability of gender categories through legal resistance, albeit without specific focus on race and class. Concluding that both feminist and transgender standpoints fall short of addressing an expanded domain of the "feminization" of poverty, the final section explores the means by which coalitions/alliances can be forged across situated standpoints. In the end, I suggest that borderland coalitions/alliances are needed to address the feminization of poverty and other issues that serve to construct boundaries, borders, and subordination. [*1146]

II. Feminisms: Situated "Feminizations" of Poverty

In an academic sense, I tend to see the "feminization of poverty" from the lens of a white feminist sociologist. As such, I understand that the rates of poverty for women and children in the U.S. increased significantly in the last four decades, often as a result of the increasing number of female-headed households. I understand that the concept "feminization of poverty" was introduced by sociologist Diane Pearce in her 1978 article, The Feminization of Poverty: Women, Work, and Welfare, where she argued that the combination of public welfare and sex-segregation in the workplace institutionalized sexism and fostered poverty among women. n14 Simply stated, sociological knowledge identified an increased rate of women in poverty, explained it as a shift from sex-neutral poverty to gender-specific poverty, and theorized how changes in family structure, women's place in the workforce, and the nature of public services for women and children contributed to an increased proportion of women and children in poverty. n15 If I stop here, it would seem that sociological knowledge etches an image of poverty rates simply characterized by gender in the U.S.

It is important to note that research about the feminization of poverty also emerged from research about race, class and family—a great deal of which was done in response to the Moynihan report of 1965, which characterized the dissolution of the black family (with high rates of female-headed households) as pathologically responsible for poverty. n16 Consequently, sociological research in the 1980s and 1990s highlighted the intersection of race and class in the feminization of poverty. n17 Importantly, this research problematized the assumed primacy of gender in the term "feminization of poverty," suggesting it was not primarily gender that characterizes poverty for women of color but very real subordination based on race and class. It is from research grounded in such critical race theory that we saw how the feminization of poverty was never a new phenomenon plaguing all "women" but was actually yet another manifestation of a long established matrix of domination in the U.S. In fact, some scholars argue against using the very term "feminization of poverty" because it brings gender to the fore, such that dynamics of racism, classism, and poverty are erased. n18 So, as a feminist sociologist, I am left with a complicated body of knowledge that identifies increased rates of poverty among women and children, and especially women and children of color, due to intersecting dynamics of racism, classism, and sexism.

Yet, as a feminist sociologist, I also think it is important to an understanding of the feminization of poverty to examine how sociology (or social science more generally) is also complicit in reproducing and reifying a matrix of domination. U.S. feminist sociologists of color have warned of the dangers of objectivity, universalism, and subject/object dichotomies in the project of a positivist sociology. n19 For example, we know that sociologies of family have served to reify the image of a nuclear family with 2.5 children as "normal," thereby creating as deviant single-parent households and extended families. n20 More generally, we see that social science knowledge must be examined as a dominant discourse. As Charles Lemert states:

It has long been recognized that professional sociologists have resisted a serious taking into account of feminism. If anything, their record has been even more dismal in their unwillingness to read with definitive seriousness the writings of other extramural...
sociologists—the new developments in queer theory and postcolonial studies, the varied and serious work by African Americans, the very considerable literature by and about Black feminists and other women of color. n21

Thus, I approach the issue of feminization of poverty, as a feminist sociologist with the following question: if sociology is understood as a dominant discourse, what "knowledge" do we actually have about the feminization of poverty?

Today, we know that while the overall rate of poverty in the U.S. is decreasing, the rates of women and female-headed families in poverty have been increasing—men and their families are the ones escaping poverty, while women and their children increasingly experience it. Furthermore, we know that Chicano/as and Latina/os experience more poverty overall than do whites, and among Latina/os and Chicanos/as, the women are disproportionately poor. Currently, the dynamics of racism, sexism, and poverty are still quite similar for Latina/os. For example, a recent Los Angeles Times article reported that median household assets for Latina/os has declined. n22

Needless to say, this "data" suggests that with regard to racism/classism/sexism, "the more things change, the more they stay the same." n23 The subordination of women of color in the U.S. capitalist labor market is well established, such that there is a clear historical legacy to the "feminization of poverty." n24 Yet, we must ask whether this construction of "feminization of poverty" is always critical social theory. Patricia Hill Collins notes that "black feminist thought remains emancipatory in some dimensions, namely, conceptualizing power relations through intersections of race, gender, and class, yet dominant in others, namely, its relative silence on issues of sexual politics and on nationalism." n25 In other words, a construction of the feminization of poverty that only focuses on the intersection of race/class/gender is, itself, a partial knowledge derived from a situated standpoint.

I am suggesting that critical race theory, feminism, and indeed critical race feminism, are not bound by exclusionary identity politics, yet they are situated standpoints that construct dominant knowledges in regards to gender and sexuality. Specifically, the sociological lens by which we view the feminization of poverty is characterized both by white, middle class feminism (emphasizing the salience of gender and women's subordination) and critical race feminism(s) (emphasizing the intersections of race/class/gender and the subordination of poor women of color). What we do not see is an expanded view of the way poverty is "feminized."

Where are the lesbians of color within these discussions? If we queer our lens, does the phrase "single women with children" have different meaning? Isn't our understanding of the "feminization of poverty" dependent on assumptions of heteronormativity that erase bisexual and lesbian women of color? This question is very important, given the centrality of theorizing by U.S. lesbians of color in feminist theories and critical race feminisms n26 and the curious way that they are often characterized as simply "U.S. feminists of color" and their critiques of heteronormativity erased. Additionally, where are Male-to-Female transgender individuals in these constructions of "feminized" poverty? Does the matrix of race/class/gender domination explain their daily negotiation of the maze of poverty due to their transgression of gender? Does sociological knowledge about rates of poverty for women and children highlight issues of sexism within a heterosexual paradigm such that the experience of effeminate gay men is subjugated?

When sociological and anthropological literature on Latino sexuality "suggests that Latino men's sexual identity is determined not by the biological sex of the sexual partner but rather by the culturally defined roles of activo/pasivo (i.e. dominant/submissive) assumed by the actors," might "feminization" also describe those considered feminine/submissive/pasivo rather than simply essentialized categories of women and men? n27 In other words, why do we not see the faces of young gay men of color, Latino youth, "feminized" as "pasivo" and often ostracized from family, community and support networks? Are these youth represented in the high numbers of "children in poverty?" Does a theory that depends on the assumption that women face increased levels of poverty as compared to men not serve to erase those whose lived experience challenges the essentialist categories of "woman" and "man?" Will understanding the matrix of racism/classism/sexism explain the intersection of gender and sexual domination that marks the lives of gay, lesbian, bisexual, transgender, and queer people?

At heart, I am arguing that all of these examples suggest our understandings of poverty and its "feminization" are only partial knowledges. Importantly, the absence of knowledges about the "feminization" of poverty for gay, lesbian, bisexual, and transgender individuals indicates not only a silencing of certain knowledges, but also a constructing of dominant knowledges about sexuality and gender.
Clearly, a conceptualization of the "feminization of poverty" that assumes there has been a marked increase of women (of color) and children into poverty due to dissolution of heterosexual marriage does not recognize, let alone explain, the above-mentioned gendered/sexualized experiences. In other words, the construction of knowledge about "feminization of poverty" depends on dual and intersecting assumptions of heteronormativity and binary gender. I suggest that these constructions of knowledge are representative of situated standpoints of white feminists and feminists of color. As such, it seems logical to presume that we can create new knowledges that do not essentialize gender and presume heteronormativity. In the next section, I discuss whether a queer/transgender perspective of poverty (conceptualized in terms of the various forms of transgender activism) might expand the domain of this social problem, such that we might avoid erasing lives and creating discourses of dominance in the very project of constructing critical knowledges.

III. Trangendering a "feminization of poverty"?

The history of gender transgression and gender transition is one that has been silenced, erased, and co-opted, according to transgender activists. n28 As is often the case with a group whose lives have been defined and pathologized by others, the word "transgender" was first coined to name an experience that was not captured by available terms. Moving beyond a coded language of "speaking without saying," n29 Virginia Prince coined the term "transgenderist" in 1987 to name the experience of people who had changed their gender, but not their sex. n30 Simply explained, Prince was naming the experience of being born a "biological male," dressing as a woman, living as a woman full time, but not opting for sex-reassignment surgery. n31 In the 1990s the term transgender (or TG) emerged as a contested term among various groups within a broader gender-bending community: transvestites, transsexuals, crossdressers, transgenderists, gender blenders, gender benders, drag queens, bigenders, feminine men, androgynes, drag kings, intersexuals, masculine women, crossgenders, butch lesbians, shape shifters, passing women, bearded women, passing men, gender dysphories and others who might consider themselves "gender outlaws." n32

In general, the emerging transgender movement in the 1990s sought organized resistance to medical, legal, and social restrictions of a Western, binary gender system. As MacKenzie explains, "transsexualism is moving away from being considered a psychological "disorder" that is treatable with surgery and hormones to a grassroots civil rights movement." n33 Importantly, Feinberg explains that the process by which transgender individuals jettison medical labels to organize together for the right to live unrestrained by binary gender norms is complex and characterized by a variety of experiences. n34 The "movement" is characterized by hundreds of organizations nationwide, a complex system of support [*1151] groups, local and national conferences, active internet newsgroups, publications, listserves, web sites, n35 and a range of grassroots efforts--from direct action to more "traditional" efforts to lobby legislators in Washington D.C., n36 academics creating new knowledges, n37 activists challenging the knowledges currently being produced, n38 and a growing collective of people who resist the idea that gender is stable and unchangeable.

My ethnographic research on transgender activism focused on the means by which transgender activists employed processes of identity and differences as they struggled to act collectively despite a variety of experiences and identities. n39 My research illustrated that a key aspect of transgender activism in the U.S. during the 1990s was the process of constructing a collective "transgender" identity through the creation of transgender group boundaries, articulation of transgender consciousness, and negotiation of transgender identity in everyday life. The construction of a "transgender" collective identity suggests a "transgender" standpoint, whereby those with lived experience and the political achievement of a critical consciousness possess a particular knowledge of the binary gender system. In particular, the transgender standpoint centers on understanding "transgender oppression" and envisioning "transgender rights," offering a very particular understanding of domination and subordination

Rather than understanding the "feminization of poverty" in terms of the interlocking axes of race/class/gender domination, a transgender standpoint might examine the dominant gender categorization system that assumes stable gender categories. Rather than examining the way that white supremacist, capitalist patriarchy has structured a society where women are child-rearers and labor markets are sex and race segregated such that poor women of color with children are disproportionately poor, a transgender standpoint might examine how the processes of binary gender constraints (in medicine, psychology, and law) serve to pathologize transgender expression (such that gender transgender individuals [*1152] disproportionately end up under medical supervision or in the criminal justice system) and marginalize transgender people from gendered social structures (e.g., sexsegregated jobs and marriage, etc.) and services (e.g., welfare and child support). A transgender standpoint might highlight how stepping outside the bounds of presumed stable gender
categories can result in poverty (e.g., male-to-female transgender prostitutes who do sex work because access to "traditional" sex-segregated work is blocked). Ki Namaste reminds us of the potential of critical theory that takes lived transgender experience seriously.

Critics in queer theory write page after page on the inherent liberation in the transgression of gender codes, but they have nothing to say about the precarious position of the transsexual woman who is battered, and who is unable to access a women's shelter because she was not born a biological woman. n40

At heart, Namaste reminds us that a transgender standpoint offers a means by which to better understand how battering is experienced and, as I have explored here, poverty reproduced.

Yet, I am not suggesting that simply adding a transgender standpoint and stirring will give us more complete knowledge about the feminization of poverty. Important to the understanding of a transgender lived experience expressed by transgender activists is the way it has been complicated. In my research, throughout the process of constructing a collective identity in the TG movement, I observed "voices of difference" (TG of color, poor TG, and gay, lesbian, and bisexual TG) challenging a universal "transgender" experience. Like the voices of difference that complicated identity politics, TG voices of difference similarly contest a construction of a universal, politicized identity-a single transgender standpoint. In other words, by articulating the way in which transgender experience intersects with race, class and sexuality, these voices of difference complicate the construction of a collective identity. Namely, those on the periphery of the movement insist that transgender identity is not a universal experience but rather one characterized as multiple and fractured. n41 According to scholarship, "the surfacing of voices of difference within movements is pivotal in facilitating the deconstruction of essentialized identities and advocating a radical cultural politics of difference." n42 In other words, the transgender voices of difference challenge a universal transgender standpoint, reminding us that, at best, [*1153] we have standpoints situated in particular historical, socio-political moments and lived experiences.

Placing a transgender standpoint in the foreground might expand our understanding of poverty, but it must not be at the cost of also understanding race and class as parts of a situated standpoint. Transgendering a feminization of poverty is another means by which to construct partial truths but does not provide us with a more thorough (universal?) knowledge. If voices of difference are still in the borderlands of movements, are not these movements still providing situated standpoints that at times are critical and at times dominant social knowledges? I am suggesting that the distinction between identity politics and a politics of difference is the distinction between a movement based on one standpoint and movements emphasizing situated standpoints. As such, the challenge is to find a way to talk from situated standpoints and partial knowledges to address concrete manifestations of domination/subordination.

Like feminism, transgender politics can be seen as existing in tension between identity politics and a politics of difference, wherein voices of difference in feminism deessentialized the category "woman," and voices of difference in transgender activism have deessentialized the category, "transgender." But it is important to recognize that a politics of difference still produces only partial truths from situated standpoints, so the question becomes how social change is possible. Are we only able to produce our partial truths that leave us in an abyss of relativism, where no one's truth is more legitimate than another's? Do our situated standpoints erase the potential of collective action that essentializes a standpoint and creates more subjugated knowledges in the process? I am assuming that the pitfalls of relativism and essentializing are negotiable through coalitional efforts to talk across intersectional situated standpoints.

IV. Critical Intersectional Coalitions against Poverty

"There is no hiding place. There is nowhere you can go and only be with people who are like you. It's over. Give it up." n43

"The overarching matrix of domination houses multiple groups, each with varying experiences with penalty and privilege that produce corresponding partial perspectives, situated knowledges, and, for clearly identifiably subordinate groups, subjugated knowledges." n44

Thus, the problem for coalition politics is not 'What do we share?' but rather 'What might we share as we develop our identities through the [*1154] process of coalition?' Coalition cannot be simply the strategic alignment of diverse groups over a single issue, nor can coalition mean finding the real unity behind our apparently diverse struggles. Our politics must be informed by affinity rather than identity, not simply because we are not all alike, but because we each embody multiple, often conflicting, identities and locations. n45

So far, I have argued that feminist sociological knowledges about the feminization of poverty are partial and situated. Similarly, I have argued that transgender knowledges are partial and situated, such
that a simple application of them to feminist sociological understandings of the feminization of poverty would not create a more complete knowledge. In making these arguments, I am implicitly illustrating the way in which the feminist movement has become multiple feminist movements; feminism has transitioned from a politics of identity to difference, as such not only producing knowledge from the standpoint of women but from Black feminist women, Latina lesbians, and other situated standpoints. I have also illustrated the way that the nascent transgender movement is engaging in a politics of difference, dependent on and productive of multiple and situated knowledges about what it means to be a white male-to-female (transwoman), a queer, a Latino female-to-male (transman), or a poor Black cross-dresser. At heart, I am asserting (as a sociologist is apt to do) that we are at an interesting sociological moment where we are participating in and producing politics of difference that depend on and create partial knowledges from situated standpoints, and I am asking whether they/we can work in affinity/coalition.

Much of my research is attempting to sort out social movement processes as we increasingly doubt simplistic identity politics. I recognize that one of the epistemological contributions of identity politics (especially feminist identity politics) is standpoint theory--"an approach that argues that knowledge is and should be situated in people's diverse social locations. As such, all knowledge is affected by the social conditions under which it is produced; it is grounded in both the social location and the social biography of the observer and the observed." n46 However, I also recognize "the decreasing effectiveness of an identity politics currently associated with standpoint theory raises question of its continued relevance." n47 As such, this paper is an examination of the way in which standpoints are situated in a politics of difference--highlighting the continued relevance of standpoint theory in political work and also raising the question of the viability of situated standpoints. [*1155]

This is an important question for LatCrit because it addresses the very concerns that this movement is built upon--concerns about intersectionality, partial and situated knowledges, construction of transformative knowledges and coalitional politics. Further, it is an important question for all movements (e.g., feminist and transgender), negotiating the tension between politics of identity and difference. I am not asserting that we must sort through these epistemological questions of how to combine situated standpoints in construction of postmodern knowledges in order to enact a better politics of difference. Following Seidman's assertion that "postmodern social ideas emerged, at least in part, out of the development of the new social movements," n48 I feel that this epistemological question arises from the very type of political activity we are witnessing currently. In other words, I feel this is an important question epistemologically and politically, and offers us a means by which to see how our ways of knowing and our politics are related and interconnected--a seemingly vital question for academic activists.

Importantly, I also see this as an important question because I see epistemological and political value in standpoint theory and want to assert it is important to continue theorizing it. n49 The assumption that "one's everyday life has epistemological consequences and implications--the disadvantaged have the potential to be more knowledgeable, in a way, than the dominant group" is an important means by which we can create and legitimate knowledge--from the borderlands. n50 Furthermore, if both sociology and law are central in constructing, and complicit in upholding, matrixes of domination (as I have assumed in this paper), standpoint theory is a politically and epistemologically vital means by which to create oppositional knowledges. Taking Patricia Hill Collins' warning that standpoint theory (in her example of Black Feminist Thought) can be both dominant and critical social theory, n51 I still feel that the links between experience and knowledge and the centrality of political struggle in order to achieve a standpoint offers important potential to create oppositional knowledges in the context of difference politics.

The question this paper has been entertaining is whether situated standpoints can address the same social problem, and if so how. In considering this question, it is important to mention some challenges facing standpoint theory in an era of difference. One criticism of standpoint theory has been the problem with relativism--if we assert that the knowledge is partial and situated, we lose all standards by which to determine which knowledge is legitimate. Patricia Hill Collins [*1156] discusses this as the myth of equivalent oppressions. n52 She discusses the necessity of understanding that assertions that standpoints are partial and situated are not assertions that all oppressions are equivalent. To do so, she begins to explore how standpoints are differently situated by comparing the social, structural components of raceclass standpoints to gender standpoints:

Black women and White women do not live in classstratified women's neighborhoods, separated from men and children by processes such as gender steering, bank redlining that results in refusal to lend money to women's neighborhoods, inferior schools in women's
inner-city neighborhoods due to men moving to all-male suburban areas, and the like. n53

She notes that a key challenge for standpoint theory is to ensure that "neither group practices nor any ensuing standpoints replicate other hierarchies." n54 In this paper, I have explored the means by which some feminist standpoints and some transgender standpoints potentially replicate hierarchies. The key is that I read feminist and transgender movements and theories as selfreflective and cognizant of their partiality, such that through coalition they might be able to become more critical than dominant knowledges.

Another challenge of standpoint theory in a politics of difference is the very challenge of difference itself. n55 The concern is that by recognizing the way in which identities intersect and oppressions are interlocking, we will lose a means by which to form collective identities and therefore participate in collective action. In the worst case scenario, the idea is that a recognition of intersectionality will be reduced to individualism and, thus, leave us without political viability and theoretical cohesiveness. On the other hand, the concern is that in striving for any sort of group-derived standpoint, we risk essentializing group identities. Both of these challenges can be seen in concrete terms by considering the topic of this paper. If we recognize the multiple feminist standpoints that theorize different understandings of the "feminization of poverty" and also genuinely hear the "voices of difference" in transgender activism, is there any means by which to enact collective action? Further, if we speak of this problem as reducible to two situated standpoints (feminist and transgender) are we in some way essentializing groups? I would suggest thatcoalitional/alliance strategies are one means by which to strategically "essentialize" group formation and standpoints, such that political work is possible but the fluidity of intersectional, transgressive identities are kept present.

It seems, at this point in the paper, that my logical conclusion would be to suggest strategic alignment of diverse groups (feminist and transgender) over a single issue, feminization of poverty. However, this will not be my suggestion. Were I to recommend this strategy, I would be recommending implicit categorization of two distinct groups, thereby erasing the multiple and often conflicting identities within feminism and transgender activism. Furthermore, recommending coalition around one issue, in this case "feminization of poverty" would be recommending a privileging of that particular issue-establishing a hierarchy of oppressions reminiscent of previous battles in identity politics. Rather, I think it important to think of coalitional efforts as much more fluid and changeable. In other words, the means by which I recommend coalition is a means by which we can make a move from identity politics to a politics of difference. Another strategy that might seem a logical conclusion would be to recommend finding the commonalities between the situated standpoints of feminists who recognize the intersections of race, class, and gender in studying the feminization of poverty and of transgender activists who see the need to link understandings of race and class and sexuality to the malleability of gender. However, that is not going to be my strategy. Rather, I follow Collins by suggesting that the important tactic is to form coalition, to "do coalition," in order to see what we "might" share. One of the more interesting things I have learned in studying new social movements is that people do not begin with an identity and then join collective action, but they come to have and construct that very identity through collective action. I think we can use a similar logic in terms of coalitional politics of difference, where as Shane Phelan explains, "identities will change as a result of our politics." n56 To begin by naming the similarities between situated standpoints as the ground by which to build coalition would be to assume we must have similar "interests" in order to proceed. To do so would be to essentialize those standpoints in some sense--where would a transgender feminist of color stand? What would his or her standpoint be? To highlight the similarities in standpoints as the reason for coalition is to fall back on strategies of identity politics where we assume stability and naturalness of group identity. Instead, I want to suggest that we envision coalition in the way that Phelan does when she says we must strive for alliances beyond identity, for a "deessentialized identity politics," n57 where we use strategies of "migration," as Collins describes. "Embracing migration and movement can also spur some important coalitions among individuals of all sorts who move into and through outsiderwithin locations. . . . Outsider-within locations allow individuals from these diverse places to meet and compare notes." n58 Collins's vision of "outsider-within" locations is to "no . . . longer belong to any one group." n59 She views migration and movement as a call to breach boundaries, consciously and purposely, in order to develop critical social theory. n60 I think what she is suggesting is that our situated standpoints, our differently-situated outsiderwithin locations, now (in a politics of difference) depend on intersectional coalitions. It is from the critical borderlands of outsider-within coalitions that we find what we share and locate allies.

Rather than identifying the things we hold in common as the means by which to form coalitions, postmodern political theorists Phelan and Collins suggest that we "migrate" into coalition to find what we "might share."
n61 Collins summarizes the process: "Individuals who manage to migrate from these subordinated groups often find that they share common themes, interpretive paradigms, and epistemological orientations." n62

As a hopeful note, I will close by briefly mentioning one potential common theme and epistemological orientation I think we might share between feminism and transgender activism. First, as this paper has illustrated, the situated standpoints of feminists of color hold the intersections of race, class, and gender as central to explaining the feminization of poverty. Similarly, transgender activists centralize difference and the fluidity of identity through activism centered on destabilizing gender. Yet, the fluidity implied by intersectionality and by deconstructive resistance to gender categories are distinct. Coalitional theorizing between intersectional and "queer" situated standpoints might show shared points of "difference" and also highlight the specificities of each.

In the end, I am assuming that "silencing anyone won't make any of this go away." n63 In other words, as we strive to define a politics of difference that puts the intersections of race/class/gender/sexuality at center, seeks to de-essentialize categories of identity/oppresion, and (re)define the project as one of multiple truths and partial knowledges, I think it important to once again examine the way in which we construct knowledges, reproduce silences, and resist domination. In this paper, I have argued that (politically) intersectional coalitions, and (theoretically) critical borderlands, are strategies of a politics of difference, intersections, partial truths, and transformative knowledges. [*1159]

Conclusion

And so, I would like to end by answering my own questions. I began by asking, "why do we not speak of transgender people of color or queer Latina/os when we address the "feminization of poverty?" I answered it by asserting that even in a politics of difference, we still have silences because critical theory can also act as dominant theory. I also asked "How is it that the "feminization of poverty has become understood as an example of 'female' subordination curiously distinct from racialized and (not or) sexualized subordination?" My argument is that both sociology and law are complicit in constructing white supremacist, capitalist, patriarchal, gender binary, heteronormative knowledges--partially dominant standpoints about the "feminizations" of poverty. I began by asking "How might we attend to these subjugated knowledges from our own locations within a matrix of domination?" I also asked "how do we participate in anti-subordination efforts across our multiple intersections?" I answered these questions by suggesting that we can speak from a situated standpoint to produce oppositional knowledge(s), but it is not, and need not be, an essentialized position. Further, I suggested that coalition between situated standpoints is one means by which to construct knowledges and strategize politically, but it must not be coalition formed around a single issue or in terms of essentialized group interests. I close with the suggestion that (politically) intersectional coalitions and (epistemologically) critical borderlands are a means by which we can unearth silenced knowledges, create transformative ones, and continue a critical politics of difference.

FOOTNOTE-1:


n2 See generally Valdes, Latina/o Ethnicities, supra note 1.

n3 This is similar to the way in which Critical Race Theory has been described as androcentric, Afrocentric, and heterocentric. Valdes, Latina/o Ethnicities, supra note 1, at 5. My examination of situated standpoints in sociological knowledge is in many ways illustrating a similar point made by LatCrits about the essentialist dangers of other critical legal endeavors.

n5 See generally Collins, supra note 4. In the spirit of doing interdisciplinary work, this piece uses the language of sociology, social movement theory, feminist theory, queer theory, and transgender activism. During my presentation of this work, Professor Athena Mutua acted as commentator and relayed to me that she had to translate much of what I was saying into critical legal studies and LatCrit language. As I understand, my discussion of the tension between a politics of identity and difference is similar to LatCrit discussions of "politics of differentiation and identification." See generally Valdes, Latina/o Ethnicities, supra note 1. My interest in partial knowledges and situated standpoints is parallel to "perspective jurisprudence" and "outsider jurisprudence." See generally Martha Albertson Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies (1995); Mari J. Matsuda, Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989). My use of "outsider within" and "intersectional" ideas are similar to notions of "multi-dimensionality" and "intersectionality." See generally Berta Esperanza Hernandez-Truyol, Building Bridges -Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement, 25 Colum. Hum. Rts. L. Rev. 369 (1994); Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241 (1991). My use of "coalition" is similar to the use of the same term in LatCrit work. See generally Iglesias & Valdes, supra note 1. The interesting process for me in this work has been to step into the act of "doing coalition" by presenting this work and finding out "what we shared."


n7 Steven Best & Douglas Kellner, Postmodern Theory: Critical Interrogations 205 (1991); Gamson, supra note 6, 595.

n8 Phelan, supra note 4, at 154.

n9 Best & Kellner, supra note 7, at 207.

n10 See generally Hernandez-Truyol, supra note 1.

n11 Collins, supra note 4, at 5.

n12 In this paper, I would like to step away from my usual role of sociologist observing/ participating/understanding "others" and speak, in many ways, as an activist. In fact, I do not even like creating that false dichotomy between social scientist and activist, but I suggest it here because I want to highlight my own participation in the acts of resistance to which I will refer. As well, I want to be clear that these are my own ideas of how to move forward in anti-subordination efforts - and not those of the activists with whom I've interacted and learned.

n13 Collins, supra note 4, at 8.


n18 See generally Feinberg & Knox, supra note 15; Burnham, supra note 17; Martha E. Gimenez, The Feminization of Poverty:
Myth or Reality?, 19 Int'l J. Health Services 45 (1989).


n20 See generally Zinn, supra note 19.


n23 Collins, supra note 4, at 13.

n24 See generally Amott & Matthaei, supra note 17.

n25 Collins, supra note 4, at 89.

n26 See generally Gloria Anzaldua, Borderlands: La Frontera (1995); Audre Lorde, Sister Outsider: Essays and Speeches (1984); Cherrie Moraga, Loving in the War Years (1983).


n30 See generally Feinberg, supra note 28.

n31 Many in the transsexual community have heavily critiqued Virginia Prince's work and public statements about transsexual experience because Prince is not a transsexual and often dismisses the validity of transsexual experience.

n32 See generally Blending Genders: Social Aspects of Cross-Dressing and Sex-Changing (Richard Ekins & Dave King eds., 1996); Bornstein, supra note 28; Feinberg, supra note 28.


n34 See generally Feinberg, supra note 28.

n35 Califia, supra note 28, at 9.

n36 See generally Wilchins, supra note 28.


n39 My research sought to understand the emergence of "transgender" activism in the mid-1990s. The research took the form of a postmodern ethnography including a comparative case study of 45 TG organizations, unobtrusive observation of TG Internet Newsgroups and World Wide Web Pages, and field work in one TG community and four TG conferences. See generally K. L. Broad, Fracturing "Transgender": Intersectional Claims and Identification, in Advances in Gender Research 6 (Patricia Gagne and Richard Tewksbury eds. 2002); K.L. Broad, Is it G,L,B and T? Gender/Sexuality Movements and Transgender Collective Identity (De)Constructions 7 International Journal of Sexuality and Gender Studies (2002).


n41 See generally Broad, supra note 39.

n43 Bernice Johnson Reagon, Coalition Politics: Turning the Century, in Race, Class, and Gender 540 (Margaret L. Andersen & Patricia Hill Collins eds., 1995).

n44 Collins, supra note 19, at 234.

n45 Phelan, supra note 4, at 140.


n47 Collins, supra note 4, at 203.

n48 Seidman, supra note 4, at 204.

n49 See generally Collins, supra note 4.

n50 See generally id.; Anzaldua, supra note 26.

n51 See Collins, supra note 4.

n52 Id. at 208.

n53 Id. at 219.

n54 Id. at 219.

n55 Id. at 205.

n56 Phelan, supra note 4, at 149.

n57 Id.

n58 Collins, supra note 4, at 234.

n59 Id. at 5. A concrete example might be the way that I transgress gender and also exist as a feminist. Given the contentious history between some forms of radical feminisms and some transgender activists, my "position" is an outsider within. I have all sorts of feminist credentials (e.g., a job in Women's Studies), yet my involvement with transgender activism also marks me as an outsider. Similarly, I have all sorts of credentials to "fit" in transgender groups, but my position teaching both Women's Studies and Lesbian/Gay Studies marks me as an outsider. And yet, I travel between and within these worlds.

n60 Id. at 231.

n61 See generally Phelan, supra note 4; Collins, supra note 4.
Lisa Sun-Hee Park

Introduction

A number of federal and state policies have had significant impacts on low-income, pregnant immigrant women living in California. This paper focuses on the issue of "Public Charge," in conjunction with the 1996 Welfare Reform Act and the 1996 Immigration Act. I argue that the social contexts that helped garner support for such anti-immigrant legislative measures created an environment that essentially criminalized motherhood for low-income immigrant women--whether they be undocumented or documented.

Public charge is a term used by the Immigration and Naturalization Service and the State Department to refer to immigrants who have or will become dependent on public benefits. Interestingly, this term has been a part of U.S. immigration law for more than 100 years as grounds for inadmissibility and deportation. However, it is with the passage of recent immigration and welfare reform laws that concerns regarding "public charge" have resurfaced. In particular, the vagueness of its definition and the standards with which this measure is applied generated considerable confusion regarding who is eligible for certain federal, state, or local public benefits and whether non-citizens may face adverse immigration consequences as a public charge for having received public benefits.

This concern prompted some non-citizens (including immigrants are medically 'on the run,' too afraid to obtain health care, even when they legally are entitled to it." As a result of this chilling effect, low-income, pregnant immigrant women in California are left with few options. On the whole, they either opt not to seek prenatal care, choose self-pay, or enroll in Medi-Cal and take the risk of public charge. Whichever option they choose, the threat of public charge sends a clear message: low-income immigrant women--documented and undocumented--are not welcome to use public benefits, including health care for which they are eligible. Immigrants, regardless of their documentation status, are not viewed as having the same rights and privileges as citizens. The recent passage of both the Welfare Reform Act and the Immigration Act of 1996, underscore the secondary status of immigrants and the popular assumption that they have a "natural" tendency for dependency. In this way, public charge is used as a form of punishment and guarantee against further increases in the number of poor immigrants and their families.

This paper is part of a larger project investigating the impact of the welfare and immigration reforms on prenatal care providers and immigrant health advocates who serve low-income immigrant communities in California. For this paper, I focus on low-income, pregnant immigrant Latinas' access to Medicaid. In the larger study, we interviewed ninety-nine key informants—government officials, safety-net prenatal care providers, and immigrant advocates--who serve low-income, pregnant Asian and Latina immigrants at the national, state, or local levels. We focused on four regions in California where seventy-seven percent of new immigrants are concentrated: Los Angeles, San Diego, San Francisco Bay Area, and Central Valley. Safety-net health care providers and advocates who work with low-income immigrant Latinas repeatedly and consistently reported a "chilling" environment in which women are afraid to access Medicaid to cover their prenatal care. We found that three factors contributed to this "chilling" environment: (1) the sharing of information between the California Department of Health Services and the federal Immigration and Naturalization Service, (2) the slow and confusing implementation of the reforms, and (3) the intimidating Medicaid eligibility process.
Part I critiques the feminization of poverty model and discusses its limitations as an explanatory instrument for immigrant Latinas. Part II discusses how these legislative policies have worked to perpetuate the poverty among low-income immigrant communities in California. Part II.A briefly outlines particular provisions in the 1996 Welfare and Immigration policies that are relevant to immigrant women's health. Then, Part II.B and II.C present a case study of how public charge determinations (long dormant until these recent legislative reforms) and point of entry detection programs maintain the poverty of low-income Latina immigrants by criminalizing their motherhood. Finally, I conclude with a discussion of the larger social context of anti-immigrant policies and their implications on women's poverty.

I. The Feminization of Poverty Model: A Critique

The issue of public charge highlights a number of criticisms raised by Athena Mutua in response to the relevance of the feminization of poverty as a descriptive or analytic tool. n14 Its utility is certainly questionable in the case of low-income immigrant women. In line with earlier critiques, the feminization of poverty model does not adequately address the various conditions of poverty for immigrant families. This section will outline four specific assumptions that contradict the experiences of low-income immigrant women.

First, the model's assumption that women are "falling into" poverty is incorrect in this case. n15 Most of these women and their families in this public charge dilemma were already living below the poverty line and have been their entire lives. Instead of asking how they fell into a state of poverty, a more relevant question is: how is their poverty maintained and what are their everyday experiences and strategies in dealing with these barriers to mobility?

Second, the model minimizes the role of race as a cause of poverty among immigrants. The issue of race is prominent in understanding the experiences of immigrants, and as such, immigration policy is justly viewed through a "racial" lens. This is true historically and contemporarily. For instance, the Chinese Exclusion law of 1882 was a racist immigration policy directed towards Chinese immigrant workers who were viewed as immoral interlopers. n16 Today, Latinos comprise forty percent of the incoming immigrants and Asians comprise another forty percent. n17 This dramatic change in racial composition has stirred the emotions of nationalistic and ethnocentric political forces opposed on principle to a sizable foreign-born population. [*1165]

These sentiments were solidified with the passage of California's Proposition 187. n18 Lynn H. Fujiwara writes:

Proposition 187 reflected fears that undocumented immigrants were overutilizing public resources such as health care, education, and economic assistance at the expense of poor working-class "Americans." Racial- gendered images of migrant women crossing the border to have their children and receive medical care through state-funded health care services played on working-and middle-class voters' resentments against "nonAmericans" who allegedly received benefits from their tax dollars. n19

Similar sentiments also apply to the 1996 Welfare and Immigration reforms. Anti-immigration proponents successfully linked immigrants with crime, welfare, and illegality. Fujiwara states, "The imagery that drove anti-Latino sentiments traded on stereotypes of Latina fertility. These sentiments gained momentum from claims that Latinos overuse public health services and education and take jobs from "American citizens." n20 [*1166]

In looking at the case of low-income immigrant Latinas, it is clear that their immigration status contributes to their race, gender, and class experience (and vice versa). To highlight simply their gendered status misinforms the context of their experiences.

Third, the feminization of poverty model is criticized for mistakenly treating all women as members of an
oppressed group or class equally vulnerable to poverty. n21 This criticism is related to the earlier statement regarding the secondary or "epiphenomenal" treatment of race. n22 Here, the lessons learned through the work of feminist scholars of color in regard to "rethinking" theories of racial-ethnic families appear appropriate. More specifically, the understanding of family patterns as "relational" applies here. n23 Evelyn Nakano Glenn writes that "relational means that race/gender categories are positioned and that they gain meaning in relation to each other." n24 Another scholar has added that examining race, class, and gender allows us to better understand the world where some people's privilege depends on oppressing and exploiting others. n25

Simply focusing on the gendered aspect of poverty obscures the fact that some women are privileged by the oppression and continued poverty of other women. In this way, women can be oppressors as well as the oppressed, depending upon their race, class, and immigration status (sexuality and disability are, of course, other possible sources of privilege and oppression). Perhaps the strongest evidence is presented in studies of domestic labor in the United States, wherein middle-class white women benefit from the subjugated status of low-income immigrant women. n26 [*1167]

Fourth, the feminization of poverty model ignores "the role of the capitalist economy in creating and perpetuating poverty." n27 For immigrant communities, the larger capitalist or global economy is central to understanding their experiences. The next section will address this fourth point in more detail to illustrate the deep connections between the larger capitalist economy and the state of low-income immigrant communities.

The increasing global nature of capital, in conjunction with recent welfare and immigration reforms, has helped contribute to the continuing presence of poverty within immigrant communities. Many low-income immigrant women, the vast majority of whom migrate as workers, experience a double-edged sword in that they enter the U.S. as a result of growing transnational markets while at the same time, face anti-immigrant legislation that punishes their arrival. While immigrant women's cheap labor is in demand in the United States, the basic needs of workers and their families are denied. n28

Despite recent efforts to restrict the flow of immigrants, the creation of global capital, military, and economic linkages continue to foster large-scale immigration to the United States. n29 The growing prominence of established immigrant enclaves in major urban cities, along with globalization of production, decline of manufacturing, and the growth of the service sector have expanded the supply of low-wage jobs, including temporary and part-time jobs. And this in turn, helps fuel continued migration.

The increased movement of goods and services brings with it an increased movement of people. n30 In this way, immigration is a form of labor mobility, sustained by interpersonal networks bridging points of origin and points of destination. n31 The decline of the traditional industrial work force and the rise of new industries based on immigrant labor occurred as the relative power between workers and management shifted through the substitution of low-wage, unorganized workers for high-wage, organized labor. n32 Immigrants from Asia, the Caribbean, and Latin America played an important role in this transition. n33 While the use of Asian and Mexican immigrants who are easily disposable (i.e., reserve labor) is not new, the circumstances leading to migration as well as the gender composition of immigrants have changed.

Perhaps one of the most significant effects of foreign investment in export production is the uprooting of people from traditional modes of existence. In export manufacturing, the catalyst for the disruption of traditional work structures is the massive recruitment of young women into jobs in the new industrial zones. n34 Young women comprise the vast majority of the workers in these export processing industrial zones. The most obvious reason is their cheap labor, but in addition, young women in patriarchal societies are seen by foreign employers as obedient and disciplined workers, willing to do tedious, highprecision work and put up with working conditions that others would not tolerate. n35

This mobilization of large numbers of women into wage labor disrupts the traditional, often non-wage work patterns. To make matters worse, this entry into wage labor is generally a one-way proposition, wherein as traditional economic opportunities in rural areas shrink, it becomes difficult, if not impossible, for workers to return home if they are laid off or unsuccessful in their job search. For workers in these situations, emigration is one of very few options available. n36

Once here in the United States, social policies such as the 1996 Welfare Reform and Immigration Acts work to maintain immigrant families' poverty by creating barriers to social services such as health care. Low-income immigrants are forced to either pay out of pocket or forego care. In this way, many immigrants with little financial means find themselves with a substantial amount of debt. These legislative policies criminalize the use of health care. The fear of potential public charge determinations not only poses a
significant barrier to adequate care but also serves as a
tangible barrier between those who are valued in this
society and those who are not. For many low-income immigrant women, their combined status as female, low-income, racial minority, and immigrant helps to define them as marginal or undeserving.

II. The Perpetuation of Poverty

A. Welfare and Immigration Reform and Immigrant Women's Health Care

In the final version of the 1996 Welfare Reform, restrictions on immigrant welfare accounted for almost half of the total federal savings. n37 This is despite the fact that only about eight percent of the U.S. population are foreign-born as of 1990, and undocumented immigrants comprise about one percent of the U.S. population, or thirteen percent of the foreign born population. Ostensibly a budgetary measure, all the savings from eliminating almost all of the safety nets for immigrants come from denying benefits to legal--not "illegal"--immigrants. Undocumented immigrants are already ineligible for most major means-tested entitlement benefits. [*1170]

Federal welfare and immigration reform legislation of 1996 added restrictions to the use of Medicaid by legal immigrants. The Personal Responsibility and Work Opportunity Reform Act of 1996 restricted immigrants' access to health care by more narrowly defining which immigrant populations were eligible for federal Medicaid funding. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 made it harder for more recent immigrants to establish income eligibility for Medicaid.

The PRWORA created two categories of immigrants with respect to Medicaid eligibility: pre-and post-enactment immigrants. n38 The distinction was based on the relationship of an immigrant's date of entry to the date of the legislative change; those entering after August 22, 1996, were classified as postenactment immigrants. States had the option of providing Medicaid coverage for pre-enactment qualified immigrants. Coverage of non-emergency services for legal post-enactment immigrants would have to be state-funded for the first five years of the immigrant's stay in the country. California opted to continue Medi-Cal coverage to legal immigrants irrespective of their date of entry to the U.S. However, state and local government agencies continued to require documentation of immigration status from applicants for means-tested programs.

The passage of these two laws facilitated the exchange of information regarding immigration status and the receipt of Medicaid-funded services between states and the INS. PRWORA explicitly prohibits the use of federal funds for Medicaid benefits other than emergency care for specific groups of immigrants. Therefore, unless they have a specified immigration status, immigrants are allowed only coverage for emergency care. In the past, a Social Security card or birth certificate was sufficient to establish legal immigration status. Moreover, state and local governments are prohibited from restricting communication between state and local agencies and the INS regarding the immigration status of benefits applicants. This information link between the INS and DHS can occur through local Medi-Cal eligibility offices. When immigrants apply for Medi-Cal, the information they provide about their income and assets, as well as the information in documents they used to establish their California residency, can now be turned over legally to the INS.

Currently in California, legal challenges to the implementation of welfare and immigration reforms and the use of state general funds have ensured the eligibility of low-income immigrants for Medi-Cal coverage of prenatal care and other pregnancy-related services. The problem, however, is that the policy implementations of the welfare and immigration reforms have created a chilling effect that has discouraged use of [*1171] Medicaid by immigrants who are legally eligible in California. There is concern that a decline in Medi-Cal enrollment, and consequently prenatal care utilization, is occurring among low-income pregnant immigrant women.

Studies have shown that uninsured women are less likely to make the recommended number of prenatal care visits, and they experience poorer birth outcomes than women with Medicaid. n39 Furthermore, foreign-born women are more likely than U.S.-born women to be uninsured for prenatal care and are less likely to follow the recommended schedule of prenatal care visits. n40 A minimum standard of fourteen visits starting no later than the third month of pregnancy is recommended by the American College of Obstetricians and Gynecologists. n41 During these visits, women are screened for potential pregnancy complications, which can require additional visits, especially in the latter months of pregnancy. Medicaid coverage for prenatal care is important in ensuring early and continuous use of prenatal care by women who would otherwise be uninsured for the care.

B. Impact of Public Charge

Among the various forms of collaboration between the state DHS agency and the federal INS agency, the issue of public charge is perhaps the most alarming to immigrant communities and those who serve them. The issue at stake is whether Medicaid, a non-cash
public benefit, falls within the public charge domain since the benefit is not cash assistance, but health care coverage.

The INS can prevent an immigrant they judge likely to become a public charge from obtaining legal permanent residency. In addition, the INS can refuse readmission to the United States to immigrants who leave the country for more than 180 days, whom, when they attempt to reenter, are judged likely to become a public charge. The INS can also deport a person found to be a public charge, though this is rarely done.

Since the 1996 enactments, information concerning people who apply for and receive Medi-Cal has been provided continuously to the state DHS office by local Medi-Cal eligibility agencies. In May of 1999, after pressure from immigrant health advocates, the federal government further clarified public charge criterion to exclude non-cash benefits, such as Medicaid and special-purpose cash benefits that are not intended for income maintenance. However, the failure of the federal government to provide clarification on the potential impact of the use of noncash benefits on future immigration status, almost three years after the passage of the legislation, had a significant impact on immigrant communities.

Since 1994, the INS and state DHS officials have made public charge determinations based solely on the use of Medi-Cal. This practice was in conflict with a written policy stating that public charge determinations should be made on the basis of the individual's total circumstances, including age, health, family status, assets, resources, financial status, education, and skills. One community health care clinic director told us of an incident in which she received a phone call from a family member of someone who was having a heart attack. They had called to ask how much an ambulance would cost for a full fee, cash paying patient. Despite the fact that they were documented immigrants, they expressed fear of a public charge determination for using an ambulance as a public benefit. In another case, an immigrant woman in the Bay Area scalded herself badly in the bathtub. The clinic director described the situation:

Her family were all documented citizens and working in one of the suburbs. And she was so afraid of getting her family in trouble, or getting herself in jeopardy that she didn't show up in the emergency room for 30 days after having scalded herself, and by then she was so infected that she was not able to survive. She died.

C. Port of Entry Detection Programs

In California, the sharing of information between Medi-Cal and the INS around issues of public charge became institutionalized through the Port of Entry Fraud Detection programs. There were two such programs: the first was the Port of Entry Detection (PED) at the border of Mexico, and the second one expanded this program to include the Los Angeles International Airport and the San Francisco International Airport. This later program was called the California Airport Residency Program (CARR).

The first Port of Entry Detection Program started in 1994. Under this program, INS officials shared information with DHS staff regarding non-citizen entrants they suspected might have illegally received Medi-Cal benefits. DHS staff used the INS assistance to identify potential cases of Medi-Cal fraud, especially with regard to California residency.

The second program, the California Airport Residency Program began at the Los Angeles International Airport in 1994 and expanded to the San Francisco International Airport in 1996. Under this program, non-residents returning to the country through the Los Angeles and San Francisco Airports were asked about their use of Medi-Cal. In many instances, immigrants who had received coverage legally in the past five years were required to repay the benefits before reentering the country. These demands for repayment were illegal, and in response to lawsuits and advocate pressures, a court injunction stopped this practice. However, despite the injunction against forced repayments, the inspection process continued under stricter legal guidelines. DHS officials, unable to legally demand repayment for benefits consequently informed immigrants that they may "wish" to pay back claims paid by Medi-Cal for past health services.

During an interview, an official of the DHS office of Audits and Investigations explained that INS initially contacted DHS regarding beneficiary fraud by individuals entering the United States. DHS then created a pilot program in the San Diego Port. The INS officials first identified potential fraudulent beneficiaries and referred them to DHS for further investigation. In a separate office, DHS officials asked for proof of California residency and determined if the individuals had or were receiving AFDC or Medi-Cal. If they suspected residency fraud, then they referred them back to the INS with information about the results of their initial review and wrote a "notice of action" to the DHS field office to determine residency status and money owed for medical care or AFDC. This additional measure of referral to the field office was a procedural change from the past when DHS used to determine fraud solely on the initial meeting at the airport or port of entry. More recently, DHS referred cases to their field offices for independent review. At this point, DHS and the INS conducted separate
in effect, immigrants were screened for both issues of public charge is a concern for the INS. It appears that, will become dependent on public benefits. However, in some cases, immigrants were denied re-entry into the United States. A hotline was created for complaints of inappropriate treatment within the DHS investigation process. This was in response to past problems with DHS officials demonstrating a lack of respect toward immigrants in this program. The DHS official we interviewed acknowledged this problem and stated that these issues had been resolved.

In April 1999, the state Health and Human Services Agency terminated the two programs. A few days later, both the state assembly and senate budget subcommittees defunded the programs. These actions followed a particularly negative review of the programs by the Bureau of State Audits, declaring both Port of Entry Medi-Cal fraud detection programs "unjustified." The audit cited operational and administrative deficiencies and found that the department was no longer recovering enough fraudulent Medi-Cal payments to justify its investment in these programs. In part, this was due to a class action challenging the California Department of Health Services' practice of colluding with the INS to demand repayment of Medicaid benefits received. The settlement required the state DHS to return at least $3 million to immigrants who were improperly ordered to return Medi-Cal benefits at the port of entry fraud detection programs. State auditors documented intimidation by way of threatened imprisonment or reduced chances for citizenship, and by demands for repayments higher than the actual cost of the Medi-Cal benefits received. About 1,500 families were eligible for refunds under this settlement.

DHS contends that these programs were a separate issue from public charge, since they were concerned with benefit fraud and not whether an immigrant is or will become dependent on public benefits. However, public charge is a concern for the INS. It appears that, in effect, immigrants were screened for both issues of benefit fraud and public charge by two different governmental agencies within the same program. For immigrants in general, the differences between the two are subtle, if not insignificant. For them, the message is clear: using Medi-Cal is dangerous.

According to the Auditor's report, using Medi-Cal was especially dangerous for immigrant women. After reviewing 440 case files, the audit team found that ninety-seven percent of all the individuals investigated by the Port of Entry Programs were women. Eighty-six percent were between twenty-one and forty years old, and eighty-nine percent of cases involved families with children. The report went on to add: [*1175]

The profiles of people investigated by the PED and CARR programs contrasted sharply with the general profile of people eligible for Medi-Cal benefits. For example, just under 20 percent of people eligible for Medi-Cal in July 1998 were between the ages of 21 and 40, yet this age group represented over 80 percent of the individuals investigated by both programs. In addition, women accounted for 50 percent of the people eligible for Medi-Cal benefits but comprised over 97 percent of the PED and CARR program investigations. Finally, in 1997, nonimmigrants and undocumented aliens living in California represented just 7 percent of the eligible Medi-Cal population. However, they accounted for at least 80 percent of the investigations for the programs. n50

A key informant, a Bay Area community clinic director, had an opportunity to visit the California Airport Residency site in San Francisco in November 1997. She became concerned about the program after half a dozen of her clients reported having problems trying to re-enter the country. The director was able to set up a meeting with DHS and INS officials to find out how the program operated (it was not stated whether she spoke to the DHS and the INS together or separately). When asked how they chose particular people to interview, she learned that flights from Asian and Latin America, principally Mexico, and women of childbearing age were targeted. She described the extra screening conducted near the customs checkpoint:

They are looking at women of Asian and Latino origin, not who looked pregnant, but if they had little children with them or they were somewhere between the ages of 20 and 45, then (they were) asked a series of light interview questions. And in those light interview questions, if either determined that they had children within a certain period, then they would ask, who paid for it? What kind of insurance did you have? Who was your health care provider? And if someone ended up showing their Medi-Cal card, then they were totally in the next realm of interview. n51

According to the clinic director, the process of determination appeared "purely arbitrary." She went on to explain the complicated interplay between the federal INS official and the state DHS representative. The exchanges played on the fact that there were parallel but conflicting agendas, laws, and
interpretations of regulations. With the DHS official sitting quietly beside him, the INS agent would question the woman until she described applying for Medi-Cal after being advised at the county office of her eligibility. At that point, the INS agent would raise questions as to whether she was truly eligible and advise her to consider paying back the benefits to avoid being sent to court for an eligibility determination, or the even more severe penalty of being deported and permanently denied future entry. After instilling these doubts and fears, the [*1176] woman was advised of the costs of the services she received and provided the opportunity to repay DHS. As a result of these intimidating practices, there were lines of immigrants at the airport waiting to pay back the health benefits they used through Medi-Cal.

According to our interviewers, both the Port of Entry Detection and Airport Residency Programs have had a profound effect on immigrants throughout the state of California. The fact that documented immigrants who legitimately used health services could be asked to repay their Medicaid expenses, denied re-entry, and even deported by a seemingly arbitrary public charge determination were frightening propositions for all immigrants.

Conclusion

The emergence of these highly nationalistic and ethnocentric policies signifies a society that is opposed to a sizable foreign-born population in their midst. n52 The continued "browning" of America is certainly evident in the recent numbers provided by the U.S. Census Bureau. From July 1, 1990, to July 1, 1999, the nation's Asian and Pacific Islander population grew 43% and the Latino (or Hispanic, as defined by the Census Bureau) population grew 38.8%. n53

These policies and associated programs particularly target immigrant women who are pregnant or of child-bearing age. This was evident in the profile of individuals targeted for Medi-Cal fraud investigations at the Port of Entry Detection program. The federal INS and state DHS agencies collaborated in devising a method to slow down the rate of population increase among Latinos and Asians. By targeting immigrant women with children, it appears that they attempted to interrupt the flow of immigration as well as the likelihood of more childbirth by immigrant women. However, recent immigration numbers show that these policies have not worked as intended. n54 Sassen writes:

Recent reforms in immigration law, ostensibly designed to rationalize immigration policy, have not only failed to slow immigration but threatens to do harm both to our own society and to the immigrants themselves. . . . The combination of such sanctions and a regularization program that excludes a large number of undocumented workers will [*1177] contribute to the formation of an immigrant underclass that is legally as well as economically disadvantaged. n55

These programs perpetuate the cycle of poverty among low-income immigrant women. By criminalizing access to health care, immigrant women are reluctant to receive prenatal care that may alleviate potentially costly future health problems. Lowincome immigrant families' already tenuous financial situation becomes more stressed as they seek other means to recover a public benefit for which they are ineligible. The recent welfare reform measure sends a clear message against the use of public benefits in the United States. Those who argue for stricter immigration laws view the use of public benefits as an indication of declining "quality" of immigrants admitted. n56 It is apparent that immigrants are well aware of this anti-immigrant message.

It is apparent that, within contemporary social welfare discourse, welfare dependence and not poverty or unemployment is viewed as the social ill that is the appropriate target for state action. n57 The threat of public charge, or the potential dependence on welfare benefits, has made it clear that immigrant women are undeserving and unwanted.

FOOTNOTE-1:


n6 Medi-Cal is California's Medicaid program.

n7 As self-payers, women become more likely to "shop around" for cheaper care. Choosing the lowest price provider to reduce their out-of-pocket expenses generally leads to less comprehensive prenatal care packages, delays in the start of prenatal care and/or a decline in the continuity of care. See generally Lisa Sun-Hee Park et al., Impact of Recent Welfare and Immigration Reforms on Use of Medicaid for Prenatal Care by Immigrants in California, 2 J. Immigrant Health 16 (2000).

n8 A number of scholars and activists have asserted that immigrants migrate for work rather than welfare. For instance, in their testimony before the House of Representatives Ways and Means Committee, Michael Fix, Jeffrey S. Passel, and Wendy Zimmerman stated that immigrants' overall use of welfare is roughly the same rate as natives. In regard to the dependency question, they stated that "most immigrants are self-sufficient: 94 percent of immigrants in the U.S. do not receive welfare benefits" (emphasis in original). See generally Fix & Passel, supra note 5.

n9 See generally Park, supra note 7.

n10 Safety-net providers are county and community hospitals and clinics.

n11 This is for the years 1990 to 1994. Source: National Immigration and Law Center; Los Angeles, CA.

n12 For more detail, see Park, supra note 7.


n15 Susan L. Thomas, Gender and Poverty 65 (1994).


n17 See generally B. Lindsay Lowell, Immigrant Integration and Pending Legislation: Observations on Empirical Projections, in Immigration and the Family 271 (Alan Booth et al. eds., 1997). This is a profound change in the racial make-up of the immigration flow. It is noteworthy to point out that this was an unexpected result of the 1965 Immigration Act that eliminated what was viewed as a racist national quota for immigration.

n18 Proposition 187 was a state initiative that barred undocumented immigrants from receiving public benefits including health care (except emergency medical care) and education. Passed in 1994, this initiative was a response to the surge in immigration to California during the 1980s and early 1990s. In a study of Latina immigrant women's perspectives on Prop. 187, researchers found that Latinas perceived Proposition 187 as discriminatory and directed primarily at Latinos. The study also found that Latina immigrant women were reluctant to seek medical care as a result of this initiative. See generally Nancy Moss et al., Perspectives of Latina Immigrant Women on Proposition 187, 51 J. Am. Med. Women's Ass'n, 161 (1996). This
reluctance to seek health care occurred despite that fact that the law was never enacted. Immediately after its passage, legal advocates questioned its constitutionality in a number of lawsuits.


n20 Fujiwara, supra note 19. These anti-Latina images were apparent in various forms throughout California, but perhaps none so egregiously as in San Diego. For example, The San Diego Union-Tribune devoted significant resources in highlighting immigrants' use of health benefits. In 1993 (a year before the passage of Prop. 187), they ran a five-part series entitled, "Medi-Cal: The New Gold Rush" that focused on Mexican immigrants' use of health care in the United States. The first installment began with this subheading: "California's health program to treat the state's poor--Medi-Cal--has created a new gold rush as people from around the globe flood the Golden State to grab a share of the unsurpassed medical care available here. Who pays for all this? You do." Rex Dalton, Medi-Cal: The New Gold Rush, San Diego Union-Trib., Apr. 11, 1993, at A1. The series helped to solidify many U.S. residents' misinformed notion that immigrants migrate for welfare/health benefits and that immigrants do not contribute to this society (in taxes or otherwise). The imagery of California's gold rush of the 1800s that brought so many Chinese sojourners, as well as many other immigrants, is also noteworthy. Also, a few months prior to this series, state Sen. William Craven, chairman of the Senate Special Committee on Border Issues, was quoted as saying, "It seems rather strange that we go out of our way to take care of the rights of these individuals who are perhaps on the lower scale of our humanity, for one reason or another." Jeffrey J. Rose, Migrants A Burden to Local Budgets?, San Diego Union-Trib., Feb. 6, 1993, at B1. The separation of Latinos into an "undesirable" or "undeserving" category is clear; and so are the racist undertones that helped garner support for subsequent anti-immigrant legislation.


n21 See generally Thomas, supra note 15, at 65.


n25 Zinn, supra note 23.


n27 Thomas, supra note 15. While I find Thomas' outline of some of the central complaints against the feminization of poverty model useful, I find the author's responses to these criticisms largely unconvincing. For instance, she states that "while I support the idea that women's and men's poverty is exacerbated by the
workings of a capitalist economy, I am unsympathetic to the left's notion that gender is an irrelevant consideration when analyzing poverty." Id. at 65. This statement underestimates the role of a capitalist economy in not only "exacerbating" women's and men's poverty but creating and maintaining poverty. In addition, from Thomas' analysis, it is unclear as to who these "Leftists" are and I remain unconvinced that those who critique this model for its ignorance of the larger capitalist economy find gender irrelevant. Also, on the issue of race as a cause of women's poverty, Thomas acknowledges the feminization of poverty approach as lacking. However, she adds, "I do not agree that race and class are more important than gender in causing women's poverty. . . . I would suggest that until women as women know what their similarities are they cannot understand their differences . . . race, class and gender are interwoven in complex ways, each contributing to women's pauperization. This book focuses on the role that gender plays in causing women's poverty while acknowledging that race and class also play roles in creating and perpetuating women's poverty." Id. at 66. In these statements, Thomas misunderstands the work of feminist scholars of color who have theorized about the concept of "race, class, and gender" and "difference" as an analytic tool in understanding the experiences of women of color. For some women of color at certain times (as evidenced in the lives of immigrant women of color), one's racial status can supersede one's gender or class status in defining that particular moment or experience. At other times, gender or class may take precedence. To simply set aside race and class by "acknowledging" its existence is inadequate and inexcusable in analyzing women's poverty. See generally Patricia Hill Collins, Black Feminist Thought (1990); Trinh T. Minh-Ha, Not You/Like You: Post-Colonial Women and the Interlocking Questions of Identity and Difference, in Making Face, Making Soul 371 (Gloria Anzaldúa ed., 1990); Zinn, supra note 23. The responses presented by Thomas exemplify a middle-class, white bias that work to discredit her analysis rather than bolster it.

n28 Statistics show that immigrants (both documented and undocumented) have high employment rates. See generally David E. Hayes-Bautista & Gregory Rodriguez, Immigrant Use of Public Programs in the U.S., 1996, in Report for the Center for the Study of Latino Health (UCLA School of Medicine 1997).


n33 However, this is not to say that the use of immigrant workers as cheap labor is a new phenomenon. Since the mid-1800s, Asian workers helped build the Transcontinental railroad, worked in mines, planted some of the first crops in California's Central Valley, developed fishing industries and canneries along the West Coast, and labored in sewing factories, laundries, and restaurants. And after the exclusion of Chinese in 1882 and Japanese immigrant workers in 1924, Mexican laborers were used as replacements to fill the need for low-wage, disposable labor. Mexican labor was particularly in demand in the United States during the labor shortages of WWI and WWII. With WWII, the Bracero program was created. This program, lasting from 1942 to 1964, provided Mexicans with temporary work visas and helped to institutionalize the role of Mexican workers as a reserve army of labor. They were available to be drawn into the labor force at low wages whenever shortages threatened to raise wages, but always remained vulnerable to expulsion when the economy contracted or when other sources of cheap labor appeared. Even though the program was allegedly enacted to ease war-time labor shortages, agricultural growers and other employers obtained renewal of the program for
decades thereafter. See generally Teresa Amott & Julie Matthaei, Race, Gender, and Work (1996).

n34 See generally Sassen, supra note 29.


n36 See generally Sassen, supra note 29.


n38 See generally Ann Morse et al., America's Newcomers: Mending the Safety Net for Immigrants (1998).


n42 See generally U.S. Department of Justice, supra note 4.

n43 See generally Schlosberg & Wiley, supra note 5.

n44 Interview with clinic director (Oct. 1998) (on file with author).


n47 Id.


n49 See generally California State Auditor, supra note 46.

n50 Id. at 34.

n51 Interview with clinic director (Oct. 1998).


n54 In fact, Thomas J. Espenshade and his colleagues argue that there were a number unintended consequences as a result of the 1996 policies: 1) limited legal migration, and 2) increase in undocumented migration. See generally Thomas J. Espenshade et al., Implications of the 1996 Welfare and Immigration Reform Acts for U.S. Immigration, 23 Population & Dev. Rev. 769, 770 (1997).

n55 See generally Sassen, supra note 29.

n56 See generally Michael Fix & Jeffrey S. Passel, Immigration and Immigrants Setting the Record Straight, at http://www.urban.org/pubs/immig/immig.htm (last visited Feb. 23, 2001). Also, DeFreitas notes that immigration at current levels do not harm domestic wages or employment. "Immigrants appear to contribute more in federal, state, and local
taxes than they use in public assistance and services." DeFreitas, supra note 52.

n57 See generally Amott & Matthaei supra note 33.
Introduction

The "feminization of poverty" concept should be retired, if it has not already been so. It should be retired, even though the concept has been extremely powerful as a discursive construct. In a phrase, the idea captured a seemingly universal phenomenon, inspired theoretical research into the nexus between women and poverty, and summoned coalitions of women by marking an agenda for, and among, women across the boundaries of race, ethnicity, and nationality. In short, it has been a war cry, demanding and framing analyses of women's poverty, and justifying and inspiring women's collective action. Nevertheless, the feminization of poverty construct should be retired because its definition is unclear and its meaning seems only partially accurate—capturing the dynamics of poverty in some communities but not others.

Specifically, the concept fails to adequately capture the dynamics at work in the creation and the maintenance of poverty, both women and men, in poverty. This is so particularly where poverty is the norm for both women and men, as it is in many U.S. communities of color and other national and sub-altern communities. Further, the feminization of poverty construct, by inadequately reflecting the gender dynamics of poverty in these communities, may also unnecessarily strain the intra-community coalitions of men and women of multiple sexualities whose survival may be more intimately and immediately tied to and dependent on each other. Moreover, because the construct relies on essentialized understandings of men and women, it may erase the experiences of and hinder coalition building with those "who transgress gender, moving through the categories of 'woman' and 'man.'"

Ultimately, the feminization of poverty concept should be retired because it may have served its purpose. This purpose is not to describe the existence of a recent but universal phenomenon but to spawn the research, debate, and investigation that has generated alternative notions and frameworks for understanding the lived experiences and conditions of all people in poverty. One of these notions or frameworks is simply the idea and reality of "gendered poverty." The notion of gendered poverty recognizes that gender relations are deeply embedded in the operation of market systems and other economic structures and that poverty itself is deeply gendered. In other words, it summarizes research confirming that men and women often come to poverty through different processes, are maintained in poverty in different ways, and experience poverty differently. Additionally, these gendered processes reflect and reinscribe the notion that gender is intransitive, reproducing current gender and sex roles that limit individuals and groups.

Unlike the discursive feminization of poverty construct, the notion of gendered poverty lacks some of the flare, moral indignation, and outrage that propelled women into coalitions (based on a sense of common experience) and inspired substantial research into the lives of poor women. Further, and perhaps more importantly, the notion of gendered poverty fails to capture the fact that even where women are not poorer than men, they tend to be more vulnerable to poverty than men. In addition, the notion of gendered poverty does not, on its face, take into consideration the intersections of race, citizenship, and other conditions, which might deeply affect and be affected by various economic processes.

Nevertheless, the notion of gendered poverty informs research into the nature of poverty and market relations as they relate to women and men, respectively and specifically. It also appears much more amenable to attachments. So, for instance, one might talk about racialized gendered oppression, gendered racial poverty, racialized transgendered poverty, or racialized gendered imperialism. Further, it potentially facilitates a broader range of coalitions, including coalitions of women, men, and transgendered people. Ultimately, however, neither a feminization of poverty nor a gendered poverty approach captures the range of...
subordinating structures that shape poverty. Therefore, an approach that seeks to understand the multidimensional nature of poverty and promotes anti-essentialist, anti-subordination principles and practices might better unravel the ties that bind people in poverty and be more inclusive, permitting shared agendas for building coalitions.

In short, I argue that the feminization of poverty construct adequately captures the idea that gender identity, being a man or woman, determines, structures, shapes and influences an individual’s access to resources and opportunities (e.g., jobs). It also captures the idea that women are more vulnerable to poverty than are men. Yet the construct creates, suggests, or facilitates a series of other problems and therefore should be retired. [*1183]

First, it is unclear whether feminization of poverty means that more women are falling into poverty or that there are more poor women than there are poor men. Second, it suggests that women are always worse off or poorer than men. Third, although it requires a gender analysis, it focuses on women's poverty in a way that conflates the concept of gender with women. In other words, gender comes to mean and refer to women. One of the results of this conflation is that the gendered ways in which poor men experience poverty go unexplored and the opportunities available for men are presumed privileged and unlimited, even where the community as a whole is poor. Fourth, the feminization of poverty construct itself, but particularly when used as an advocacy tool, may strain intra-community coalitions by suggesting that women in a given community are worse off than men. Fifth, by essentializing gender, assuming that all women experience life in the same way regardless of race, class, sexuality, or nationality, and assuming that gender roles are fixed for all and determined by biological sex, the construct fails to capture and may erase the ways in which transgendered individuals' poverty is shaped by gender. It thereby, again, inhibits or strains coalitions with variously gendered people.

And finally, both the feminization of poverty construct and the gendered poverty notion imply that gender is the predominate factor structuring and shaping poverty, particularly women's poverty, even in communities of color or those communities where people have not recently fallen into poverty but are already poor. A multidimensional approach that includes a gender analysis may be more illuminating in analyzing poverty in these communities.

Part I of this paper briefly traces the origin and development of the feminization of poverty concept. It demonstrates that the development of the term, both as an analytical framework and an advocacy tool to promote women's coalitions and studies on women's poverty, muddied the meaning of the term and led to confusing debateable universalistic claims. Simultaneously, the term generated research, which demonstrated [*1184] that even though women tend to be more vulnerable to poverty than men, women may not be poorer than men in every community.

Part II examines three contextual analyses of poverty in the lives of women and men. First, it examines Professor Arriola's analysis of labor practices in the Mexican maquiladoras. This section argues that the feminization of poverty construct fails to adequately capture the gendered dynamics of poverty in the maquiladoras. Further, it suggests that the construct when used as an advocacy tool may cause unnecessary strain within the community, thereby inhibiting intracommunity coalitions and unity between men and women. The notion of gendered poverty, in contrast, allows for a broader analysis and range of coalitions, including those between men and women.

I then sketch the intersections and disjunctures between the feminization of poverty framework, which is predicated upon the "dual and intersecting assumptions of heternormativity and binary gender" n21 and the goals of transgender activism, which challenge these same assumptions, as discussed by Kendal Broad. n22 Here, again, I suggest that the feminization of poverty construct is problematic because it fails to capture the gender dynamics implicit in transgendered lives. The concept of gendered poverty, on the other hand, may be broad enough, analytically, to encompass and capture the dynamics of sexual and gendered oppression and poverty, while facilitating coalitions among variously gendered groups. n23 And finally, I return to an analysis of women's poverty, examining Lisa Sun-Hee Park's study on the impact of welfare and immigration reform on Medicaid use by immigrants for prenatal care, n24 which suggests, contrary to the implications of the feminization of poverty construct, that gender is not the only factor or identity category that shapes women's experience of poverty. I suggest that a multidimensional approach to analyzing poverty will yield a greater understanding of poverty and possibly a firmer basis for coalition building across various groups.

Part III concludes this point, noting that a multidimensional analysis may lead to greater understandings about how poverty operates in individual and group lives. At the same time, Broad's proposition that outsider groups, such as LatCrit, "do coalition" on the basis of affinity, n25 understood as

[72x79]demonstrates that the development of the term, both as...
shared commitments to anti-subordination and substantive [*1185] social justice, n26 provides a mechanism for promoting coalitions across these multidimensional differences. I suggest that this idea provides a more useful framework for building coalitions and understanding and practicing anti-essentialist, anti-subordination praxis, a primary tenet of LatCrit's purpose. In other words, "doing coalition," is a form of anti-essentialist, anti-subordination theory and practice, and is a common agenda among various groups, including the gendered groups of women, men, and transgendered people.

I. Feminization of Poverty, Some Initial Problems: Multiple Meanings and Universalistic Claims

The discursive construct of the feminization of poverty should be retired because it is not clear to what phenomenon it refers, and depending on how it is defined, the poverty-related phenomenon it captures is limited, contrary to its advocates' universalist aspirations.

Nilufer Cagatay notes that the feminization of poverty concept has been used to describe three different phenomena or to make three different claims: "[1.] There is a trend toward poverty among women, particularly associated with rising rates of female headship of households; [2.] women have a higher incidence of poverty than men; [3.] women's poverty is more severe than that of men." n27 Not only does the feminization of poverty concept mean different things to different people, each of the claims is problematic.

The first claim that there is a trend toward greater poverty among women finds its expression in the origins of the feminization of poverty concept. While accurately capturing a particular phenomenon in the United States during the 1960s and 1970s, attempts to substantiate it as a global phenomenon rely on two faulty assumptions. One assumption is that the same phenomenon is occurring in all places at the same time. The second and more lethal assumption is that the rising female-headed household, on which the theory relied, is always worse off or poorer than similarly situated male-headed households.

The second claim that there are more poor women globally than there are poor men is accurate but embodied and associated with faulty statistics. The third claim, that women's poverty is more severe than [*1186] men's poverty, exaggerates the insight that women may be more vulnerable to poverty than are men. While all three claims encouraged research into the circumstances that led to greater poverty among women, the various meanings of the concept limit its value as a descriptive tool, even as it frames and disrupts the gendered analysis of poverty.

A. Origins: A Trend Toward Greater Poverty Among Women?

Diane Pearce is credited with coining the phrase feminization of poverty in the late 1970s, n28 and her analysis directed attention toward the gendered nature of poverty as it related to women. She declared that "poverty was rapidly becoming a female problem" in the United States n29 and argued that women were "falling" disproportionately into poverty even though they were increasingly participating in the labor force. n30 Their poverty was due to the segregation of women into low paying jobs, the increase in divorce and single parenthood resulting in an increasing number of female-headed households, and the inadequacy of government benefits (or enforced child support) to support these women and their children. n31 Her analysis spurred research into this phenomenon, and later studies substantiated many of her findings. n32 The term, to the extent that it reflects this phenomenon, seems to have accurately captured the reality of many women's lives in America throughout the 1960s and 1970s. n33

While studies confirmed that there was a trend toward greater poverty among women (or a trend of more women falling into poverty) in the United States, the question arose as to whether this phenomenon occurred "only in America." n34 Cross-national studies indicated that this trend was also present in other countries. n35 For example, Eastern Europe [*1187] has been identified as a place where the feminization of poverty idea captures reality. n36

Part of the process of the "economic transition" occurring in Eastern Europe has been the dismantling of structures that supported women's participation in the economy coupled with the resurgence of older patriarchal notions. n37 Consequently, women have been disproportionately laid off from jobs and forced to leave positions because of inadequate childcare options that had been readily available before the transition. n38

But neither the economic transition occurring in Eastern Europe nor the combination of factors occurring in the United States is a universal phenomenon occurring generally across the globe at the same pace or in the same way. n39 Later studies also confirm this insight. n40

Further, much of the earlier claims suggesting a world-wide feminization of poverty inaccurately linked the evidence that, globally, female heads of households were increasing, to the assumption that these households were less well off than male-headed households. n41 The focus on female-headed households resulted from the fact that the household
has been the unit of analysis for studying poverty, rendering female headship [n1188] the only gender-transparent factor. But because poverty traditionally has been measured in terms of income or consumption and defined as the "lack of access to resources, productive assets, and income resulting in a state of material deprivation, or as a deficiency in private consumption," later studies cast doubt "on any universal relationship between female headship and poverty." This is so even though there is an association. In other words, not all households that are or become female-headed are less well off than similarly situated male-headed households; indeed in some communities, female-headed households may be considered better off. At the same time, however, a disproportionate amount of female-headed households suffer from chronic poverty.

In summary, the idea of a global feminization of poverty has been partially discredited. Further, things change. The feminization of poverty may be decreasing in the United States, where the idea first gained currency, even as it may be increasing in Eastern Europe.

B. Women Have a Higher Incidence of Poverty?: Some International Claims

Globally, more women are poor than men, meaning women have a higher incidence of poverty. But how much higher has been a debated question posed, in part, by advocates using questionable statistics.

The use of the feminization of poverty construct gained momentum not only nationally but also internationally. For example, the Fourth World Conference for Women notes that the "absolute poverty and the feminization of poverty, unemployment, the increasing fragility of the environment . . . underscore the need to continue the search for . . . people-centered sustainable development." In addition, the United Nations Development Fund for Women (UNIFEM) has consistently used the term, explaining that "with women making up 70 percent of the world's 1.3 billion poor, the feminization of poverty is a growing phenomenon . . . . Further, as globalization changes markets and economic opportunities worldwide, the feminization of poverty remains a global phenomenon."

UNIFEM's use of the feminization of poverty construct is an example of the phrase being used in two distinct ways. These different uses confuse and muddy its meaning, limiting its usefulness as an analytical tool. Its use as an analytical tool is further limited by the faulty assumptions and statistics embedded in and surrounding the idea. These faulty assumptions and statistics also render the construct less credible as an advocacy tool.

The idea that women make up seventy percent of the world's poor is related to the claim that there is a higher incidence of poverty among women as compared to men. The claim that women make up seventy percent of the world's poor is problematic. This statistic has been challenged empirically, and advocacy organizations such as UNIFEM have been cautioned against using the statistic to bolster claims of the feminization of poverty. UNIFEM itself has recently acknowledged that the figure is not credible.

However, there is a consensus that there are more poor women than poor men across the globe. The reasons that there are more poor women than there are men across the globe is not merely the result of some women in some places "falling" disproportionately into poverty, because many women were born into poverty and remain there. Rather, the higher incidence of poverty among women relates to women's greater vulnerability to poverty.

C. Women's Poverty: Greater Severity or Vulnerability?

In some circumstances and communities, women's poverty is more severe than the poverty of men in the same community. In other circumstances, women's poverty may be less severe. However, the feminization of poverty construct correctly alludes to the fact that the conditions and experiences of poverty are gendered and that women are more vulnerable to poverty than are men.

While the notion that the feminization of poverty was occurring on a global level inspired research at national and international levels into the lives of poor women, it also encouraged studies that broadened the definition of poverty itself. These broader definitions helped to unpack the nature of gendered poverty generally, and women's poverty specifically.

In addition to the quantitative analysis of income or consumption, researchers have begun to investigate the intrahousehold distribution of resources and to use other qualitative and participatory analyses for measuring and understanding poverty. For instance, the United Nations Development Programme (UNDP) has developed a concept of human poverty based on Amartya Sen's approach, in which poverty represents the "absence of some basic capabilities to function" (such as education) with "functionings" representing what people can be or do. Human poverty is defined as "a denial of choices and opportunities for living a tolerable life."
such, accounts for "more than the minimum necessities for material well-being." n62 As measured by income and consumption [*1191] frameworks. Human poverty looks at deprivation in basic human development such as "a short life, lack of basic education and lack of access to public and private resources." n63 Poverty is increasingly "being viewed more as a process rather than a static concept," n64 and the causes of poverty, not simply its symptoms, are being investigated. n65

Under an income/consumption framework, women cannot be said to be poorer than men in every society across the globe. n66 However, Cagatay argues persuasively that from a human capability perspective, which focuses on access and choice, women are poorer than men in "most societies in many dimensions." n67 She explains that women are often poorer in terms of capabilities such as education and health, and are sometimes poorer in life expectancy, where household allocation of resources is biased against girls' and women's nutritional and health needs. n68 Further, she notes that it is harder for women to transform their capabilities [such as education] into incomes or well-being [because of] gender inequalities in the distribution of income, access to productive inputs such as credit, command over property or control over earned income, as well as gender biases in the labour markets and the social exclusion that women experience in a variety of economic and political institutions. n69

[*1192] These "form the basis for the greater vulnerability of women to chronic poverty." n70 Further, she summarizes findings which demonstrate that labor biases together with women's responsibilities for reproductive labor result in women being more "time poor," more vulnerable to transient as well as chronic poverty generally, and more economically and socially insecure. She states:

Across a wide range of cultures and levels of economic development, women tend to specialize in unpaid reproductive or caring labour compared to men, who tend to specialize in paid production activities. Women's combined paid and unpaid labour time is greater than are men's. . . . Women are relatively time poor and much of their work is socially unrecognized since it is unpaid. Furthermore, when women are in paid work, the return to their labour is lower than the return to men's labour. Thus, women on average work more, but have less command over income as well as assets. Nor do they always have control or command over their own labour . . . . n71

She argues further:

Women's responsibilities for reproductive labour limit the range of paid economic activities they can undertake. Women are less mobile than men because of [these activities and other social norms]. In the paid sphere, they tend to be concentrated in informal labour activities (such as homeworking), since such activities allow them to combine paid work with unpaid reproductive labour. However, these are also insecure forms of work. It is hard for such workers to get organized for collective action.

The gender-based division of labour between unpaid (and often reproductive labour) and paid labour renders women economically, and socially more insecure and vulnerable to not only chronic poverty but also transient poverty that can result from familial, personal or social and economic crises. . . . n72

Having thus argued, Cagatay notes that a correlation exists between gender inequality and poverty and suggests that eradicating gender inequality may also help reduce poverty. n73 Further, she makes clear in her [*1193] analysis that women and men experience poverty differently, and that a gender analysis is crucial to understanding and seeking to eradicate poverty.

However, Cagatay does not argue that gender necessarily causes poverty. Rather, women's gender causes them to be more vulnerable to poverty than men. Gender structures and shapes poverty and women are more vulnerable to poverty, given the limitations they face in most societies and their roles in unpaid reproductive and nurturing work.

Nevertheless, while women's vulnerability may be implicit in the phrase, feminization of poverty, it is no more facially clear in that phrase than it would be in the notion of gendered poverty. Further, depending on the framework for understanding poverty, women are not always worse off or poorer than men in every community. Therefore, given the origins and development of the feminization of poverty construct, resulting in muddled, multiple, and problematic definitions, a shift in terminology may be warranted, particularly where a broader range of gendered dynamics can be captured.

In summary, the feminization of poverty concept has served a significant purpose in helping to generate research into the relationship between gender and poverty. The construct directs attention to the gendered nature of poverty and alludes to a higher incidence of poverty among women and women's greater vulnerability to it. However, its meaning over time has become muddled, and its new meanings often rely on faulty assumptions to provide more general appeal and applicability. In addition, as a framework for
understanding or analyzing particular groups of women's poverty, the feminization of poverty no longer asks the right questions. The questions have been: are women falling disproportionately into poverty and why? Are there more poor women than poor men?; and is women's poverty more severe than men's? Present studies, however, have added the following questions: what are the conditions of women and men in poverty? How are men and women poor?; how are they maintained in poverty?; and what does it mean to live in poverty? These questions require a more nuanced approach to the study of gender and poverty, perhaps better captured by the broader notion of gendered poverty. The feminization of poverty [construct should be retired for these reasons alone. But in addition, it may do more damage than good.

II. Feminization of Poverty Applied: Failing, Straining, and Erasing

In communities where people are already poor, including many communities of color in the United States, the ways in which people are maintained in poverty are gendered. The feminization of poverty construct alludes to this gendered poverty but fails to capture the full extent of gendered poverty including the gendered nature of men's poverty in these communities, the gendered nature of transgendered poverty, and finally the multidimensional nature of women's poverty in these communities.

A. Poor Women and Men at the U.S.-Mexican Border

Women and men at the U.S.-Mexican border are poor. Being a woman or a man determines in large measure which, if any, opportunities are available. Generally at the border, women have more opportunities for employment than men do; labor is feminized. Below, I summarize and examine Elvia Arriola's article entitled Voices from the Barbed Wires of Despair: Women in the Maquiladoras, Latina Critical Legal Theory and Gender at the U.S.-Mexican Border. The examination reveals gender forces at work in the maquiladoras, structuring opportunities differently for women and men.

1. The Setting

Elvia Arriola exposes the inhumane working conditions and exploitation of Mexican women and men by predominately U.S. transnational corporations based in Mexico at the U.S. border. These border corporations, called maquiladoras, employ an overwhelmingly female labor force at depressingly low wages, while largely marginalizing men whose options are to return to the Mexican interior or attempt to cross an increasingly militarized border. While neo-liberal free-trade economic policies, including the North American Free Trade Agreement, facilitated the establishment and movement of corporations south of the border in the name of progress and modernization, these same laws and an increasingly militarized border deter the movement of both the labor force and the marginalized to better opportunities north of the border. The result is the legally maintained and partially contained transnational gendered exploitation of people in the south for the benefit of corporations and consumers in the north. Although Arriola uses both LatCrit and feminist theory to explore the conditions in the maquiladoras, the image conjured is of gendered poverty or of a gendered imperial project rather than the one invoked by the feminization of poverty construct.

She states:
The maquiladora's industry may be the late twentieth century's hallmark of an exploitative transnational capitalist system of production, trade economics, and employment whose success depends on the use and abuse of a highly feminized workforce which, in contrast to the sophisticated business elite that invests in maquiladoras, is poor, young, and uneducated. In other words, it is a system that thrives on gender-based oppression. A typical maquiladora's population of workers is unlikely to benefit in any long lasting way from the experience of working for one of the thousands of factories, [in part] because of the fragmentation of the production process [which allows] the work to be done rapidly, efficiently, and by individuals who have no skills prior to employment.

2. Women's Gendered Oppression in the Maquiladoras

The gender-based oppression Arriola points to focuses primarily on women and manifests itself in a number of ways. First, the ideal worker is a young woman whose relationship to family care is limited and enforced (through, among other things, pregnancy tests), and replicates in some ways the male ideal worker norm found in most industrialized countries. Further, the ideal worker, as female, relies on stereotypes about women's nature (e.g., they are passive and attentive to detail) and the role of their income responsibility (e.g., theirs is only a second income). These stereotypes are used to justify job segmentation, wage differentials, repetitive and thoughtless work, and authoritative and harassing supervision, some of which is required by the way in which the production process is organized.
notes that while the practices of the maquiladoras operate on patriarchal notions already culturally developed, n91 the maquiladoras buttress them through practices such as plant beauty pageants that augment managers' control of the large female labor force. n92

Arriola argues that the wages are not adequate for a decent living or enough to lift the laborers out of poverty. n93 Further, she suggests that the working and health conditions are extremely poor and so consistent as to be a condition of employment. n94 In addition, she notes that the fragmented processing structure does not provide the type of skills transferable to other types of work, which limits any long-term benefits for the employees. n95 This combination of factors suggests that while women may be "liberated" from domestic work, their lives and well-being have not significantly improved. n96 In effect, they have jumped from frying pan into the fire. Although it is clear how the corporations, owners, and northern consumers might benefit from this arrangement, it is less clear how the employees and Mexicans will benefit in the long run, as suggested by the rhetoric surrounding the establishment of maquiladoras as "mutually beneficial." n97

3. Men's Gendered Limitations in the Maquiladoras

However, Arriola does not make the connection between gendered processes and men, and the feminization of poverty does not even contemplate the ways in which gender might regulate and limit opportunities [\*1197] for men. n98 The gender-based oppression Arriola identifies refers primarily to women's oppression and poverty. Gender here generally refers to women, thereby conflating the notion of gender with women. This conflation obscures the gendered processes at work in the maquiladoras that negatively affect the lives of the poor men, in part because it assumes that their positions and identities are privileged. n99 These gendered processes, however, maintain both women and men in poverty.

The maquiladoras attract both men and women from the interior of Mexico looking for employment and better opportunities. n100 When men are employed in the maquiladoras, and they increasingly are, they are often involved in more active, thoughtfull jobs and earn higher salaries, n101 consistent with the norms of a patriarchal order. n102 However, the preferred laborers in many of the industries are women; thus, men often are unemployed, marginalized, and left with the options of returning to their villages or crossing an increasingly militarized border. n103 They often choose the latter option with ever greater risk of death. n104 Thus, while the patriarchal structure of the maquiladoras and of the culture may marginally benefit men who find employment in the maquiladoras, more men are maintained in poverty because they have little or no work at all. n105 [\*1198]


A feminization of poverty framework in this context directs attention to the poverty of women working in the maquiladoras and the ways in which they are maintained in poverty. It therefore invites necessary interventions that minimize or alleviate the ways in which women's gender shapes poverty in the maquiladoras. n106 At the same time, however, the top approach is analytically problematic because it implies that generally, women, who have more access to employment, are worse off than the men, who have far fewer job opportunities.

A broader gender analysis illuminates the conditions for many Mexican men who are not necessarily better off than Mexican women and demonstrates that the communities, consisting of both women and men servicing the maquiladoras, are poor. n107 This gendered poverty model captures the idea that gender structures women's and men's opportunities, choices, and experiences differently. Further, the analysis suggests that while women-focused interventions are needed, men-focused interventions may also be needed. Therefore, a gendered poverty, rather than a feminization of poverty framework opens more possibilities for understanding the conditions in this specific context and triggers additional (perhaps gender specific) activities geared toward minimizing or alleviating poverty.

Further, in suggesting that women are worse off than men, the feminization of poverty construct may strain efforts that could potentially aid both women and men in the community. n108 Pitting women against men in the community could inhibit the potentially beneficial coalitions [\*1199] needed for community-wide efforts that are gender aware (and gender fair), including attempts to unionize. The gendered poverty approach, in contrast, neither forecloses intrawomen or cross-border women coalitions, nor hinders coalitions of women and men in these communities. Consequently it does not strain intra-community efforts.

5. Possibility of Strain in Community: An African American Analogy

The kind of strain produced by the potentially inaccurate suggestion that women are worse off than men in a particular community where both groups suffer from gendered poverty is exemplified by the debate raging in the African American community. Here, the debate is whether black women or black men
are worse off in the context of American white supremacist patriarchal domination. n109 The debate concretely draws on African American history and revolves around both the material and spiritual/psychological effects on black men and women since slavery. n110 To the extent that it focuses on socio-economic issues, it is sometimes argued that black women, even though they are often paid less than black men, can at least get a job, even if it is only as a domestic. n111 Black men, however, even though they tend to have higher wages and advance further in their careers than black women, often cannot find jobs. n112 This argument is then buttressed by the fact that one out of four black males is under the supervision of the criminal justice system, n113 which often negatively affects and reduces their job opportunities, while high homicide rates impact their overall life chances. Both phenomena appear to be relatively gender specific or resulting from, in part, racialized or subordinated masculinity. n114 In other words, these phenomena seem to affect black men because they are both black and men. Nonetheless, it is clear that under an income/consumption framework, black women have a higher incidence of poverty than black men and black female-headed households tend to be poorer than black male-headed households. n115 A human poverty perspective assessing human capabilities, such as education (black women have slight advantages in educational attainment at the college level), life expectancy, and access to resources might complicate this picture. In any event, all too many black people, both women and men, are poor, their poverty is shaped by their genders, and debate is a distraction that potentially hinders the unity necessary to overcome poverty.

A gendered poverty analysis, particularly a racialized gender analysis in this context (and, perhaps, in the case of Mexicans working at the border) n116 might demonstrate the impact of and poverty-maintaining effects of racialized gender oppression or gendered racial oppression on the life chances of both black women and men, albeit experienced differently. This approach places women and men on the same side struggling against racialized gendered poverty and oppression, where it is understood that gender roles and racial oppression together may limit and negatively impact on individual human potential, whether female or male. While patriarchy may nonetheless divide these communities encouraging men to engage in sexism within their communities, a racialized gendered poverty approach links these oppressions. n117 Understanding the nature of the oppression in this way aids in demonstrating that both black women and men are maintained in poverty through race and gender oppression and that this unitary structure hurts them both. It also suggests that sexism within the community exacerbates or sustains this gendered poverty by, at a minimum, making unity difficult. n118 Further, the approach minimizes the need to debate which group is worse off and, instead of straining intra-community efforts, might facilitate community unity, while demonstrating the need for male and female specific understandings and interventions. n119

B. Feminization of Poverty and Gender Outlaws

A gendered poverty approach may also allow and encourage unity and coalition building with and among those within the community who are oppressed and impoverished because of gender non-conformity. Kendal Broad, in her essay, Critical Borderlands & Intersectional Coalitions: Feminist/Transgender "Feminizations" of Poverty, n120 illustrates the disjunctures between transgender activism and goals and the notions of feminized poverty. n121 She notes that a focus on feminization of poverty denotes the impoverishment of an essentialized female whose gender comports with the socially assigned roles of her physical sex in the context of heterosexual partnerships and expectations. n122 In other words, the practices and performances of these females comport with notions of femininity and are purportedly determined by the biological sex of the individual. It suggests, for example, that women are poor, in part, because they are "mothers." Their poverty is linked to their unpaid reproductive work. n122

However, this idea erases the experience of those who transgress gender (those whose genders do not comport with the gender assigned to their sex), moving through the categories of "woman" and "man," and whose poverty may be linked to their gender non-conformity instead of resulting from their compliance to roles such as "mother." For example, a "butch lesbian" is a female who is "masculine" and chooses other females for partners. These characteristics contradict dominant notions of femininity and the demands of heterosexuality. The demands of gender conformity and heterosexuality impose hardships and penalties, including financial penalties that impoverish transgender people. A simple example is the denial of marriage to lesbian and gay partnerships that results in their losing the significant financial benefits that marriage provides to married couples. n123 The feminization of poverty fails to address these issues of gender and sexual domination and the social norms and policies that induce or exacerbate transgendered poverty particularly.

Transgender activism destabilizes notions of femininity and masculinity, including the idea that
gender is determined by physical sex and sexuality. n124 As such, it challenges the "dual assumptions of binary gender (e.g. that there are only two sexes which determine two corresponding genders) and heternormativity," upon which most understandings of the feminization of poverty construct are predicated. n125 The broader notion of gendered poverty may better accommodate the various understandings of gender and the ways in which poverty is mediated through gender because it focuses on how social roles and expectations shape poverty. n126

Broad nonetheless suggests that there are some possible connections and intersections between a feminization of poverty framework and transgender activism, if the lens is queered. n127 For instance, examining the poverty of effeminate gay men or feminine/submissive/pasivo transgendered people might provide further insight into the processes of feminized poverty, n128 because these men not only transgress accepted gender roles but assume a more feminine role, which, in the context of patriarchy, is already a subjugated role. n129 In addition, queering the lens on gender [*1203] exposes and better illuminates how embedded traditional notions of gender are. n130

C. Poverty Is Multidimensional

The feminization of poverty construct grew out of the women's movement, a movement that focused on a single identity characteristic. The construct therefore seeks to expose how gender operates in the lives of women. Broad calls this body of information "partial knowledges," capturing part of the picture of women's and others' lives. In other words, the feminization of poverty focuses on a single axis of subordination--gender--or a single intersectional axis of a subordinating structure. n131 In this case, it explores the intersection or nexus between women, and poverty, or the gender subordination manifested in poverty. But people's identities are multiple, and the structures that bind them are multilayered and multidimensional. That is, people are not just men or women but are, for example, black, white, or Indian, and American, Mexican, or Indian, and heterosexual, homosexual, or bisexual. And Racism, classism, sexism, nativism, as well as the sex/gender system are structures that may simultaneously bind them

1. Identity, Partial Knowledges, and Multidimensional Analysis

Broad argues that people of color de-essentialized the categories "woman" and "transgendered." n132 She calls the process by which people of color de-essentialized these categories a movement from identity politics to one emphasizing situated standpoints in a politics of difference. This politics of difference recognizes the category of "woman," as multidimensional. n133

Broad notes that situated standpoints are important for creating and legitimating valuable subjugated bodies of knowledge within a "matrix of domination," n134 where subjugated people can speak, understand, and convey their experiences and insights to the broader community. n135 However, she notes that these situated standpoints still result in partial knowledges, [*1204] which, while exposing certain aspects of the matrix, may also erase or reinforce other aspects of the matrix. n136

Broad, quoting Patricia Collins, explains that "the overarching matrix of domination houses multiple groups, each with varying experiences with penalty and privilege that produce corresponding partial perspectives, situated knowledges, and, for clearly identifiable subordinated groups, subjugated knowledges." n137 For example, the feminization of poverty construct does this by illuminating, for example, heterosexual women's experience, while reinforcing ideas that erase aspects of lesbians' experiences. n138 Multidimensionality, on the other hand, allows a more thorough investigation of the inevitable interlocking hierarchies and oppressions that create disadvantage and poverty. Accordingly, multidimensionality is committed to understanding the multiplicity of identities that constitutes an individual's and a group's identity, and the multilayered factors, including subordinating structures, that shape experiences and social phenomenon in a given context. n139 This approach creates and leaves open a wider range of coalitional opportunities by clarifying connections between different groups of people and understandings that biases often travel together, supporting a matrix of domination.

2. Women's Poverty: Not Just Gender

The feminization of poverty construct, and to a lesser degree, the gendered poverty approach, see women's sex and gender as the predominate factors mediating poverty n140 and frame poverty as a women's issue. However, the lives of women of color, even in the context of the United States, present a much more complicated picture. Women of color in the United States were subjected to the interplay of phenomena affecting white women in the 1960s and 1970s, n141 such that their prominence among poor women threatened to limit the applicability of the feminization of poverty idea to America only. n142 However, many of these women were already poor, even born into poverty. This fact contradicted the idea [*1205] that they fell into poverty from a status other than poverty n143 and belies the idea that female poverty was a new
phenomenon. n144 Although their poverty may have been attributed to gender inequality and subordination, it arose as much or more from their subordination based on class, national origin, race, and other statuses. n145 This remains so today, and an examination of a particular situation demonstrates the ways in which poverty is multidimensional, often standing at the intersection of multiple subordinating structures. n146

3. An Example: Medicaid, Prenatal Care, and Immigrants

Lisa Sun-Hee Park, in discussing her paper on the "impact of recent welfare and immigration reforms on the use of Medicaid for prenatal care by immigrants in California," notes that the feminization of poverty, defined as a trend toward women falling disproportionately into poverty construct, does not go far enough in explaining the differential experiences of immigrants. n147 Her study explores other kinds of subordinating policies and practices that structure immigrant female poverty.

Park explains that the federal welfare and immigration reforms of 1996 linked the use of Medicaid to immigration status, n148 restricting the use of Medicaid by both legal and illegal immigrants. As such, immigrant status in this case acts as a poverty-exacerbating aspect of women's identities.

Specifically, the Personal Responsibility and Work Opportunity Reform Act of 1996 "restricted immigrants' access to health care by more narrowly defining which immigrant populations were eligible for federal funding." n149 Immigrants who entered the country before the new law was enacted were provided federally funded Medicaid, if eligible. n150 Immigrants who entered the U.S. after the statute was enacted were prohibited from receiving federally funded Medicaid for non-emergency services, [*1206] including prenatal care for five years. n151 Other non-qualified aliens, including the undocumented, were entitled neither to federally funded Medicaid nor state funds, unless the state passed new legislation allowing state funding. n152 The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 made it harder for recent immigrants, even if eligible, to establish income eligibility for Medicaid. n153

Both laws facilitated the exchange of information regarding immigration status and the receipt of Medicaid-funded services between states and the Immigration and Naturalization Service (INS). n154 One of the potential results of this shared information is that unnaturalized immigrants who receive Medicaid benefits run the risk of being characterized as public charges when they apply for naturalization.

The immigration status of the women that Park discusses, together with their poverty, sex, and gender, subjects them to the poverty-exacerbating/maintaining effects of this legislation. These immigrant women are already poor and thus otherwise eligible for Medicaid. n155 For poor, immigrant women bearing children, the legislation prohibits funding for prenatal care or makes access to it more difficult. n156

In addition, their race, nationality, and gender, manifested in expected and realized child rearing roles, made these women specific targets for "port of entry detection and airport residency programs." n157 INS and Department of Human Services officials specifically targeted Latina and Asian women with young children reentering the U.S. for questioning about their children's births in the U.S. and the funding for such births. n158 If the births were funded through Medicaid, officials often asked the women to repay the money, even where they were legally entitled to it, before allowing them to re-enter the country. n159

Park notes the overall result of these laws and practices has been a chilling effect on women seeking prenatal care. n160 For example, women entitled to Medicaid but not naturalized believe they face a difficult choice. Either they apply for their legally entitled Medicaid benefits and obtain prenatal and birthing care but risk possibly being seen as a public charge by the INS, thereby jeopardizing a later opportunity for naturalization. [*1207] Or they forgo treatment, possibly endangering their health or the health of their infants, but preserve later opportunities for naturalization. n161 This is the case, even though state legislation, later cases challenging the law, and new but confusing and slowly implemented regulations softened the impact of these laws. n162

This study supports the idea that Latinas' gender exacerbated their poverty and their experience of it in a very different way from men. However, the exacerbation and continuation of their poverty was the result of "distinct though interlocking, social relations and processes," n163 including immigration status, national origin, nativism, and racism. Therefore, even within the United States, the feminization of poverty construct fails to capture the reality of all women's conditions. And while a gendered poverty analysis might better capture more complicated practices, a multidimensional approach sees the multiple identities these women experience--Latin, immigrant, poor mothers--and the multilayered intersections of subordinating structures such as racism, sexism, and nativism that shape their lives. In other words, a multidimensional approach is capable of mapping out an even larger range of subordinating structures, practices, and policies.
III. "Doing Coalition" Through Affinity: Broadening the Analysis, Widening the Coalitional Circle

While the feminization of poverty construct may have made the connections between different groups of women more apparent, and a gendered poverty approach may make the connections between a wider range of groups apparent, Broad would argue a multidimensional approach confirms that this group-based information remains only partially knowledgeable about social structures that reinforce and reproduce harmful subordinations. To overcome these limitations, she recommends that the various outsider groups "do coalition." Doing coalition, she argues, will strengthen the various groups' theories, creating additional critical knowledges, and building the critical coalitions and political organizations needed to change or transform the various structures of domination and subordination. n164

"Doing coalition" requires individuals within outsider groups to join with other outsider groups to find out what they share and create new [*1208] identities. n165 This process builds critical bodies of knowledge. n166 Broad notes that "individuals who manage to migrate from these subordinated groups often find that they share common themes, interpretive paradigms and epistemological orientations." n167 Further, she suggests that, based on her research of new movements, "people do not begin with an identity and then join collective action, but often come to have and construct identity through collective action." n168 She argues that "identities will change as a result of our politics." n169 Quoting Shane Phelan, she states:

Thus the problem for coalition politics is not "What do we share?" but rather "What might we share as we develop our identities through the process of coalition?" Coalition cannot be simply the strategic alignment of diverse groups over a single issue, nor can coalition mean finding the real unity behind our apparently diverse struggles. Our politics must be informed by affinity rather than identity, not simply because we are not all alike, but because we each embody multiple, often conflicting, identities and locations. n170

Broad overlooks the fact that some groups come together in coalition with fairly well-defined identities. And while new identities may arise out of the coalitions and collective pursuits, friction, tension, and collapse also may lie at the fault lines of the old identities, especially where these are socially attenuated, as often is the case for different racial groups. n171 Further, it is not clear what Broad means by affinity. Do different groups, who come together, even though they have different histories of oppression, but nonetheless share oppression, constitute a coalition based on affinity? If affinity is understood as sharing a commitment to substantive social justice based on principles of anti-subordination and understandings of the multiplicity of identity in the context of the matrix of domination, then she might find LatCrit already "doing coalition" in some limited form.

LatCrit, for example, has an anti-essentialist, antisubordination agenda. In this way, it may already be engaged in a politics of difference whereby it employs the essentialized Latina/o category strategically to engage in the de-essentialized practice of Latinaness. LatCrit recognizes that Latinas/os are a heterogeneous group whose members individually [*1209] embody multiple identities. n172 Further, different individuals within the group are situated differently within and at multiple intersections of interlocking oppressions and privileges. In other words, Latinaness is multidimensional. This multidimensionality or anti-essentialist perspective forces LatCrit to ask questions, seek knowledge, and map the various subordinating structures that this group experiences in a specific and contextual manner. n173

In addition, various LatCrit members may migrate into coalition with other groups, but the LatCrit conference certainly fosters the migration of other outsider groups into LatCrit through the practice of rotating centers. n174 This practice encourages the focus of at least one panel discussion during the LatCrit conferences on the concerns or interests of a non-Latino racial/ethnic group and perhaps others. This migration is believed to advance theory or the production of subordinated knowledges and promote coalition building. n175

"Rotating centers" institutionalizes a process of both advancing theory and building coalitions. . . . It does so by bringing together various groups to participate, analyze and theorize about their individual and community experiences, thereby [advancing theory and] facilitating the understanding, trust and camaraderie needed to build coalitions. . . . n176 [It allows the various groups to] identify shared experiences and become informed of those experiences unique to particular groups. n177

LatCrit, Critical Race, or Queer theorists might understand coalition building as being based on both perceived group commonalities and a commitment to anti-subordination. n178 But the process of coalition building exists to stimulate migration, potentially bringing diverse outsider groups together, and this process is being further developed theoretically as a method of critical coalition building. n179 [*1210]
And finally, in encouraging scholars and others to bridge the gap between theory and practice so that each informs the other, LatCrit encourages the collective pursuit of antisubordination scholarship and practice. In these ways, LatCrit engages in "doing coalition." n180 The idea of "doing coalition" may expand LatCrit methodology and goals by suggesting that LatCrit actively involve itself with other outsider groups and their struggles based on the shared commitment to substantive social justice and principles of antisubordination. This may be where the newer and perhaps firmer political identities that Broad envisions are forged.

Conclusion

The feminization of poverty construct should be retired in favor of a more nuanced approach, such as the notion of gendered poverty. However, even the notion of gendered poverty focuses attention on a single intersection of oppression, the intersection or nexus between gender in its broadest form and poverty. This in itself is a significant area of research and a potentially rich arena for coalition building. But even a notion of gendered poverty should be situated in a broader framework, one that understands that in any given context there may exist multiple intersections of subordination that limit human potential. Even while this framework may map out areas of commonality and difference among groups subject to subordination, "doing coalition" with outsider groups based on a shared commitment to social justice and anti-subordination principles will better inform theory building and facilitate the development of political organizations dedicated to eliminating gendered poverty and other subordinating structures that limit human potential.

FOOTNOTE-1:

n1 Mary Romero, a professor in the School of Justice Studies at Arizona State University, commented after the LatCrit V panel on the feminization of poverty that she did not think that the concept - feminization of poverty - was still widely used. This comports with my own intuition that the phrase has become simply a popular catch word occasionally used to describe, among other things, the increasing poverty of women associated with the rise in divorce and the increase in womenheaded households in the U.S.

n2 See Substantive Program Outline of the Fifth Annual LatCrit Conference entitled Class in LatCrit: Theory and Praxis in a World of Economic Inequality, (2000) (on file with author) [hereinafter Substantive Panel Outline]. In this panel we were asked to consider whether the framework of the "feminization of poverty" was a suitable framework for LatCrit as part of the process of LatCrit taking "the long foreshadowed step of affirmatively and self-consciously centering issues of class and economic inequality in the articulation of LatCrit theory and discourse." The program author notes that the feminization of poverty term was used to "mobilize shame and outrage against the conservative public policies and corporate greed that produced new levels of unprecedented poverty," as experienced primarily by white women. Nonetheless, the program notes "LatCrit . . . politics must take the struggles of women within Latina/o communities as seriously as it takes the struggles of Latinas in and against the racism and classism of the white majority." One of the questions posed for the panel was whether the notion of feminization of poverty could "mark a common agenda for women of all colors, to transcend the divisions of race, ethnicity and national origin?"

This author was asked to comment on three papers which explored the feminization of poverty construct in the context of the Latina/o condition or LatCrit commitments. These papers together with international development literature form the basis of my critique of the construct.

n3 See, e.g., UNIFEM, Eradicating Feminized Poverty, Strengthening Women's Economic Capacity (1998), available at http://www.unifem.undp.org/ecpov.htm ("Millions of women in developing countries live in poverty. With women making up 70 percent of the world's 1.3 billion poor, the feminization of poverty is a growing phenomenon. . . . There are many reasons for the feminization of poverty. . . . UNIFEM is seeking new and innovative ways to help women lift themselves and their families out of poverty [which includes] bringing together women's organizations, decision-makers and the private sector to share knowledge and ideas.").
n4 See discussion infra notes 25-85 and accompanying text.

n5 Here, I mean simply subordinated groups primarily subjected to a colonizing power. "Edward Said (1998) traces the origins of the term subaltern to Antonio Gramsci. In Gramsci's usage, subalternity is the opposite to a dominant, elite or hegemonic position of power, and it is the interaction between dominant and subaltern groupings that is the essence of history." Dianne Otto, Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference, 5 Legal and Social Studies 337, 361 n.1 (1996). "Subaltern Studies" critiques both colonialist and nationalist perspectives in the historiography of colonized countries with India having been a primary focus of analysis. See Ranajit Guha, A Subaltern Studies Reader, 1986-1995 (1997). Some critical race theorists have begun to use the term to describe the complexities of racialized subordination in the United States. See, e.g., Anthony P. Farley, The Black Body as Fetish Object, 76 Or. L. Rev. 457 (1997).

n6 See discussion infra notes 98-123 and accompanying text.


n9 Cagatay, Gender and Poverty, supra note 8, at 2; see also Cecile Jackson, Women and Poverty or Gender and Well-Being, J. Int'l Aff. 2-5 (1998), available at http://www.brittanica.com/bcom/magazine/article/0,5744,331823,00.html.

n10 Here the term "gender" refers to the socially constructed but contingent social and sexual roles ascribed to the different biological sexes, while "gendered" refers to the various processes which inscribe and reinscribe these roles as well as the manifestation of these ascribed roles in various processes, systems, institutions, etc., throughout a given society. The gendered poverty concept captures the idea that the social and sexual roles ascribed to the different biological sexes are embedded in people's experiences of poverty. See Jackson, supra note 9. See generally Nilufer Cagatay, Engendering Macroeconomics and Macroeconomic Policies, WP 6, UNDP 3-6 (1998) available at http://www.undp.org/poverty/publications. Although throughout this essay, I use the word gender to encompass the more sex based reproductive capacities and roles of some women on which a number of gender roles are justified (i.e., motherhood), the distinctions nevertheless between the terms "gender" and "sex" should be maintained. See Remarks by Hilary Charlesworth, 93 ASIL Proc. 206, 206-07 (2000) (calling for a maintenance of the integrity of the terms 'gender' and 'sex' and their meanings regarding social roles). For the purposes of this essay, however, I assume that a detailed focus on the issues confronting women will entail both notions of sex and gender, and I occasionally imply the distinction. See, e.g., discussion infra notes 120-25 and accompanying text.

n11 See Jackson, supra note 9 (discussing how different definitions of poverty can flesh out gender inequality and the ways that poverty is gendered); see also Cagatay, supra note 10 (discussing the development of gendered economic analysis in relationship to macroeconomic theory and policy).

n12 See Jackson, supra note 9.

n13 The notion of gender intransitivity reflects the belief and practices of people and institutions that gender - both social and sexual roles - is fixed and unchangeable in more specifically, that
these gender roles are changeably tied to biological sex. See Francisco Valdes, Unpacking HeteroPatriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins, 8 Yale J.L. & Human. 161, 176-177, n.34 (1996) ("Gender transitivity' signifies the fluidity of gender and belies the notion that sex fixes gender."). Intransitivity denotes the inflexibility or "immutability" of gender determined by sex. Id. at 162, 176 [hereinafter Valdes, Hetero-Patriarchy].

n14 See discussion infra notes 68-74 and accompanying text.

n15 "Racialized gendered imperialism" attempts to capture a similar dynamic as bell hook's phrase: "patriarchal white supremacist capitalism." See Broad, supra note 7.

n16 The feminization of poverty is an attractive discursive construct for those committed to anti-essentialist antisubordination praxis, not only because it seemingly provides both an analytical framework and the power to mobilize coalitions, but also because it allows us to focus on a single axis of subordination -- gender --or a single intersectional axis of subordinating structures. See Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241 (1991); Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139 (explaining that black women live at the intersection of race and gender). In this case, it explores the intersection or nexus between women and poverty, or gender, and the class subordination seemingly manifested in poverty. However, its limitation simultaneously is its single intersectional focus, which in some ways reduces its universal application. This focus limits both its analytical and mobilizing power. Anti-essentialist, antisubordination principles, on the other hand, allow for a more thorough investigation of the inevitable interlocking hierarchies and oppressions that create disadvantage and poverty. This is so because this principle and approach is by definition anti-sexist, anti-racist, and anti-homophobic and aspires to be anti-classist, while also committed to understanding the multidimensionality of individual and group identity, and the multidimensionality of factors that shape experiences and social phenomenon. See Francisco Valdes, Under Construction: LatCrit Consciousness, Community, and Theory, 85 Calif. L. Rev. 1087 (1997) [hereinafter Valdes, Under Construction]; Francisco Valdes, Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidisciplinary, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors, 75 Denv. U. L. Rev. 1409, 1419-20 (1998) [hereinafter Valdes, Beyond Sexual Orientation]. This approach also creates and leaves open a wider range of coalitional opportunities. See discussion infra notes 174-182 and accompanying text. Nevertheless, to the extent that focusing on a single intersectional axis is necessary (and it is at times), the feminization of poverty construct should be retired in favor of a more nuanced approach, perhaps captured in the notion of gendered poverty.

n17 See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990)

n18 See Valdes, Hetero-Patriarchy, supra note 13, at 162 (explaining that the Euro-American sex-gender system is not universal, a fact that belies its essentialized claims); see also Allan Johnson, The Gender Knot: Unraveling our Patriarchal Legacy 24-26 (1997).

n19 Broad notes that the term "transgender" is an umbrella term. She states that in the 1990s the term transgender (or TG) emerged as a contested term among various groups within a broader transvestites, transsexuals, cross-dressers, transgenderists, gender blenders, gender benders, drag queens, bigenders, feminine men, androgynes, drag kings, intersexuals, masculine women, crossgenders, butch lesbians, shape shifters, passing women, bearded men, passing men, gender dysphorics and others who might consider themselves "gender outlaws."
Broad, supra note 7, at 8.


n21 Broad, supra note 7, at 1159.

n22 Id. at 1154.

n23 Id. at 1161.

n24 Lisa Sun-Hee Park, Impact of Recent Welfare and Immigration Reforms on Use of Medicaid for Prenatal Care by Immigrants in California, J. Immigrant Health (forthcoming 2000) (manuscript on file with author).

n25 Broad, supra note 7 at 1164.

n26 Broad does not clearly define "affinity." I define affinity in terms of Frank Valdes's post-subordination vision. See generally Frank Valdes, Outsider Scholars, Legal Theory & OutCrit Perspectivity: Postsubordination Vision as Jurisprudential Method, 49 DePaul L. Rev. 831, 832-33 (discussing substantive social justice for all as a goal of a postsubordination vision). Valdes sees this postsubordination vision as a jurisprudence which calls on outsider groups "[to expand] the focus of outgroup coalition [to build] beyond sameness/difference issues with forward-looking assessments of hopes and aspirations . . . . organizing these critical coalitions chiefly around the progressive principles and policies that will ensure social justice and substantive security for all." Id. at 831.

n27 Baden supra note 8, at 13 (quoting Cagatay, supra note 8 at 3) (emphasis omitted).

n28 See Broad, supra note 7, at 1164.


n30 Id.

n31 Id. at 32-34.

n32 See, e.g., Gertrude Schaffner Goldberg, The Feminization of Poverty: Only in America? (Gertrude Schaffner Goldberg & Eleanor Kremen, eds.) (1990);


n34 Goldberg, supra note 32.

n35 Id. (analyzing the labor market, equalization policy, social welfare, and demographic factors such as single parenthood in seven countries (Canada, France, Japan, Sweden, the United States, Poland and the Soviet Union) and finding that the trend toward greater poverty among women was most pronounced in the United States, could occur in Canada, was not evident in Japan or Sweden and was unclear in the other countries); see also, McLanahan, supra note 32, at 10-11 (citing Casper's findings on eight countries using sex-poverty ratios and noting that three countries avoided large gender differentials in poverty rates for three different reasons).


n37 See Wendy Rhein, The Feminization of Poverty: Unemployment in Russia (Review), 52 J. of Inl'Aff. 351 (1998); see also Report of the Secretary General, Review and Appraisal of the Implementation of the Beijing Platform for

n38 See Rhein, supra note 37.

n39 See id.; see also McLanahan, supra at note 32, at 2 (discussing Paula England's work, which argues that the feminization of poverty has stopped increasing in the United States and may be reversing).

n40 See Goldberg, supra note 32.

n41 See Baden, supra note 8, at 13.

A review of the empirical evidence for the association between female headship and poverty highlights both the heterogeneity among this category, such that the validity of the concept has itself been questioned, and the dangers of assuming that female headship always represents disadvantage. The processes which lead women to head households are many and in some cases this may represent a positive choice, so that the connotations of powerlessness and victimhood are inappropriate. In female headed households women often have greater autonomy and control over resources. Well-being outcomes for women and children in these households may be better than in male-headed households at the same level of income.

Id.; see also Beijing Platform Review, supra note 37, at 26. Although female-headed households are increasing worldwide, there are still relatively few. See Cagatay, Gender and Poverty, supra note 7, at 3.

n42 See Toynbee, supra note 36, at 1.

n43 See Cagatay, Gender and Poverty, supra note 8, at 4; see also Toynbee, supra note 36, at 1 (discussing the fact that when considered world-wide, more women live in poverty than men, but it is more useful to limit the analysis to "working women of reproductive age who are without male economic support").

n44 Cagatay, Gender and Poverty, supra note 8, at 5 (emphasis in original). See, e.g., Poverty in the U.S., supra note 29 (defining poverty in relationship to income and consumption and using the family as the unit of analysis).

n45 See Baden, supra note 8, at 13 (emphasis added).

n46 Cagatay, Gender and Poverty, supra note 8, at 3; see Baden, supra note 8, at 13; Marcoux, supra note 8, at 4 (using data for Latin American households, he notes "womenheaded households do seem more vulnerable to poverty than men-headed ones, but where comparable data are available the actual difference in poverty incidence is not very great").

n47 See Cagatay, Gender and Poverty, supra note 8, at 3.

n48 See id. at 17.

n49 See McLanahan, supra note 32, at 2 (discussing Paula England's work, which argues that the feminization of poverty has stopped increasing and may be reversing in the U.S.).

n50 See Rhein, supra note 37 (noting that in Russia the possibilities for changes seem grim because the transitional economy will bring increased unemployment and service shortages, as industries are closed and privatized).

n51 Although the trend toward greater poverty among women can not be said to be universal - being reflected in every community, one might argue that in absolute numbers across the globe, more women may be falling into poverty as compared to men. U.S. statistics confirm in the U.S. there are more poor women than poor men (using individual as unit of analysis) and there are disproportionately more female-headed households than men-headed households in poverty. See Poverty in the U.S., supra note29, at 1. But in any event, there are more poor women across the globe than poor men. For instance, the UNDP in its 1997 report states that poverty has a female face and that children make up most of the world's poor. UNDP Human Development Report 1997: Overview (1997), available at http://www.undp.org/hdro/e97over.htm (last visited Jan. 23, 2001) [hereinafter UNDP HD REP]. In Italy, there are more women living in poverty than men. See Beijing Platform Review, supra note 37, at 26. Marcoux challenges the numbers sometimes touted by various organizations but concedes that he believes women make
up the majority of the world's poor. See Marcoux, supra note 8, at 1, 4.

n52 Fourth World Conference for Women, Report of the Secretary General, Review and Appraisal of the Implementation of the Beijing Platform for Action, para. 17 (1995) (emphasis added). Although the Platform does not define feminization of poverty, the Secretary-General's report on the implementation of the Platform notes that the feminization of poverty phenomenon was probably not universal, citing Catagay's work. Consequently, one assumes he was defining feminization of poverty as referring to a trend toward greater poverty among women.

n53 UNIFEM, supra note 3, at 1 (emphasis added).

n54 Id. at 1-2.

n55 Marcoux, supra at note 8, at 1.


n57 Marcoux, supra note 8, at 1.

n58 See Jackson, supra note 9, at 2 ("The point is not that women are poor but that poverty is gendered.").

n59 See Cagatay, Gender and Poverty, supra note 8, at 4, 6-10 (describing the need for intra-household distribution of resources, the human poverty concept and the qualitative and quantitative methods currently being used).

n60 See id. at 7.

n61 UNDP HD REP supra note 51, at 1. Human poverty from a development perspective is described as follows:

It is in the deprivation of the lives people lead that poverty manifests itself. Poverty can mean more than a lack of what is necessary for material well-being. It can also mean the denial of opportunities and choices most basic to human development - to lead a long, healthy, creative life and to enjoy a decent standard of living, freedom, dignity, self-esteem and the respect of others.

Id. at 3.

n62 Cagatay, Gender and Poverty, supra note 8, at 7 (emphasis in original); see also UNDP HD REP, supra note 51, at 3-4 (defining human poverty and describing the human poverty index).

n63 UNDP HD REP supra note 51, at 3.

n64 Cagatay, Gender and Poverty, supra note 8, at 6; see also UNDP, Programming Manual, at 13 (Apr. 1999) (describing poverty as a process).

UNDP promotes an understanding of poverty that goes beyond the lack of income. The Human Development Report of 1997 introduced the concept of human poverty that focuses on the denial of opportunities and choices most basic to human development, namely to lead a long, healthy, creative life and to enjoy a decent standard of living, freedom, dignity, self-esteem and the respect of others. This understanding of poverty sees it as a process, not as a condition. And it sees the poorest people not as passive victims but as leading agents struggling against a process of impoverishment. Rather than focusing on poor people's weaknesses, the concept of human poverty focuses on their potential strengths and on the assets they need in order to move out of poverty.

Id.

n65 See Cagatay, Gender and Poverty, supra note 8, at 6.

n66 See, e.g., Cagatay, Gender and Poverty, supra note 8, at 10-11 (discussing studies done in Guinea that found, based on an income/consumption measurement, that women were not poorer than men). The World Bank and CIDA conducted a study using a consumption approach based on a household survey to measure poverty. See id. at 11. Both reports found that femaleheaded households were not poorer than male-headed-households "in terms of incidence, intensity or severity of poverty." Id. at 11. But the CIDA report also used a participatory poverty approach that found that women were poorer individually and collectively. See id. It identified three areas of general deprivation: "excessive workload, social subordination and reduced life chances." Id. Participatory poverty approaches involve the poor themselves in defining poverty. See id.
n67 Cagatay, Gender and Poverty, supra note 8, at 8. Cagatay argues that both quantitative and qualitative analysis should be used in order to assess and understand poverty. Id at 9.

n68 See id. at 8.

n69 Id.

n70 Id.

n71 Id. Cagatay continues in explaining that women sometimes do not have control over their labor:

In some cases, men may forbid their wives from working . . . in other cases, men may extract labour from women with the threat . . . of violence. . . . Men tend to have more command over women's labour so that in crisis situation they may be able to mobilize the labour of women, while women generally do not have the reciprocal right or ability to mobilize men's labour.

Id.

n72 Id at 8-9.

n73 See Cagatay, Gender and Poverty, supra note 8, at 12. Both Nilufer Cagatay and Sally Baden are tentative about whether gender inequality itself causes poverty directly. But they both seem to agree that there is a correlation between levels of inequality and levels of poverty and that gender mediates poverty. See Cagatay, Gender and Poverty, supra note 8, at 11-12; Baden, supra note 8, at 14. In fact, Baden states that "gender inequality and poverty are the result of distinct though interlocking, social relations and processes. Social relations of gender mediate women's experience of poverty. This implies that it is only by looking at context that we can deduce whether social relations of gender act to exacerbate or relieve scarcity." Id. (emphasis added).

n74 See generally Baden, supra note 8.

n75 See id.

n76 See id.

n77 See id.

n78 See id.

n79 Arriola, supra note 20.

n80 Id. at 4-5. Arriola uses the term Latinos to describe the people working in the maquiladoras even though this label probably more accurately describes people of Central and South American origin living in the United States. She does this although the people working in the maquiladoras are predominately Mexicans. However, she explains that there are other groups from Central and South America that comprise the workers and therefore uses the term Latinas/os to describe them. See id. I use the term Mexican men and women for purposes of clarity in this paper.

n81 See id. at 2-3.

n82 See id. at 28 (explaining that the name maquiladoras is derived from the word "maquila that once referred to the miller's practice of keeping a portion of the grain as a form of payment. Today, the term maquiladora refers to the factories on Mexican soil that assemble raw material components of foreign-owned enterprises, most of which have been manufactured in America.").

n83 See id. at 10.

n84 See id. at 8.

n85 Arriola notes that although the border is not open, it is porous, and thousands cross or try to cross illegally. They either will be caught or not. See Arriola, supra note 20, at 15.

n86 See id. at 8.

n87 Id. at 31.

n88 See id. at 46-49; Adrienne D. Davis, Straightening it Out: Joan Williams on Unbending Gender 49 Am. U. L. Rev. 823 (2000) (citing Joan Williams who defining the "ideal worker" as someone with immunity from family work). Adrienne Davis was co-director of the gender, work and family project which co-sponsored this symposium. Here, she is summarizing some of the main points of Joan Williams book entitled, UNBENDING Gender: Why family and Work Conflict and What To Do About It (2000), which served as a basis for the symposium. She is also summarizing some of the discussions that occurred during the event. The book unpacks the economic implications of
gendered work by analyzing the "ideal worker norm" as being one that primarily men can occupy and positing a theory of domesticity. See Deborah J. Vagins, Occupational Segregation and the Male-Worker-Norm: Challenging Objective Work Requirements Under Title VII, 18 Women's Rts. L. Rep. 79 (arguing that "objective" work requirements that assume workers have "wives" at home are based on a male-worker-norm and are discriminatory to women).

n89 See Davis, supra note 88.

n90 See Arriola, supra note 20, at 33, 40 (discussing justifications for low wages and the preference to hire women because they were unlikely to complain due to the differences in gender socialization).

n91 See id. at 40-43.

n92 See id. at 43-44. She notes that these practices are also racist. See id. at 39-44, 67.

n93 See id. at 31-35.

n94 See id. at 50-53.

n95 See id. at 31.

n96 See id. at 54-58.

n97 See id. at 25.

n98 Traditional understandings of patriarchy suggest that men are not oppressed by gender structures in a patriarchal order because men are not oppressed as a group. Rather they are beneficiaries of the order. However, individual men can be harmed by patriarchy or gendered structures as men may be in war, but this, it is argued, is not oppression. However, men may be oppressed due to other subordinating structures that shape their identities such as race, class and sexuality. See Mary Becker, Patriarchy and Inequality: Towards a Substantive Feminism 1999 U. Chi. Legal F. 21, 30-32. I, however, see the interplay between men's gender and race or class or other subordinating structures as subordinated masculinities that are subject to a particular kind of racialized or other form of gendered oppression.

n99 This results, I believe, in part, because gender inequality between women and men is thought to cause women's poverty. However, neither Catagay nor Baden seem to believe that gender inequality per se causes women's poverty even though there is a correlation. This thinking, to the extent that it implies that men's opportunities are structured by gender, assumes that men's opportunities in a given community are always privileged. In a situation where the men are not also poor, assumed privilege may not be problematic. But, in situations where both men and women are poor and maintained in poverty, this assumption may undermine a fuller understanding of the ways in which poverty operates in a given community and the ways in which poverty is gendered.

n100 See Arriola, supra note 20, at 40-42.

n101 See id.

n102 Patriarchy generally rewards men as compared to women with higher social benefits because patriarchy is maledominated, male-identified and male centered. See Johnson, supra note 18, at 5-14.

n103 See Arriola, supra note 20, at 18.

n104 See id.

n105 See id. Also this is consistent with patriarchy where all men benefit but some men benefit more than others. See Becker, supra note 98; Johnson, supra note 19, at 5-14.

n106 See id.

n107 See generally Jackson, supra note 9 (arguing that the gendered poverty concept allows men to be seen as having gendered identities as well, and as suffering from gendered poverty).

n108 Anti-sexist initiatives in the context of patriarchal societies seem to engender resistance and intra-community strain in and of themselves. See, e.g., Susan Faludi, Backlash: The Undeclared War Against American Women (1991) (discussing the backlash against the feminist agenda and efforts to empower women in the United States). Whenever there are efforts to change established orders from which any segment of the community benefits or perceives itself to benefit, there is bound to be resistance from them in the context of
that community. All men benefit from patriarchy in some way or another even if the benefit is only psychological. See generally Myron Gochnauer, Critical Notice, Myth, Misogyny and Male Neurosis, 6 Canadian J.L. & Jurisprudence (Jan. 1993) (reviewing The Psychoanalytic Roots of Patriarchy: The Neurotic Foundations of Social Order and arguing that the patriarchal system "is maintained not by conviction based on evidence, evil motive or conscious self-interest, but by satisfaction of psychological need"). A poor man who insists that his wife not work or work in a job with inferior wages to his benefits in some way psychologically, even though the result is less income for the household. Nevertheless, it seems possibly incorrect, but certainly unnecessary, to suggest that poor men are responsible for women's poverty or are direct beneficiaries. See generally Geoff Dench, Transforming Men: Changing Patterns of Dependency and Dominance in Gender Relations (1996); Warren Farrell, The Myth of Male Power (1993). Further, it seems as a practical matter, demonstrating to men how they also suffer from gendered poverty and how it hurts both them and women, places them in alignment on the same side of those who seek to eliminate gender oppression. Further, to the extent that it can be shown that their own sexism facilitates and/or exacerbates their poverty, their practices can be understood as a form of self-hate and self-sabotaging behavior.


n110 See Collins, supra note 109, at 59-60 (summarizing the debate about African American employment). She states:

Historically the classic pattern of employment for African-American men and women has been high-paying, yet less secure work for Black men as contrasted with lower-paying, more plentiful work for Black women. . . . This classic pattern of exploitation, differentiated by gender, has often been misrepresented in arguments suggesting that Black women or Black men have a labor "advantage' over the other. What these approaches fail to realize is that both African American women and men have been disadvantaged in the labor market, with gender differences in employment structuring distinctive patterns of economic vulnerability.

n111 See id.


n113 See Lindesmith Center-Drug Policy Foundation, The Sentencing Project Young Black Men and the Criminal Justice System: A Growing National Problem (Feb. 1990), available at http://www.lindesmith.org/library/sentence/tlcybm.html (reporting that approximately one in four black men in their 20s is in the criminal justice system, while only one in sixteen white men in the same age group is in the system); State of Black Men, supra note 112 (reporting that black men die of homicide more frequently than white men, white women, black women, or Hispanic men).

n114 If we understand masculinity to be training in hierarchy whereby boys are socialized into the roles of domination (over women, sexual minorities, and the Other), suppression (of their emotions) and subjugation (to other men in command) on the one hand, and subordinated masculinity constituting the same training in hierarchy but also in the roles of subordination, then we may be able to see the gendered aspects of oppression that subordinated men face. See, e.g., Johnson, supra note 18, at 189 (noting, in the context of a discussion critiquing a defense of patriarchy because of female power, that patriarchy uses powerful tools to motivate boys to walk the path of patriarchal manhood which
include devaluing emotional attachment, tenderness, vulnerability, and nurturing; to objectify themselves and others; to organize their lives around issues of control, dominance, and competition; and to develop their potential for aggression).

n115 See Poverty in the U.S., supra note 33.

n116 Arriola discusses the racism implicit in comments made by managers operating the maquiladoras. See Arriola, supra note 20, at 39. She notes that the overall effect of the exploitation of the maquiladoras workers is the exploitation of brown people for the benefit predominately of white capitalists and northern consumers. See id.

n117 See Valdes, Beyond Sexual Orientation, supra note 16, at 1450 (noting that "biases travel together"). As for sexism within the community, it can be argued that it is an unacceptable and destructive form of intra-group self-hate. See Katti Gray, Modern-Day Emancipation/Experts on the Issue of 'Post-Slavery Trauma' Say the Black Community Must Look Back To Heal the Past Before It Can Move Forward, Newsday, Oct. 5, 1999, at B6.

n118 Both Nilufer Cagatay and Sally Baden are tentative about whether gender inequality itself causes poverty directly. But they both seem to agree that there is a correlation between levels of inequality and levels of poverty and that gender mediates poverty. See Cagatay, Gender and Poverty, supra note 8, at 11-12; Baden, supra note 8, at 14.

n119 Any comparisons between black women and men are made difficult by the fact that men's statistics are included in race literature, while women's statistics are included in feminist literature. See Irene Brown, Latinas and African American Women in the U.S. Labor Market, in Latinas and African American Women at Work: Race, Gender, and Economic Inequality 1, 23 (Irene Brown ed., 1999).

n120 See Broad, supra note 7.

n121 Broad notes that the term "transgender" is an umbrella term. She says:

In the 1990's the term transgender has been adopted as an umbrella term to speak about transvestites, transsexuals, crossdressers, transgenderists, gender blenders, gender benders, drag queens, bigenders, feminine men, androgynes, drag kings, intersexuels, masculine women, cross-genders, butch lesbians, shape shifters, passing women, bearded women, passing men, gender dysphorics and others who might consider themselves "gender outlaws."

Id. at 8; see also Remarks by Brenda Cossman, The Gender of International Law, 93 ASIL Proc. 206, 207-08 (2000) (discussing how "disrupting the traditional relationship of sex and gender can open up the analysis to an array of identities and marginalized subjects beyond the category women [such as] the gender outlaws who have traditionally lived outside the margins of international law.").

n122 See Broad, supra note 7, at 1166-67.


n124 See id. at 7.

n125 Id.

n126 See id. at 15.

n127 See id.

n128 Id. at 6.

n129 Here I am suggesting that effeminate gay men may find themselves more ostracized and oppressed than "masculine" gay men because they "act" like "women." See id. at 6 (speculating that Latino men's identity, which is not defined by the sex of the partner but rather cultural roles of activo/passivo or the dominant or submissive role assumed by the actors, may result in greater impoverishment of the passivo actor). However, it is not clear that feminine lesbians are more ostracized than masculine lesbians are. This suggests that the transgression of dominant (male) gender roles is the more damaging factor.
n130 See Valdes, Hetero-Patriarchy, supra note 13, at 176-77.

n131 See Crenshaw, Mapping the Margins, supra note 16; see also Crenshaw, Demarginalizing the Intersection of Race and Sex, supra note 16 (explaining that black women live at the intersection of race and gender).

n132 In describing the process in which a "universal transgender standpoint" was challenged, Broad turned to theories explaining social movements quoting Seidman and Nicholson: "the surfacing of voices of difference within movements (is) pivotal in facilitating the deconstruction of essentialized identities and advocating a radical cultural politics of difference." Broad, supra note 7, at 1163.

n133 See id. at 1164.

n134 Id. at 1169.

n135 See id.

n136 See id. at 1165.

n137 See Broad, supra note 7, at 1164.

n138 See id. at 1158-60.

n139 See Valdes, Under Construction, supra note 16; see also Valdes, Beyond Sexual Orientation, supra note 16.

n140 I mean to suggest that the reproductive capacities of women and their gender - the societal roles and restrictions that structure women's lives based on perceptions about their reproductive capacities - influence, effect, and structure their material and overall well-being.

n141 See Diane Pearce, The Feminization of Ghetto Poverty, 21 Soc'y 70, 71-72 (1983) (arguing that both gender and race affect poverty rates and a gender analysis of the problem is a useful one).

n142 Goldberg, supra note 32, at 1-2, 6 (noting that racial injustice might be so powerful a force in minority women's poverty that their numbers drive the case for feminization of poverty. As such, the feminization of poverty might be uniquely American. However, similar trends were found in other countries.).

n143 See Substantive Panel Outline, supra note 2.

n144 See Broad supra note 7, at 1153.

n145 See id. at 1156-57 (suggesting that work done in reaction to the Monihayn report cast doubt on gender subordination being the primary cause of poverty for women of color). But cf. Pearce, supra note 141, at 71-72 (noting that there is a substantial added disadvantage to being both black and female, however, she argues that the gender differentials are greater than the racial differentials). Pearce explains "the differences in poverty rates between black and white men within each sector are quite small, whereas there is a substantial added disadvantage to being both black and female. . . . If one compares the progress of black men and black women to that of white men, then at present rates black men will catch up to white men in 35 years, but it will take black women 135 years to achieve occupational parity with white men." Id.

n146 See Broad, supra note 7, at 1153.

n147 Park, supra note 24.

n148 See id. at 5.

n149 Id. at 3.

n150 Id.


n152 See Park, supra note 24, at 7.

n153 Id. at 3.

n154 Id. at 5.

n155 Id.

n156 Id.

n157 See Park, supra note 24, at 5.

n158 Id.

n159 Id.

n160 See generally id.

n161 See id. at 11 (summarizing the findings of the paper).

n162 See id. at 6-9. "Poor people often face trade-offs between different dimensions of poverty in their struggle
with deprivation." Cagatay, Gender and Poverty, supra note 8, at 9.

n163 See Baden, supra note 8, at 11 ("Gender inequality and poverty are the result of distinct though interlocking, social relations and processes. Social relations of gender mediate women's experience of poverty. This implies that it is only by looking at context that we can deduce whether social relations of gender act to exacerbate or relieve scarcity.").

n164 See id. at 19-20.

n165 See id. (emphasis added).

n166 See Broad, supra note 7, at 1168.

n167 Id. (quoting Patricia Hill Collins, Fighting Words: Black Women and the Search for Justice (1998)).

n168 Id.

n169 Id.

n170 Id. at 17.


n174 See Mutua, supra note 171, at 1185.

n175 The concept of "rotating centers" can be useful to "trigger meaningful substantive analysis of the different ways in which white supremacy configures relations of relative privilege and oppression among different non-white groups and the intergroup rivalries that are thereby activated. . . ." Elizabeth M. Iglesias, Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community, 53 U. Miami L. Rev. 575, 676 (1999) (discussing anti-essentialist methodology).

n176 See Mutua, supra note 171, at 1185.

n177 Id. at 1217.


n179 See Valdes, Beyond Sexual Orientation, supra note 16, at 1451 (noting that a goal of queer theory ought to be "balancing human complexity and social heterogeneity in a scholarship of antisubordination solidarity"). Valdes also states that critical coalitions . . . require a commitment to a "rotation of centers" that ensures thoughtful distribution of attention and energy to pursue efficiently the social justice interests of all coalition partners. . . . The bedrock of a critical coalition is that no single identity or interest ever will rise to the level of domination, much less hegemony. Our responsibility as antisubordination scholars remains constant: to devise conceptual frameworks that may help foster a culture of understanding and coalition among multiply diverse and overlapping outgroups as one means toward effective and efficient outgroup reform agendas . . . of advancing antisubordination collaboration.

Id. at 1453-54.

n180 Broad, supra note 7, at 1165.
"In the border between dusk and dawn
I listen to frozen thumpings, my soul
Should I jump face tumbling
down the steps of the temple
heart offered up to the midnight sun . . . ." n2

I. Culture & Religion

A. Background and History: Barriers and Opportunities

Mexican American women come from a variety of backgrounds and are anything but homogenous. Even among this sub-group of Latinas, one finds as many differences as commonalities, with various components of identity—race, ethnicity, national identity, gender, class, sexual orientation, etc.—blending together in countless ways. Professor Ramon Gutierrez wrote, "the process by which people define themselves and are defined by others is dynamic. Cultural identity is not a fixed and static entity; rather, it ebbs and flows as history unfolds." n7 Group identity is not susceptible to precise description and remains context-dependent. Jeanette Rodriguez poses a number of questions that illustrate the complexity of describing common experiences for Mexican American women.

What do I mean by 'experience,' and whose experience is it? Mexican-American women are a heterogenous group in which the identification of acculturation factors is critical. Are we considering first-, second-, or third-generation Mexican-American women? Were they born here or in Mexico? Are they urban or rural dwellers? What is their socioeconomic status, level of education, migration process? The sum total of these factors will identify whose experience is being discussed. n8

I acknowledge the complexity and risks of group description but nonetheless assert that Mexican American women are infrequently involved in shaping public policy, influencing law, and altering the status of women in the religious sphere. n6 The Essay then explains why, in spite of this background which deters so many Mexican American women from formulating and implementing public policy and law and organizing for religious change, Mexican American women still come together to discuss and act upon many issues. Yet, Mexican American women's efforts toward anti-subordination continue to be under-recognized, and these women are under-utilized as change agents. This Essay nonetheless recognizes the work of Mexican American women and other Latinas, and closes by outlining some strategies for better utilizing and positioning Mexican American women to emerge from under the fist of oppression. [1213]
American women's common history of colonization and shared cultural background influences their inclination to participate (or not) in the formation and implementation of public policy, law and religion.

Colonization impacts the colonized in conscious and unconscious ways. n9 With respect to Latina/os, "structurally, colonization produces powerlessness and lack of control over those institutions which have a direct impact on them, such as schools, the political system, and businesses. Besides the oppression of physical colonization, there is also an oppression brought about by psychological colonization." n10 Although colonization clearly has a deep influence on all colonized people, it is impossible to measure its ultimate impact. It is nevertheless possible to see the effect of colonization through many Mexican American's internalization of "feelings of inferiority, lack of self-worth, hostility, apathy, [*1214] apparent indifference, passivity, and a lack of motivation in relation to the goals of the dominant society." n11 This internalization pervades our existence and partly explains an oblique sense of inevitability about oppressive living conditions. Although oppressive conditions result largely from dominant society's overt and subtle racism over the centuries, Mexican American women's conditioning may reinforce that oppression.

Mexican American women's social, cultural and familial background often conspires to dissuade them from seeking public policy change, altering legal structures, or transforming the religious sphere. n12 This background includes an emphasis on "hope, family, importance of life, and the ability to endure suffering, in particular that of straddling two cultures and not belonging to either one." n13 Mexican American women are formed in the shadow of this background, yet more Latinas, including Mexican Americans, are seeking elective office, n14 entering law, n15 organizing for social change, n16 and working within and without their churches. n17 This work is part of an anti-subordination agenda to liberate Mexican American women from the double or triple oppression resulting from the [*1215] intersection of their race, gender, and often class. n18 While encouraging, only a small percentage of Mexican American women engage in this struggle. This Part of the Essay describes some of the many reasons that Mexican American women are reluctant to work for change in any of these arenas.

Social and cultural conditioning may shed some light on why Mexican American women tend not to center their needs. Latinas are acculturated to be secondary, subordinate beings.

Marianismo, a construct in which the Virgin Mary is the aspirational model . . . demands that a Latina must be la buena mujer ('the good woman'), and requires of women self-sacrifice, self-effacement, and self-subordination. The notion of familismo (family comes first) also keeps Latinas, right here within our own fronteras (borders), hiding behind the proverbial privacy closet door of family. n19

Even when Mexican American women acknowledge their needs, including the need to be free from oppression, those needs often occupy low priority status. n20 Their conditioning can convince them that "they have caused their own problems or that their problems result from God's will and they should simply accept their problems. This conditioning also discourages them from involving others in their problems." n21 To illustrate, "a recent study found that Latina shelter residents were the least likely . . . to contact a friend, minister or social service provider for assistance prior to entering the shelter [for abused women]." n22 The inclination to bear their burdens in solitude and to even accept blame for their problems, is common in the Latina culture.

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. n23

Because of this sense of predestination, Mexican American women may accept unfavorable public policies, laws, religious roles and religious [*1216] doctrine, yet are reluctant to create or perpetuate divisiveness. n24 There are other challenges. Mexican American women must also overcome cultural conditioning that encourages them to endure and accept their fate with dignity. n25 This conditioning results in acceptance of the status quo, and honorable women are supposed to be dignified in their acceptance. If ingrained deeply enough, this conditioning can silence any Mexican American woman, and it helps to explain tendencies to accept unfavorable public policies, an oppressive legal system, and a patriarchal religious sphere.

Mexican American women, however, have not been uniformly conditioned, and even those who have been conditioned to accept their destiny with dignity have been moved to take on activist roles by specific issues. n26 In particular, Mexican American women have been moved by problems that they perceive as harmful to their families. n27 In other words, if a problem only affects them individually, they may silently accept it. However, if it harms their families or the larger community, they are more likely to spring into action,
exhibiting a "you can hurt me, but don't you dare hurt my child" attitude. n28 Interestingly, this very dynamic often moves Mexican American women to the table where they advocate for change and impact policy.

Traditionally, the Chicana's strength has been exercised in the home where she has been the pillar of family life. It is just this role that has brought her leadership and her abilities to the larger community. It is the Chicana who goes to her children's school. She makes the long trip to the social security office. She fights the welfare bureaucracy for her neighbor's family. It is the Chicana who, by herself and with her sisters, is developing ways in which the youth of her community can be better cared for when their mothers must leave home to work. n29

This protectiveness is not surprising considering the centrality of family for Mexican American women, n30 especially once they become mothers. n31

"Latinas appear bound by a norm of 'loyal motherhood.' They tend to get married younger, have larger families, and stay in relationships longer." n32 These experiences continue to be normative for many Mexican American women, and make it difficult for them to pursue higher education or engage in activities which best position one to form public policy, influence law, or alter the religious sphere.

The powerful social control conditioning in which the Chicana finds herself is perhaps the greatest obstacle to her breaking away from the traditional role. In addition, she must deal with the conflict of meeting traditional expectations and developing her capabilities, which may or may not lead to goals outside the familial. n33

These normative experiences produce barriers, but they also offer opportunities (even if the experiences are devalued in the United States), n34 and must be viewed through a lens that recognizes their value while not allowing them to inhibit positive change. For example, these experiences may lead to a political life. As these women develop as mothers, they may become interested in issues that impact their children and arrive at activism through the pragmatism of experience, rather than through the abstraction of theory.

Other Mexican American women may have different formative experiences yet still be poorly positioned to effectuate change. For instance, their independence may well be stifled, especially if they follow the pattern of moving from dependence on their fathers to dependence on their husbands. "Like other women, the Chicana has traditionally and historically moved from her parents' home to the home of her husband. This same conditioning may foster emotional dependence and a concern for the needs of others before her own needs." n35 This double-edged conditioning perpetuates dependence and self-sacrifice, the combination of which can make Mexican American women impotent to effect change.

Making the challenge even tougher, educational achievement remains elusive for most Mexican American women, n36 who continue to drop out of school at unacceptably high rates. n37 "In general, Chicanas are poorer, less educated, and employed in the lowest-paying jobs vis-a-vis white women, as well as men. Sex discrimination in training and job access is but one barrier Chicanas face. They also experience discrimination based on their race/ethnicity and culture." n38

Although more Mexican American women are presently educated, middle-to upper-income, or employed in prestigious jobs than ever before, these women represent a small minority. As illustrated in academia, "out of more than 57,000 tenured academics in the United States, only 255 are Hispanic women." n39 A high dropout rate combined with the demographics of a group that marries young, quickly starts a family, and has an above-average number of children, results in a small college matriculation rate, n40 and an even smaller graduate school matriculation rate. n41 Without education, and with the responsibilities of raising a family, Mexican American women are disadvantaged in the quest to alter harmful law and religious and public policy. n42

Mexican American women, as well as men, are traditionally very religious. n43 "An examination of the Mexican American religious experience in contemporary North American society reveals a deeply religious group that is predominantly Roman Catholic." n44 Mexican American women are even more likely than Mexican American men to place a high value on religion, n45 with Catholicism permeating their lives and the church serving as a place of spiritual nourishment, a hub for social activities, and a center for activism.

For many people in the Hispanic community, and in general for people who have been similarly marginalized on many levels, the religious worldview is their only worldview. They understand everything within a religious context. Mexican American women have been marginalized as women, as mestizas, as Chicanas; thus religion is a significant dimension of their human experience. n46

The daily oppression with which they struggle often prompts an intimate and constant relationship with the Divine. Moreover, the geographic space of the church provides a place where women can physically gather to be spiritually nurtured. Thus, it operates as a place of
refuge, renewal, and inspiration, for body, soul, and spirit. Antonia Hernandez, President and general counsel of the Mexican American Legal Defense and Educational Fund ("MALDEF"), as well as daughter, wife, and mother of three children, credits the church and her religious faith with sustaining her through a demanding life which requires her to fulfill many roles. Regardless of where her busy travel schedule lands her, she tries to attend mass regularly, a difficult task for someone with so many demands on her time. Although Hernandez's accomplishments may be unusual for a Mexican American woman, her religious dedication is not.

Even though Mexican American women are traditionally religious and predominantly Catholic, their Catholicism is not necessarily traditional.

Mexican and Mexican American religiosity is characterized by a style and approach of worshipping the sacred that clashes directly with the vision of the institutional American Catholic church. Mexican and Mexican American religious expression is a type of worship that is closely interwoven with the everyday life experiences and historical struggles of the Mexican American community and that is deeply influenced by cultural, political, and economic realities.

A religious tradition has nevertheless survived in the absence of strong ecclesiastical support and has evolved as a noninstitutional type of religion influenced by popular religion and piety.

The American Catholic Church has historically disrespected Mexican American popular religiosity and has not taken its Mexican American church members or their culture very seriously.

"Mexican-American women have been raised within a culture and a church which have never taught Mexican-American literature, history, customs, traditions or foods." In spite of the rapid growth of Latina/o Catholics in the United States, few Mexican Americans have risen to leadership prominence within the church, and Mexican Americans by and large have not been in a position to strongly influence church policies, even when they strongly disagree with these policies. Yet some Latinas have individually or collectively challenged oppressive policies, or otherwise sought more expansive and inclusive religiosity. As social and cultural norms allow for greater self-definition, and as some of the steps outlined later in this Essay are implemented, even more Latinas will be positioned to impact the religious realm. In order to move religion from a force that subordinates to one that liberates, more Mexican American women must be at the table to discuss, challenge, and offer alternatives for women in the religious world.

Religion and family are interconnected for the Catholic Latina, with both holding paramount importance. Mexican American women are primarily responsible for transferring religious values to younger people. "The Mexican-American women have been the main interpreters and transmitters of our dynamic faith experience. Our abuelitas, viejitas, and madrecitas have been the functional priestesses and theologians of our iglesias del pueblo." Professor Rivera succinctly wrote about the mythical exaltation of family and church for the Latina, while simultaneously challenging the stereotype that holds so many Latinas captive:

Those within the Latino community expect Latinas to be traditional, and to exist solely within the Latino family structure. A Latina must serve as a daughter, a wife, and a parent, and must prioritize the needs of family members above her own. She is the foundation of the family unit. She is treasured as a self-sacrificing woman who will always look to the needs of others before her own. The influence of Catholicism throughout Latin America solidifies this image within the community, where Latinas are expected to follow dogma and to be religious, conservative, and traditional in their beliefs.

It is clear that Mexican American women struggle as they straddle the border between cultures and negotiate the influence of religion, family, and other pervasive forces. Paradoxically, while these influences have the potential to spur her to activism by imparting moral vision and triggering a protective mechanism, they also can constrain her, because religious influence and cultural conditioning to accept things as they are, disincrone Mexican American women from agitating for change, either at the legal and public policy level, or within the religious sphere.

B. Examples of Oppression: In the Crossfire

The first Section of this Part described the background and conditioning of many Mexican American women, which is necessary to understand the oppression to which these women are subjected. This second Section builds on the first by briefly describing some forms that oppression can take in the areas of public policy, law and religion; focusing on those who are especially marginalized and vulnerable.

A repugnant form of subordination known as environmental racism has polluted many communities of color. In California, the . . . most toxic zip code region lies within Vernon. .. . . This 1-square-mile section of Los Angeles County--zip code 90058--is dotted with waste dumps, smokestacks, and wastewater pipes from polluting industries . . . Environmental justice activists say that it
is no accident that zip code 90058, where the population is 59 percent African American and 38 percent Latino American, is the state's 'dirtiest.' It is just one example, they say, of a newly recognized form of discrimination, a toxic racism. n59

It is no accident because the biggest polluters tend to dump their toxic wastes among communities considered the most vulnerable.

Ample evidence confirms that toxic contamination problems inordinately affect communities of color and that there is a direct relation between the powerlessness of Third World communities (both within and outside the United States) and their vulnerability to toxic contamination hazards. Environmental issues are thus issues of social and racial justice. Actions that lead to toxic contamination of communities of color thus are acts of institutional racism, if not of systematic racial violence. n60

Mexican American communities throughout the country suffer from environmental racism, especially in the Southwest. In Kettleman City, California, populated mostly by Latinos, "residents are . . . threatened with the triple jeopardy of poverty, poisoning on their jobs, and risks associated with the nearby hazardous waste landfill." n61 While everyone who lives in polluted communities suffers, the women and children are especially impacted because they are less likely to leave the area for work purposes. As the keepers of the community, they typically discern the environmental problems because:

by and large, it is women, in their traditional role as mothers, who make the link between toxic wastes and their children's ill health. They discover the hazards of toxic contamination: multiple miscarriages, birth defects, cancer deaths, and so on. This is not surprising, as the gender-based division of labor in a capitalist society gives working-class women the responsibility for the health of their children. n62

Although Latinas are depicted as powerless, Mexican American mothers have courageously confronted environmental racism, not necessarily out of concern for the environment, but because of the ill effects on their children. n63 When describing the reasons for their mobilization to resist undesirable land uses in their community, they talk not about land values, but about the children. One woman noted that, "we were compelled to unite, because the future quality of life for our children is being threatened. And we've been fighting every which way. . . . You know, if one of her children's safety is jeopardized, the mother turns into a lioness." n64 The Mexican American women who have tirelessly fought environmental racism have not worked alone; they have heeded the important strategy of establishing critical alliances to halt oppressive conditions. n65 Contrary to the one dimensional stereotype of Mexican American women as weak and unable to impact policy, they have demonstrated that if family is threatened, they are fully capable of effecting change.

Public policy and law have conspired against all women and people of color through the movement to abolish affirmative action n66—a movement that has succeeded in California, the nation's most populous state of Hispanics. n67 California citizens overwhelmingly approved Proposition 209, eliminating affirmative action for women and people of color. n68 Other states have initiated similar legislation, n69 and in Hopwood v. Texas, n70 the Texas Supreme Court upheld a reverse discrimination claim by white applicants to the University of Texas School of Law.

Women of color are especially susceptible to the attack on affirmative action, and in some states they are already prohibited from seeking an affirmative action remedy for the double discrimination they face as women of color. n71 The ramifications for Mexican American women are especially troubling because they have among the lowest level of educational achievement of any group in this country. n72 Even with affirmative action, as of March 1999, only 7.1% of all Mexican Americans had acquired a bachelor's degree or more. n73 Yet without affirmative action, presumably even fewer than 7.1% of Mexican Americans would have acquired a college degree. Affirmative action provided hope for some Mexican American women and made all the difference for many, myself included. Now that this avenue has been effectively closed off in the two states with the largest Latina populations—California and Texas—higher education will be more elusive for Mexican American women, with devastating consequences. Moreover, this vulnerable group is not in a favorable position to effectively respond to the attack on affirmative action or to alter the policies and laws that disadvantage them. With so few in higher education, even fewer can challenge the policies and laws which kept Mexican American women out altogether until recently, and allows only a trickle through now; n74 but until those policies and laws are changed, the number of Mexican American women in higher education will remain small.

Mexican American women are also noticeably absent from the leadership table in the religious sphere. Oppression continues to stifle leadership opportunities, particularly for women in the Catholic Church. For example, they cannot be ordained. n75 Latinas have it even worse because they have been culturally
conditioned both not to draw attention to themselves, as one sometimes must in a leadership setting, and not to challenge controversial positions. Consequently, Latinas, including Mexican Americans, suffer from oppression at the hands of the church, especially when moving toward leadership. The story of Sister Rosa Marta Zarate is illustrative. A Mexican immigrant, Sister Rosa Marta ministered primarily to Mexicans and Mexican Americans.

Through her professional and personal development in the community, she soon realized that only by identifying with the people she served did her work have meaning. But the closer she identified with these communities' causes, the more alienated she became from the religious institutions that had employed her to work among them. Taking exception to her avowed advocacy for these groups' interests and demands, the Diocese of San Bernardino decided to terminate her contract without further cause. Sister Rosa Marta Zarate sought redress and ultimately engaged in litigation for breach of contract, claiming she was doing this not only for herself but also for the sake of the people she was serving.

Zarate's lawsuit sought more than $1.5 million and her reemployment. She claimed wrongful termination, defamation, sex-based employment discrimination, fraud, and intentional infliction of emotional distress. Following dismissal of her case by the superior court, she appealed.

The Zarate case demonstrates the difficulties a Latina faces when wearing the yoke of leadership within the church while pursuing an anti-subordination agenda—the church rebuked her efforts and punished her by terminating her job. "Zarate, who said she was never told why she was dismissed, believes her work was interpreted as divisive, driving Latinos away from the Church. She contends that her success was resented because she was a woman." This sort of gender and race-based discrimination is all too common in the church and Sister Rosa Marta, or any individual woman, cannot battle it alone. It is amazing that Zarate even tried, particularly considering her cultural conditioning which discourages both active church leadership for Latinas, and any activity that is considered divisive. Zarate was not well positioned to challenge oppressive church doctrines or polices, but she persisted and the door opened a crack. With determination, collaboration, and strategic alliances, some day others like Zarate can swing the door open on their way to the table.

This Part detailed common cultural conditioning and history for many Mexican American women in an attempt to give the reader both an introduction of these women, and a greater understanding of why they might be unlikely to sit at the tables of power and decision-making. It then sketched some examples of how Mexican American women are marginalized or oppressed, and how their background translates into a relative lack of power to effectively fight that oppression. This is only part of the story—Mexican American women have also occupied many sites of resistance. In spite of an upbringing that would militate against organizing for change, Latinas have long been involved in social justice issues. The next Part provides a snapshot of some courageous women who shatter stereotypes of Latinas.

II. Altering Power Structures: Unsuspecting Activists Turn the Tables

I am a welder
Not an alchemist.
I am interested in the blend
of common elements to make
a common thing.
No magic here.
Only the heat of my desire to fuse
what I already know
exists. Is possible.
We plead to each other,
we all come from the same rock
we all come from the same rock
ignoring the fact that we bend
at different temperatures
that each of us is malleable
up to a point.

I am the welder.
I understand the capacity of heat
to change the shape of things.
I am suited to work
within the realm of sparks out of control.
I am the welder.
I am taking the power
into my own hands.
common concern. Although rarely recorded in history books as leaders, women have been moved by various combinations of circumstances to create change. To a certain degree, Latinas follow this pattern. It would seem that because of social and cultural conditioning, they would not be natural leaders or activists in either the public policy or legal arenas, or within the religious sphere. But they surprise. This Part describes how Latina activists in a Mexican American community in Southern California and in Argentina turned the tables on policy, law, and religion, to achieve desired goals. It thus provides a glimpse of oppressed women in two communities--women who were not considered a threat, and who were hardly taken seriously, until it was too late to ignore them. Some of the political activists in these communities turned to activism reluctantly, others did not even know they were activists until they were in the midst of it, n82 and others were born for it.

Juana Gutierrez helped form the Mothers of East Los Angeles (MELA), n83 a group that undertook important activist work, including work to prevent the placement of a prison and a toxic waste plant in East Los Angeles. n84 Juana and other MELA members' activist roots sprang from a home parish where they were nurtured by the guidance and encouragement of a local priest. n85

One Sunday after mass, Father Moretta decided to ask all the women parishioners to meet with him. He told them about the prison site [that was planned for construction in East Los Angeles] and asked for their support . . . Thus bolstered by the authority of the church and by a mother's responsibility to protect her children, the women coalesced into a group. n86

Although Father Moretta originally brought the women of MELA together, they ultimately took ownership of their organization, leading a fight against marginalization and oppression. Through their work toward social justice, which started with a meeting after church, these women [*1228] from East Los Angeles, led by Juana Gutierrez, were able to prevent the construction of a state prison in their neighborhood.

What prompted Juana and others like her to evolve from church volunteers to grassroots activists? Juana and many of MELA's other members did not work for pay, but they were seasoned volunteers, having spent considerable time assisting their local parishes. n87 As church volunteers, these women gained valuable experience, which would serve them well in their activist struggles. n88 Although most women did not volunteer at church with the intent of becoming activists, a number of them naturally gravitated in that direction. One woman, Rosa, stated that "after I got divorced, I started living with my sister and attending Our Lady of Victory. I was looking around for something to keep me occupied . . . and so I started teaching catechism. Then one of the nuns pulled me aside and got me into UNO..." n89 Another woman had attended mass regularly, but she became more active in church activities shortly after the passing of her father. When she expressed her sense of great loss to the priest, he suggested she might ease her grief through volunteer work with the youth. She followed his advice, and her activism in the church involved her in community social life for many years. n90

East Los Angeles had a history of church-related volunteerism--a number of church-based organizations had sprung into existence starting as far back as the 1940s, continuing through the 1990s. n91 Saul Alinsky had long before popularized churches as logical settings for grassroots activism, favoring them because they offered existing community centers, which typically honor and share common values, and have both funding and fund-raising mechanisms in place. n92 The churches in East Los Angeles fit that model, and with the Catholic Church's centrality in Mexican American communities, n93 it was not surprising that church leaders and members became activists. For instance,

Young priests and nuns became involved in the antiwar effort and joined civil rights groups. At the same time, Chicano student activists joined with others to develop Catolicos por La Raza, a group advocating [*1229] the church's active involvement in social change. They asked the church to sponsor leadership training for community residents and to assign priests and nuns to work actively with community projects. n94

The church was a natural place to ignite enthusiasm about justice issues. In East Los Angeles, Father Moretta made announcements after mass about MELA-organized marches and he asked priests in other parishes to do the same. n95 Mexican American women activists also visited community parishes to gain support for their marches and grassroots campaigns. n96 "Much like a web drawing in other people, the parish networks served to widen the basis for grassroots participation." n97 The churches provided spiritual nourishment for activists, taught about social justice and responsibility, and provided a venue and springboard for engaging in social activism. n98 Through the church, the Mexican American women of MELA became activists, influenced their churches, impacted policy and effectuated change.

Some Mexican American women started off volunteering at their parishes and ended up as activists, defying the expectation that they would serve only in
the home as daughters, wives, and mothers, or at
church as volunteers who simply did what was asked
of them. While they may not have consciously
broadened their identity as homemakers and parish
volunteers to include activism, they nonetheless
intuitively blended their private and public roles as
need dictated, without considering those roles
contradictory. "Mothers around the world work and
think with a double vision--the near and the banal,
such as supervising a child's homework; and the larger
questions of purpose for the child. This vision enables
them to make connections between the spheres of their
lives." n99 As one sociologist explained, "the ways
women . . . interpret their social identities--as mothers,
. . . wives, . . . members of particular ethnic and racial
groups, members of the working class or middle class -
help them to devise creative strategies to solve
community problems." n100 The confluence of gender
and race produced a dynamic and interconnected
relationship between the women of MELA, religion,
and policy, with each influencing the other in a
struggle against oppression.

Far south of East Los Angeles, another group of
women engaged in a different struggle. They bravely
opposed the Argentinean government's military junta,
challenged the government to reveal what had happened to their children. From 1976 through 1983, tens of thousands of Argentineans "disappeared" that is, they were kidnapped, tortured, and ultimately murdered. During a reign of terror when few dared challenge the government, Las Madres de Plaza de Mayo ("Las Madres"), protested the government's actions. They initially met in church--a safe haven and a place to gather spiritual strength. They soon realized that to be effective, they needed a public presence, and began to gather in the most prominent location conceivable--the Plaza de Mayo that faced the presidential palace--in spite of a prohibition against such meetings. "The Mothers had decided to work openly against a regime that enforced secrecy and total compliance, and their Friday meetings represented the beginning of a long and courageous struggle to claim space for truth and dissent in the very setting of governmental power." n109

Even though Las Madres moved from the church to a
public space, spirituality remained an ally. At one point,
Las Madres organized a protest in front of a Cathedral
with students from the Catholic schools. Each time the
police approached them with guns drawn and
attempted to block the protest, Las Madres merely began to pray. The fact that the church had
great influence over the government and the militants
were fearful of God, allowed Las Madres to proceed.

It was not just the physical space of the church, but
Las Madres' personal spirituality as well, that was
contradictory messages that they had to critically
interpret. On the one hand, "as women in a traditional
society imbued with the values of machismo, the . . .
women had to overcome the psychological, social, and
political barriers that kept them in the sphere of the
household." On the other hand, their conditioning
taught them that women serve a unique protective role;
it is their duty to look after their families and their
communities. Their organizations' names even
reflected the potentially conflicting, but ultimately
reconciled roles that these women embraced. "The
name of the organization, 'Mothers of East Los
Angeles,' clearly communicates gender identity and the
metaphor of mother as protector of the community."
Rather than allowing contradictory messages to
paralyze them, these women selectively chose the
messages that would strengthen them in their fight
against oppression. Las Madres purposively utilized
gender to empower, turning the perception of Latinas'
powerlessness on its head.

[Las Madres] took the negative stereotype of Latin
women and turned it into a positive image . . . while
women are respected in their roles as mothers and
wives, there is a patriarchal tradition throughout South
America that reinforces sexism and which has
generally excluded women from the public
sphere, including their involvement in the mainstream political process.

Thus, by playing on the gender concepts in Latin America and forming a gender-identifiable group, Las Madres made it more difficult psychologically and politically for the military to punish them. n115

Not only did the women manipulate common stereotypes, they also celebrated self-created identities, and gracefully interwove their multiple roles rather than succumbing to pressures to live either/or lives. "In departing from set norms and expected behavior, . . . [Las Madres] enlarged their political space and the space for their perceptions, for thought and activity occur in an inextricable relationship." n116 One leader explained "she considered herself a housewife and also a political activist, defying the simplification of the male/female, private/public spheres." n117

The activists of MELA and Las Madres were conscious of gender-based oppression and understood that they had the power to take advantage of stereotypes portraying them as weak and submissive, while subverting those very stereotypes. "When the Mothers refused to consider themselves helpless victims but rather active agents, first in searching for their children and later in demanding that those responsible for the junta's crimes be brought to justice, they were continually exceeding the limits set by the government on permissible action." n118 The oppressor was not even aware that the women of Las Madres had defied stereotypes until it was too late--Las Madres was already a powerful and respected force in Argentinean society.

The women of MELA and Las Madres reveal numerous specific connections between gender and religion. First, in both groups, women initially came together through their churches. Second, through their involvement, these women were able to actualize their faith, thus making their actions consistent with their beliefs. It was not enough to learn and simply believe concepts of social justice--they concretized their beliefs. Third, a gendered/raced spirituality based in popular religiosity sustained them, particularly when facing their greatest challenges. I do not make the claim that all Latinas experience spirituality the same way, nor that all of their experiences are distinct from Latinos'--or others'--experiences. However, for many Latinas, religion is a personal experience. There is a degree of intimacy uncommon among both men and Caucasian women. n119 This intimacy and immediacy are sources of sustenance for activist and non-activist Latinas alike. n120

Gender and religion are also inextricably connected with public policy. To illustrate, the women in East Los Angeles who came together through their church to protect their community, eventually took ownership of the prison issue, and developed strategies to prevent its construction in their neighborhood. They were moved by a social problem, claimed it as their own, and acted upon it. In Argentina, Las Madres took on the task of making the government responsive to its demands, and it was partially responsible for the transition from a military dictatorship to a democracy. n121 In addition, they impacted policy and touched lives.

This Part has highlighted how the intersection of gender, race, ethnicity, and religion has influenced Latinas to take a stand against subordination, allowing them to impact important policies and to change their religious communities. To summarize, gender is significant because women are often the keepers of a community and when the community is threatened, they live out their values by engaging in social activism. Ethnicity and culture provide formative conditioning that leads these women to incorporate their spiritual backgrounds into their activism. Religion is important for the Latinas described in this Essay because it influences the development of a moral compass; and for the Catholics, faith without works is insincere, thus religious beliefs become connected with public policy. "Faith in the midst of injustice is subversive." n122 Spirituality thus prompted these marginalized women to undertake social justice projects in the fight against subordination.

III. Strengthening and Expanding Transformative Possibilities

Don't give in mi prietita
tighten your belt, endure.
Your lineage is ancient,
your roots like those of the mesquite [*1234]
firmly planted, digging underground
toward that current, the soul of tierra madre-
your origin . . .

Yes, in a few years or centuries
la Raza will rise up, tongue intact
carrying the best of all the cultures.
That sleeping serpent,
rebellion-Revolution, will spring up.
Like old skin will fall the slave ways of
obedience, acceptance, silence.
Like serpent lightning we'll move, little woman.
The last Part of this Essay briefly described two groups of Latinas--Mexican American women in East Los Angeles and Argentina--women characterized partly by their endurance in the face of adversity and partly by their refusal to obey silently and accept the unacceptable. Their grassroots activism commenced in the church and reflected internal values that they shared with, and perhaps learned from, the church. Significantly, their activism allowed them to transform their moral values into social action, thus permitting them to live congruently with their values, while providing concrete solutions to pressing problems, raising the visibility of oppressed communities, and infecting others with their commitment to change.

Grass-roots protest activities have often been trivialized, ignored, and viewed as self-interested actions that are particularistic and parochial, failing to go beyond a single-issue focus. This view of community grass-roots protests is held by most policymakers as well as by many analysts of movements for progressive social change.

However, this view is misguided and ignores the value that grassroots activists play in transforming communities. After all, it is the Juana Gutierrezes who keep communities vital. As one writer noted, "in . . . Eastside Los Angeles, women conclude that only a watchful community, not regulatory agencies or elected officials, can maintain the quality of life in the places where we live." Devaluation of grassroots activity also succumbs to the patriarchal notion that only abstract, broader level theorizing is worthy of attention and ignores the feminist motto that the personal is political.

We should honor the grassroots activism that improves individual communities and is essential in the anti-subordination project with which women of color must be engaged. Yet we must also learn the system where national policies are made because that is the system we are presently operating in and hoping to influence and change. "A woman from a dominant culture does not have to learn another culture's point of view to survive, but Mexican-American women must know the ways of the dominant culture." Thus, we must formulate a multi-pronged strategy which simultaneously establishes a pipeline of Mexican American women for leadership positions in areas of public policy, law, and religion; undoes harmful conditioning that inhibits anti-subordination work; and continues existing efforts and strategic collaborations to destabilize subordination at institutional levels. This Part will describe a number of challenges that Mexican American women face, and steps that they can take as part of the strategy to alter public policy and legal and religious systems in order to make them less oppressive, more empowering, and more responsive to a variety of norms and needs.

Mexican American women face innumerable challenges when trying to utilize public policy, law and religion to undo centuries of subordination. A fundamental challenge arises from the dearth of Mexican American women in leadership positions in all of these areas. Their absence is partly explained by the conditioning described earlier, by their low level of education, and by their relative invisibility in the political and religious worlds.

Yet it is crucial for Mexican American women to become policy-makers for the important reasons described in the previous discussion on environmental racism.

Besides assisting local grass-roots work, the Network has been an important force in projecting the questions of environmental racism and economic blackmail into the national debate among environmental organizations and onto the agenda of government agencies. This has been possible because we have taken seriously the need to affect national policy. We could spend the rest of our lives - and in many cases, we have to - fighting off one garbage transfer station or incinerator after another in our communities. We have to 'put out those fires' because our communities are being poisoned every day. But strategically, we need to think in terms of a preventive situation, a way to affect city, county, state, and national policy.

Until Mexican American women are in leadership positions, they will not be able to make systematic changes and will be limited to putting out individual fires.

One reason that Mexican American women are handicapped in their ability to engage in the politics that typically precede and accompany public policy work is that they are more inclined to draw attention to an issue, to the community, or to their families, not to themselves. Moreover, unbridled personal ambition is still frowned upon.

In my culture, selfishness is condemned, especially in women; humility and selflessness, the absence of selfishness, is considered a virtue. . . . If you get above yourself, you're an envidiosa. If you don't behave like
everyone else, la gente will say that you think you're better than others, que te crees grande. With ambition (condemned in the Mexican culture and valued in the Anglo) comes envy. n134

Accordingly, Mexican American women struggle with cultural conditioning that condemns both ambition, which is often necessary to advance to policy-making positions, and self-improvement efforts, which can be interpreted as selfishness, but are, nevertheless, required to sit at the table of decision-making in the United States. Rather than blindly accepting this conditioning, Mexican American women must critically assess cultural taboos, and be willing to challenge oppressive conditioning, without abandoning cultural strengths. We struggle with this difficult task but must persist because until we are involved in cocreating our circumstances, we will be powerless to change them.

Like all political women, Mexican American women must achieve a delicate balance between their political and family roles. But Mexican American women especially are bound by the conditioning that family comes first. n135 This is not to denigrate the role of wife and mother, even if that role is burdensome because of the second shift that it entails. n136 In fact, many Mexican American feminists disagree with some feminists' belief that women's familial role is a primary source of oppression. n137 For many Mexican American women, that role is considered a source of power, n138 which does not necessarily conflict with activism. "Contrary to what some may suspect, the Mothers of East Los Angeles did not abandon their families to pursue political issues. Actually, they have gained tremendous support from their husbands and children." n139 The family role may be the catalyst that starts the Mexican American woman's engine toward a political life. "Women who participate in grassroots community activism often assert that their experiences as wives and mothers are intimately linked to their political activism." n140 Thus, any threat to the family's well-being, or even to the neighborhood or community--la raza, may prompt a Mexican American woman to embrace an activist role that might otherwise go unknown. n141 "For these women, family serves as a spur to action, contradicting popular notions of family as conservative and parochial." n142 But I digress--grassroots activists can balance their home and activist roles in part because they can selectively get involved with issues as time permits. As elected officials, they would not have the luxury of deciding when or whether to devote time to issues, resulting in an imbalance between home and work, with work winning out. Accordingly, Mexican American women may be disinclined to engage in full time politics. While that is slowly changing, the numbers of elected Latinas is still very small compared to their representation in the population. n143 [*1238]

The bad news for the Mexican American women who enter the political arena is that their ranks are slim and there are few role models. The good news is that there are some role models, n144 and existing groups that provide training and mentoring. The National Women's Political Caucus ("NWPC") does not focus on Latinas, but its mission is "to identify, recruit, train and support" women seeking elected and appointed office. n145 Thus, Latinas can benefit from NWPC's resources and networks. The National Hispanic Leadership Institute focuses more specifically on Latinas, but not just on politics. Its mission is "to develop Hispanics as ethical leaders through training, professional development, relationship building and community and world activism." n146 In addition, the Southwest Voter Registration Education Project ("SVREP"), which has grown more politically sophisticated over the years, offers training for Latina/o politicians and activists:

Born in the era of farm worker protests and Chicano high school student walkouts, the . . . SVREP emerged 25 years ago as a voice of angry Latino outsiders, pushing for political power that had long been denied to their community.

They are on the inside now, as they showed recently at the group's Latino Academy leadership program. . . . The corporate style program embodies a new spirit in Latino politics, one driven by a growing and increasingly sophisticated middle-class Latino electorate.

Formed in 1997, the Southwest Voter leadership academy . . . is meant to educate community activists and novice politicians in the nuanced terrain of contemporary politics. n147

Another resource is the Southwest Organizing Project ("SWOP"), which is a "multiracial, multissue, community-based organization." n148 SWOP has brought together members of various marginalized groups, resulting in the creation of the Southwest Network for Environmental and Economic Justice ("SNEEJ"), which has taken many concrete steps to strengthen oppressed communities and their relationships with each other. n150 [*1239]

These groups and others provide not only model programs for public policy and leadership training, they provide the training itself. With training tools in place, a remaining challenge is to identify promising Mexican American women and to channel them towards these programs. At the same time, it is important for Mexican American women in politics to
establish and formalize networks among Mexican American women, Latinas, women of color, and all women; n151 as well as Latinos, other people of color, and others with whom they can strategically collaborate toward an anti-subordination agenda. One organizer stressed the importance of this activity as a way to hasten toward a place at the table:

we have built a base over the years; we can bring it out, and we expect to sit at the table. We have operated from the point of view that in order to sit at the table, the first thing we need to do is bring ourselves together as people of color. We know that if we cannot strengthen our relationships with one another, building a multicultural and multiracial movement to go up against the multinational corporations [or otherwise impact national policy] will be quite difficult. n152

Other challenges may disincline Mexican American women from getting involved in the types of efforts required to alter their subordinated status. One fundamental challenge is to improve the educational achievements of all Mexican Americans. Education is essential to establish a seat at the table and to penetrate the places of power where decisions impacting our community are made. Gloria Anzaldúa has stated, for a woman of my culture there used to be only three directions she could turn: to the Church as a nun, to the streets as a prostitute, or to the home as a mother. Today some of us have a fourth choice: entering the world by way of education and career and becoming self-autonomous persons. A very few of us.

Anzaldúa makes two important points--first, that education provides an opportunity to fill our lives with options, giving us a chance to dream and shape our futures. Second, that the choice of education exists for too few Mexican American women and girls, and to the extent that it exists, too few are taking advantage of it. n154 [*1240]

To make education a more viable option, we need to work for greater equity and equality in education, n155 to resurrect and strengthen affirmative action programs, n156 and to intervene at an earlier point in students' lives.

To change how law is made, implemented, and enforced, Mexican American women need to know the legal system. They cannot abandon the very system that conspires to oppress them. They are part of the system that has been used against them and they need to learn how to work within the existing system while transforming it. This is a monumental task and many courageous Mexican American women have embarked on this mission. n157 While their work has been essential, they cannot do all that is required by themselves. We need more Mexican American women in law and that means more Mexican American women in college, and law school. n158 Admittedly, more Latinas than ever are in law school, n159 but various factors have led to a recent stabilizing of those numbers. n160 One prong in the strategy to get more Mexican American women at the table is to work toward the enrollment of Latinas in college and law school in numbers proportional with their representation in the population. Once in the legal world, these women can continue the work that their predecessors have started, whether through legislation, litigation, policy-making, advocacy, or the legal academy.

As church-going Mexican American women become leaders, they should consciously preserve their spiritual core and strive for congruence between beliefs and actions. It is only then that they can act as sources of [*1241] light rather than shadow. n161 Oppression will continue to haunt them--it certainly will not disappear just because they have a seat at the table--and they should rely on their intimacy with the Divine as a continued source of strength. An African-American man talked about the importance of spirituality when subjected to subordination as follows:

In the interstices of multiple oppressions that threatened at times to scramble my consciousness into an unappetizing potpourri of postmodern anxieties, it was religion, more than anything else, that constrained the disunifying impulses of race-and class-based oppression.

I speak here not of religion in its institutional sense - not of liturgy, denomination, or creed - but of something more transcendent - the spiritual dimension of self-affirmation, purposefulness, and an empowered connection to the lives and problems of others. It was this holistic feeling of belonging and connection that transcended the alienation and fragmentation of marginalized existence . . . . n162

Mexican American women frequently have an intimate relationship with God and with what is divine in this world. Both for their personal survival and as a source for co-creating a less oppressive world as they seek and sustain a seat at the table, they should affirm the strength that this relationship offers. n163

Mexican American women, as activists and leaders, can transform the church in both small and radical ways, yet will have to shed some cultural conditioning when moving toward this transformation. This process has already begun. "In Eastside Los Angeles, the extensive collective efforts of women in the parish setting required ongoing negotiations among priests, nuns, and nonactivist women. The women were firmly committed to the parish church, which represents a
strategic place to do collective work." n164 In other words, their involvement in the church entitled them to a voice in the church. So rather than abandoning the church, Mexican American women work within it and without as they [*1242] move toward social transformation. n165 They have started doing this by using their church activities to establish stronger bargaining positions when negotiating with their parishes, and sometimes to make changes within the parish.

Labor-intensive food preparation and fund-raisers would seem to be quite traditional women's work. But women's voluntary efforts also made it possible for them to challenge traditional practices within the church. Their needed contributions gave them authority to enter into a dialogue with the priests about school administrative practices and how the funds they earned would be spent. n166

The church's exclusivity and patriarchy are largely responsible for all women's absence, including Mexican Americans, from the table of power in the religious realm. By establishing their presence, Mexican American women can alter the status quo, making the church more inclusive and less patriarchal. In pursuit of parallel goals, Riane Eisler urges all of us away from a dominator model toward a partnership one. n167 Mexican American women have already moved in this direction as illustrated by their typical relationship with Our Lady of Guadalupe. n168 "The Relationship that emerges from this religious and cultural transmission of the story of Our Lady of Guadalupe has reciprocity as one of its elements. There's an exchange--something mutual happens." n169 Mexican [*1243] American women are also uniquely positioned to build on their Marian faith to complement the masculine view of God promulgated by the institutional church, with a feminine view. n170 "It is easy to perceive Our Lady of Guadalupe as the maternal or female face of God, because she evokes an unconditional love, solidarity, and a never-failing presence at the affective level. But in doing so, we inaccurately remove these attributes from where they rightly belong: to God." n171 Mexican American women must understand that their presence in the church, as well as the work they have done for the church, grants them some power to effectuate change. They can use that power to alter church-based relationships, making the church more responsive, and they can be instrumental in moving their churches, as well as communities, toward a partnership model. Mexican American women will have to continue existing activities, and build upon them, to change the church of which they are a part, and to use the church to make broader changes.

Women have many unique skills and strengths which can be used to influence policies and laws. For example, mothers, particularly working mothers, typically have extraordinary management and creative problem-solving gifts--it is impossible to juggle full time work and motherhood without excellent management skills. n172 With respect to problem-solving capabilities, one woman observed that "most mothers, and all working mothers, would tell you that they have honed their problem-solving skills in an attempt at simple survival. People who carry many responsibilities and few resources are forced to be creative." n173 Women's existing strengths have not always been recognized or deployed for their advantage. One challenge is to consciously use those skills to establish a presence at the table and, once at the table, to change oppressive conditions. We must utilize "gendered strategies for resisting political, economic, and cultural conquests. Women's kin and friend networks--their comadres . . . are indispensable for both personal and cultural survival. Comadres helping comadres, neighbors joining neighbors--such patterns [*1244] of mutual assistance run through the histories of Mexican American women." n174

Concurrently with women's recognition and utilization of their unique skills, Mexican American women must subvert the notion that attributes considered "Mexican American" are negative ones that hold them back, instead re-characterizing those attributes as strengths. "Mexican-American women are still able to find ways of consciously or unconsciously resisting assimilation and total annihilation by the dominant culture. They do this by attempting to maintain their cultural values and forming complex relationships--interdependent, extended family relationships." n175 There are many cultural traits that we should not only value, but also intentionally use to help achieve a place at the table. As noted, Mexican American women tend to be relational, n176 self-sacrificing, n177 and concerned with the common good. Additionally, Mexican American women are known for their endurance, n178 and for valuing reciprocity. n179 The former is necessary both to work toward a place at the table and to effectuate change once there. The latter may produce a skillful negotiator who can adeptly explain why a proposed change is good for many parties. We can honor these cultural traits and others as we capitalize on them to work against the common enemy of oppression.

While re-characterizing traditional cultural attributes and values, we should look critically at traditional American values such as autonomy, n180 ambition, and consumerism, n181 before embracing them, particularly when those values require us to forfeit meaningful culturalism. "Familiarity with the Chicano
culture makes us aware of the relational character of the people. Independence at the cost of giving up the cultural value of interdependence and relationship to others is simply not a Mexican-American goal." n182 This is not to devalue American traits, but rather to recognize that we should not bury what we cherish to assimilate. Instead, [*1245] we should move away from either/or culturalism toward a meeting place where we can integrate values from multiple cultures.

It is not enough to stand on the opposite river bank, shouting questions, challenging patriarchal, white conventions. A counterstance locks one into a duel of oppressor and oppressed; locked in mortal combat, like the cop and the criminal, both are reduced to a common denominator of violence. The counterstance refutes the dominant culture's views and beliefs, and, for this, it is proudly defiant. All reaction is limited by, and dependent on, what it is reacting against. Because the counterstance stems from a problem with authority-outer as well as inner-it's a step towards liberation from cultural domination. But it is not a way of life. At some point, on our way to a new consciousness, we will have to leave the opposite bank, the split between the two mortal combatants somehow healed so that we are on both shores at once and, at once, see through serpent and eagle eyes. n183

To move away from domination, Mexican American women must ultimately be free to co-create their realidades. "When we want to talk about experience in Spanish we talk about la realidad-reality. Reality is a synthesis of experiences which are part and parcel of the totality of that person in a given moment." n184 This self-definition process cannot occur in a vacuum and must recognize the cultural milieus from which Mexican American women's realidades are derived. "There is no single hermetic Mexican or Mexican-American culture, but rather permeable cultures rooted in generation, gender, region, class, and personal experience." n185 Vicki Ruiz continues by stating that "people navigate across cultural boundaries and consciously make decisions with regard to the production of culture." n186 Although living in the borderlands physically, metaphorically, and geographically, involves a certain degree of belonging nowhere, it also offers great potential, which has gone largely unexplored. Borderland existence gives us a chance to consciously produce our culture, to choose our home, to claim what we value--that which is liberating and dignifies, and to disclaim that which is oppressive. n187 Clearly, we cannot force others to make similar choices or to honor our choices, but we can start by honoring ourselves and our choices.

While claiming strengths that are unique to the Mexican American woman, we must be careful not to essentialize her, narrowing her into a box from which she cannot escape. Our strategy must include dispelling myths and stereotypes which are deemed to be normative, even when they legitimately tell part of the story, in order to allow other realidades which are also part of the story, without those being considered exceptional or deviant. Thus, while acknowledging that certain norms persist, we must understand that they tell only part of the story -we need more room for more stories--mas realidades. We must also question conceptual frameworks that pigeonhole analyses in concrete and artificial categories of either race, or gender, or religion, or public policy. We should instead seek more fluid frameworks that recognize women's lived experiences and the interplay of identity and position. It would be beneficial to explore how our gender, race, class, sexuality and overall identity frame our (dis)ability to effectuate change, and impact how we experience oppression. This exploration could also inform how we might re-imagine equality. Hilary Putnam produced the following image of equality that we might strive for:

> there is something about human beings, some aspect which is of incomparable moral significance, with respect to which all human beings are equal, no matter how unequal they may be in talents, achievements, social contributions, etc. . . . Even those who are the least talented, or whose achievements are the least, . . . are deserving of respect. . . . Everyone's happiness or suffering is of equal prima facie moral importance. n188

But we are cautioned that even if we accept this notion of equality (which asks much in and of itself), simple acceptance does not bring it to pass - actions still must align with beliefs. n189

Mexican American women face many entrance and sustainability challenges in the worlds of politics, law and the church. This Part described strategies for successfully meeting those challenges through effective leadership that achieves antisubordination goals. At the same time, it illustrated how Mexican American women's lived experiences give them valuable insights that can be better utilized in the public policy, legal, and religious spheres. When describing Simone Young's approach to conducting the New York Metropolitan Opera, Anita Perez Ferguson stated:

> Young has spoken of the 'maestro myth' which views conducting as a role of power. She counters with a different view, "Conducting has nothing to do with power. It has everything to do with forgetting your personal self, immersing yourself in this music, making the music speak to the audience and doing that together with the forces you are working with." n190
Mexican American women are well positioned to be masterful conductors of change--they are accustomed to compromising their self interest [*1247] for the larger good and could lead by inviting each individual's talents to soar for the betterment of all. Las Madres were cognizant of this leadership model--"they provide us with an alternative model of political action based upon familial and community responsibility rather than upon individual goals." n191 In that spirit, this Part urges Mexican American women to be familiar with their strengths and to consciously use them to overcome barriers that have both blocked access to the table and have hampered their ability to alleviate subordination.

Conclusion

This Essay was prompted by a request to explore the connections between gender, religion and public policy, and the place that women of color occupy in this exploration. Two things quickly became apparent - first that this was too broad a task given various constraints. I therefore decided I would focus on Mexican American women, incorporating law into the exploration, and that even with this narrowed focus, my exploration would be rudimentary at best. Second, that even though Mexican American women had made some significant contributions in the areas of policy, law and religion, their appearances at decision-making tables were fleeting, and their absence was practically unnoticed. Although Mexican American women have a genuine opportunity to get to the table, they face an uphill battle. Understand that I do not seek to place Mexican American women in a superior place at the table, nor do I seek to displace others. Rather, I simply propose that Mexican American women should have an equal place at the table, and that their realidades, needs, and contributions need to be seriously considered.

As we deploy the strategies outlined in this Essay, we cannot expect that simple answers exist to the subordination crises that Mexican American women daily experience, nor can we expect to have the answers. "The arrogance and potential dominance associated with knowing the right answer and knowing what is best for the oppressed must be tempered with the postmodern contingency, relativity and potential deconstruction of our own foundations of knowledge." n192 We must also be careful not to capitulate to the dominant culture's approach of solving other people's problems. We should instead collaborate, listen, genuinely hear and be heard, be willing to compromise for the common good, and avoid paralysis for fear of offending or not succeeding.

FOOTNOTE-1:

n1 Professor of Law, California Western School of Law; J.D. Stanford Law School, 1987; B.A. Stanford University, 1983. I presented parts of this Essay at the Harvard Core Connections Conference, which was co-sponsored by the John F. Kennedy School of Public Policy and the Harvard Divinity School. I am grateful to the conference participants for their feedback, and to my colleague William Aceves for his comments on this Essay. I am also thankful for the diligent work of my research assistants, Claudia Flores, Angela Saloufakos, and Tamara Yorita.

n2 Gloria Anzaldua, Poets have strange eating habits, in Borderlands/La Frontera: The New Mestiza 140 (1987) [hereinafter Borderlands].

n3 I choose the word "absent" rather than "excluded" because excluded implies that we were considered but then intentionally not invited. I believe we are so invisible as to have not been considered, much less actively excluded. "For 300 years she was invisible, she was not heard. Many times she wished to speak, to act, to protest, to challenge. The odds were heavily against her. She hid her feelings; she hid her truths; she concealed her fire; but she kept stoking the inner flame." Anzaldua, supra note 2, at 23.

n4 I focus on Mexican American women primarily because I am Mexican American and, therefore, it is the Latina sub-group with which I am most familiar. Many of my Latina friends and colleagues in my home city of San Diego are Mexican American and have shared familiar stories about their experiences. Additionally, the majority of Latinos in the United States are of Mexican heritage. Roberto O. Ramirez, The Hispanic Population in the United States: Population Characteristics 1 (U.S. Census Bureau August, 1998) [hereinafter Ramirez]. With some exceptions, this Essay focuses on Mexican American women, rather than Latinas more generally, because even in their heterogeneity, Mexican American women often share cultural experiences which have uniquely shaped their inclination to influence policy, law, and religion. In order to write meaningfully of the particularities of a group without over-
essentializing, it is necessary to narrow the group, even then recognizing that any description will always be both over-and under-inclusive.

n5 According to the U.S. Census Bureau, the four most common income levels for Mexican Americans in descending order are: $10,000-12,499 (approximately 13% earn this amount); $5,000-7,499 (approximately 10% earn this amount); $15,000-17,499 (approximately 9% earn this amount); and less than $2,500 (approximately 9% earn this amount). See U.S. Bureau of the Census, Table 2.1. March 1997 CPS: Earnings of Persons by Race-Ethnicity Age 15 and Over: Both Sexes, available at http://www.census.gov/population/socdemo/hispanic/cps97/tab0201.txt (last visited Nov. 11, 2000). The majority of Mexican American women are working class, and the cultural background in this Part of the Essay best describes this group. Of course, it does not perfectly describe them and much of the background and conditioning described here applies across class lines.

n6 But see Mary S. Pardo, Mexican American Women Activists: Identity and Resistance In Two Los Angeles Communities 5-6 (1998) (describing the stories of Mexican-American women who were instrumental in engaging in non-institutional politics and shaping urban environments).


n10 Rodriguez, supra note 8, at 69 (citation omitted).

n11 Id.


n13 Rodriguez, supra note 8, at 122.

n14 "Although Latinas have only recently penetrated federal and state elective office, they have a much longer history of participation in representational politics and of office holding at the local and county levels, positions often gained after years spent in community based struggles." Paule Cruz Takash, Breaking Barriers to Representation: Chicana/Latina Elected Officials in California, 22 Urban Anthropology 325, 327 (1993). Some Latinas have successfully entered the world of electoral politics but their numbers are small compared to the total number of Latinas. For example, in 2000, there were five Latinas in the U.S. Congress. See Hispanic Americans in Congress, available at http://lcweb.loc.gov/rr/hispanic/congress/chron.html (last visited Nov. 2, 2000). As of September 1, 2000, there were approximately 16,245,000 Latinas in the United States. See Resident Population Estimates of the United States by Sex, Race, and Hispanic Origin: April 1, 1990 to July 1, 1999, with ShortTerm Projections to September 1, 2000, available at http://www.census.gov/population/estimates/nation/intfile3-1.txt (last visited Nov. 2, 2000).

n15 During the 1999-00 school year, there were 2,483 Mexican Americans enrolled in law school, but the ABA does not report what percentage were women. American Bar Association, Minority Enrollment 1971-1999, available at http://www.abanet.org/legaled/statistics/minstats.html (last visited Nov. 8, 2000) [hereinafter Minority Enrollment]. During that same school year, approximately 47% of students enrolled in law school were women. American Bar Association, First Year Enrollment in ABA Approved Law Schools 1947-1999, available at http://www.abanet.org/legaled/statistics/femstats.html (last visited Nov. 8, 2000).
Using these percentages as a rough benchmark, we can speculate that approximately 1,167 Mexican American women were enrolled in law school during the 1999-00 school year.


n17 See, e.g., Gilbert R. Cadena & Laura Medina, Liberation Theology and Social Change: Chicanas and Chicanos in the Catholic Church, in Chicanas and Chicanos in Contemporary Society 102-06 (Roberto M. DeAnda ed., 1996); see also infra Part II.

n18 The oppression can be quadrupled, quintupled, etc., when taking into consideration other sources of oppression such as sexual orientation, physical ability, etc.


n20 See, e.g., Rodriguez, supra note 8, at 79-80 (using as an example the 'self-sacrificing mother' that puts aside her own needs in favor of her children's).


n23 Ada Maria Isasi-Diaz & Yolanda Tarango, Hispanic Women: Prophetic Voice in the Church 90 (1988).

n24 See e.g., Padilla, Latinas and Religion, supra note 12, at 1000; Pardo, supra note 6, at 157.

n25 See Padilla, Latinas on the Margin, supra note 21, at 199. See also Rodriguez, supra note 8, at 146 (discussing how Mexican American women's relationships with Our Lady of Guadalupe make it possible to endure suffering).

n26 See infra Part II.

n27 In Mexican American culture, family typically includes not only immediate and extended family, but also comadres and compadres (godparents), and good friends often become tios and tias (uncles and aunts). "Family has a very different meaning for these women than it does for the middleclass nuclear family. Theirs is a less privatized, extended family that is open, permeable, and attached to community." Celene Krauss, Women of Color on the Front Line, in Unequal Protection: Environmental Justice and Communities of Color 260 (Robert D. Bullard ed., 1994).

n28 When Anita Perez Ferguson, the first Latina president of the National Women's Political Caucus, discussed why women enter into politics, she stated that "studies have shown us that women, in particular, enter into the political arena and take a stand in the community when confronted with an issue about which they care deeply, or one which affects their family or loved ones." Anita Perez Ferguson, A Passion for Politics: Encouraging Women in Leadership 8 (1999).


n31 Of course, not all Mexican American women place family first or relish the role of mother, and they should not be expected to, nor ostracized if they choose otherwise. All women who forego motherhood or do
not highly value it are subject to criticism. For Mexican American women, the criticism from their own communities is usually harshest because of cultural conditioning.

n32 Rivera, supra note 22, at 252. See also Padilla, Latinas on the Margin, supra note 21, at 200.

n33 Rodriguez, supra note 8, at 79.

n34 See infra text accompanying notes 175-81 (discussing Mexican traits devalued in the United States).

n35 Rodriguez, supra note 8, at 70.


n37 See, e.g., Fred Alvarez, Program urges young Latinas on to success, San Diego Union Trib., May 29, 1992, at B1 (stating that "no one drops out of school more often in San Diego County than young Latinas . . . ."). In San Diego County, 6.5% of Latinas in the 10th-12th grades dropped out of school in 1991 compared to 2.9% of white females, 2.6% of African American females, and 4.4% of Asian females. Id.


n39 Id. at 243. Hispanic women represent just over .45% of tenured academics, even though they represent approximately 8.4% of the population. Id.; see generally Resident Population Estimates of the United States by Sex, Race, and Hispanic Origin: April 1, 1990 to July 1, 1999, with Short-Term Projection to May 1, 2000 <http://www.census.gov/population/estimates/nation/intfile3-1.txt> (last visited July 27, 2000).

n40 Recent statistics indicate that approximately 5.4% of Mexican-origin females twenty-five and older have a bachelor's degree. See Table 5.2 Population Age 25 Years and Over by Educational Attainment, Hispanic Origin and Race, and Sex: March 1999 <http://www.census.gov/population/socdemo/hispanic/cps99/tab052.txt> (last visited Aug. 1, 2000). For similar statistics, see Ramirez, supra note 4, at 2.

n41 Only 1.8% of Mexican-origin females twenty-five and older have an advanced degree. See Table 5.2 Population Age 25 Years and Over by Educational Attainment, Hispanic Origin and Race, and Sex: March 1999 <http://www.census.gov/population/socdemo/hispanic/cps99/tab052.txt> (last visited Aug. 1, 2000).


n43 Julian Samora & Patricia Vandel Simon, A History of the Mexican American People 223 (1977). However, "according to the sociologist Andrew Greeley, Latinos are leaving the American Catholic Church at a rate of approximately sixty thousand people a year. Since 1975, 8 percent of the total Latino population has abandoned Roman Catholicism." Id. at 232.

n44 See Cadena, supra note 42, at 40, 42; Ana Castillo, Massacre of the Dreamers: Essays on Xicanisma 95 (1994) (stating that "A significant component of the mestiza's identity is her spirituality").

n45 Rodriguez, supra note 8, at 59.


n47 Id.

n48 See generally Rodriguez, supra note 8.

n49 Samora & Simon, supra note 43, at 224-25. See also Rodriguez, supra note 8,
at 143-49 (discussing in more detail popular religiosity and Mexican American women).

n50 "In this tension between popular and institutional religion strains the most serious conflict between Mexican American Catholics and the rest of the American Catholic church. Mexican American Catholics experience an ubiquitous religious tradition that is difficult to contain within the institutionalized boundaries of American Catholicism. Church leaders have interpreted the tradition as unadaptable and therefore inferior. . . . Historically, the Catholic hierarchy has consistently depicted Mexican Americans as deficient Catholics. . . ." Samora & Simon, supra note 43, at 224-25.

n51 Rodriguez, supra note 8, at 63.


n53 See Rodriguez, supra note 8, at 119 ("The vast majority (eighty-eight percent) of Hispanic Catholics across the nation are not presently and actively involved in their parishes. Furthermore, approximately six out of every ten had never been approached to become involved.").

n54 Jeanette Rodriguez, for example, suggests ways that the institutional Church can use Mexican American women's relationship with Our Lady of Guadalupe to alter its theological stance in a way that honors that relationship and the women's culture. See Rodriguez, supra note 8, at chapter 7.

n55 Ana Maria Diaz-Stevens, The Saving Grace: The Matriarchal Core of Latino Catholicism, Latino Studies J. 60, 64 (Sept. 1993).

n56 Rodriguez, supra note 8, at x (abuelitas, viejitas, and madrecitas are roughy translated as "our dear little grandmothers", "old women" and "mothers;" and iglesias del pueblo are "the common churches") (foreword by Virgilio Elizondo).

n57 Rivera, supra note 22, at 241.


n59 Jane Kay, California's Endangered Communities of Color, in Unequal Protection, supra note 58, at 156-57.


n61 Kay, supra note 59, at 168.

n62 Krauss, supra note 27, at 260. See also Moore & Head, supra note 60, at 197 (stating that "large numbers of Chicanas who have entered the microelectronic industry over the past fifteen years have suffered job-related illness and death. Birth defects are increasingly common among children of women working for high-tech manufacturers.").

n63 See generally Gabriel Gutierrez, Mothers of East Los Angeles Strike Back, in Unequal Protection, supra note 58.

n64 Id. at 223 (quoting Aurora Castillo).

n65 See Krauss, supra note 27, at 256 (stating "female grass-roots activists have assumed the leadership of community environmental struggles . . . they constitute a diverse constituency, including working-class housewives and secretaries, rural African American farmers, urban residents, Mexican American farm workers and Native Americans.").

n66 This movement is alive and well. On the opening night of the 2000 Republican Convention, Colin Powell criticized the Republican Party's persistent virulent attacks on affirmative action. "[Too many Republicans] loudly condemn affirmative action that helped [black youth], but raise hardly a whimper . . . over affirmative action for lobbyists who load our federal tax codes with preferences for special interests." Excerpts, Colin Powell, Former
Chairman of the Joint Chiefs of Staff, San Diego Union Trib., Aug. 1, 2000, at A10.

n67 States Ranked by Hispanic Population, July 1, 1999, available at http://www.census.gov/population/estimates/state/rank/hisp.txt (last visited Oct. 3, 2000). As of July 1, 1999, California had approximately 10,459,616 Hispanics, nearly double the 6,045,430 Hispanics in Texas, the state with the second highest number of Hispanic residents. Id.

n68 California voters approved Proposition 209 by a vote of 55-45%. See Bill Jones, California Secretary of State, Statement of Vote, Nov. 5, 1996 (General Election).


n70 78 F.3d 932, 934 (5th Cir. 1996), cert. denied, 116 S. Ct. 2580 (1996).

n71 See, e.g., supra notes 67-70 and accompanying text.

n72 Bureau of the Census, U.S. Dept of Commerce, Statistical Abstract of the United States 157 (1995). Approximately 81% of White females graduate from high school, compared with 73.8% of Black females, and 53.2% of Hispanic females. Id. See also supra note 37.

n73 See Ramirez, supra note 4, at 2.

n74 But see infra note 156 (highlighting MALDEF's efforts to achieve equal opportunity in education and the work place).

n75 See The Code of Canon Law: A Text and Commentary 723 (James A. Coriden et al. eds., 1985) (Canon 1024 provides that, "only a baptized male validly receives sacred ordination."); see generally Lavinia Byrne, Woman at the Altar: The Ordination of Women in the Roman Catholic Church (1998) (critiquing the Church's position).

n76 One writer notes that in Latin culture, "dissent was portrayed as socially pathological and revolutionary." Marguerite Guzman Bouvard, Revolutionizing Motherhood: The Mothers of the Plaza de Mayo 82 (1994).

n77 Diaz-Stevens, supra note 55, at 71-72.


n80 Id.


n82 "At first, these Mothers did not realize that they were embarking on a journey which would transform them into political activists . . .." Bouvard, supra note 76, at 65.

n83 Father Moretta selected the name MELA in recognition of the work of Las Madres de Plaza de Mayo, discussed infra at notes 104-115. See also Gutierrez, supra note 7, at 223-24. Ultimately, MELA split into two organizations, the original group (MELA), and Madres del Este de Los Angeles, Santa Isabel (MELA-SI), with the division roughly along parish lines and corresponding to different ideological views. See Pardo, supra note 6, at 136-38.

n84 See Pardo, supra note 6, at 3. MELA "grew into a network of over four hundred families, mobilized four thousand people, and defeated the first state prison planned for an urban setting. Shortly thereafter, MELA stopped the construction of a toxic waste incinerator, established national political ties with other environmental groups, and emerged as a permanent community voice." Id.

n85 Id.

n86 Id. at 113-14.

n87 Id. at 7.

n88 Id. at 27 (stating "the most active women had gained leadership and organizational skills as volunteers in the parish fundraising activities.").
n89 Id. at 38. "UNO, sponsored by the Catholic Church, developed in East Los Angeles in 1976 . . . . UNO identified issues . . . such as the need for street lights, reduced auto insurance rates, better community-police relations, and a crackdown on gang activity . . . Other UNO projects addressed a home improvement plan and in 1987 city-wide promotion of an increase in the minimum wage." Id. at 35.

n90 Pardo, supra note 6, at 191.

n91 Id. at 26.

n92 See generally Saul Alinsky, Reveille for Radicals (1946).

n93 See, e.g., supra notes 42-45.

n94 Pardo, supra note 6, at 34-35.

n95 Id. at 111.

n96 Id.

n97 Id. at 112.

n98 "It is significant to note that the women [of MELA] entered into the struggle not only as good Catholics at Father Moretta's behest but also as good citizens." Id. at 117.

n99 Bouvard, supra note 76, at 247.

n100 Pardo, supra note 6, at 7.

n101 In 1976, a military junta overthrew the existing government, resulting in a dictatorship which ruled through 1983. See Bouvard, supra note 76, at 1-2, 19-43.

n102 Id. at 31-32. Estimates of the number of disappeared range from 9,000 to over 45,000, but for symbolic reasons, Las Madres de Plaza de Mayo cites the number as 30,000. Id.

n103 Id.

n104 Las Madres de Plaza de Mayo is translated as "The Mothers of the Plaza de Mayo." Las Madres got its name from its initial public protests in the Plaza de Mayo, which fronts the presidential palace as well as other important buildings. Id. at 1-2.

n105 Initially, Las Madres' efforts to learn the fate of the disappeared were unsuccessful, and they gained little public support. They then decided to identify themselves by wearing panuelos, simple white head-scarves representing maternity, that is, the common bond of being mothers of missing children, peace and life. Id. at 74-75. These symbolic scarves not only bound Las Madres together, but also seemed to evoke sympathy and eventually garnered much needed public support.

n106 Id. at 72. Bouvard noted that although the women met in various churches, many churches ultimately refused to allow them entry. Id.

n107 Nancy Fabiana Fede, Unveiling the Cover of Darkness: A Look at Las Madres de Plaza de Mayo and their Success in Exposing Human Rights Violations in Argentina 7 (Spring 1999) (student paper on file with the author).

n108 See Bouvard, supra note 76, at 1-2.

n109 Id. at 69. Nancy Fabiana Fede noted that, the Plaza offered more visibility. If Las Madres had chosen to instead meet in secrecy or in a seemingly insignificant location, there would not have been an opportunity for the public to formulate an opinion regarding the disappeared or to lend their support. Las Madres risked their own safety by meeting and protesting in an open and popular location because they knew the importance of making known what had long been hidden. Because the Plaza was an open, public setting and one of grand importance to Argentine society, Las Madres' campaign was a success. Fede, supra note 107, at 20.

n110 Note, however, that Las Madres came to denounce the Catholic Church as an accomplice in Argentina's Dirty War and an institute of oppression. See, e.g., Bouvard, supra note 76 at 227. Many members of Las Madres nonetheless remained committed Christians, following Christ's model of love and nonviolence. Id. at 196.

n111 Fede, supra note 107, at 13 (footnotes omitted).

n112 Fede, supra note 107, at 18-19 (footnotes omitted).

n113 Bouvard, supra note 76, at 244.

n114 Pardo, supra note 6, at 114.

n115 Fede, supra note 107, at 17.
When asking an interviewee about her daily conversations between Mexican American women and Our Lady of Guadalupe, the following was revealed: "twenty-four year old Monica tells me that she can speak to Our Lady of Guadalupe for comfort, help, relief, and peace. When I asked her what kinds of things she talks to Our Lady of Guadalupe about, she responded, 'About my day. About my little girl. About my husband. About my family. Mainly just about family, close family, and friends.'" Rodriguez, supra note 8, at 119.

See also Padilla, Latinas and Religion, supra note 12, at 978.

See Rodriguez, supra note 8, at 135-36.

See Bouvard, supra note 76, at 65-66. Clearly Las Madres were not wholly or even primarily responsible for the transition to democracy-the Falklands War, the economy, and other factors played a large role. See Fede, supra note 107, at 4. But Las Madres established that the ruling dictatorship was not, in fact, impenetrable, and they created cracks in the regime.


Gloria Anzaldúa, Don't Give In, Chicana, in Borderlands, supra note 2, at 202 (prietita is roughly translated as "my little brown girl").

"These lifetime community advocates-turned-activists have brought about an exciting sense of hope among younger activists within the community, many of whom have returned from distinguished universities to make it 'back into the barrio,' despite having been encouraged by society to 'make it out.'" Gutierrez, supra note 7, at 232. One of the MELA activists stated, "all my six sisters came to the marches with my mom and my brother . . . Then, my sisters started bringing their daughters to the marches." Pardo, supra note 6, at 109 (quoting Dolores Duarte).

Krauss, supra note 27, at 257 (citations omitted).

Pardo, supra note 6, at 228.

See Krauss, supra note 27, at 258 (stating "the women's movement took as its central task the reconceptualization of the political itself, critiquing this dominant ideology and constructing a new definition of the political, located in the everyday world of ordinary women rather than in the world of public policy.").

Rodriguez, supra note 8, at 62.

For example, Latinos and Latinas alike are underrepresented in church leadership. "Projections place Latinos at thirty million by the year 2010, making them the single largest Roman Catholic ethnic group in the United States. By the year 2010, Latino bishops will only comprise 10 percent of the four hundred Roman Catholic bishops and of the fifty-three thousand priests." Samora & Simon, supra note 43, at 224.

See Padilla, Intersectionality and Positionality, supra note 36, at 891-92 (1997). See also supra notes 40-41.

See, e.g., Pardo, supra note 6, at 156-57, 214. Bouvard also notes that the intersection of class and gender impacts women's inclination to rise to leadership and necessarily shapes women's forms of resistance. See Bouvard, supra note 76, at 184.

Moore & Head, supra note 60, at 200-01.

See Rivera, supra note 22, at 241; Pardo, supra note 6, at 153-54.

Anzaldúa, supra note 2, at 18 (envidiosa is "one who foments envy in others," la gente are "the people," que te crees grande means "that you think you are great").
n135 See supra text accompanying notes 19, 21-33. See also Pardo, supra note 6, at 189-95.


n137 See Bouvard, supra note 76, at 190. "The private sphere has been scorned by men for centuries--and recently by some feminists--as the source of powerlessness and marginalization . . . ." Id. See also Adelaida R. Del Castillo, Mexican Women in Organization, in Mexican Women in the United States: Struggles Past and Present 11-12 (Magdalena Mora & Adelaida R. Del Castillo eds., 1980).

n138 See Rodriguez, supra note 8, at 76-79. See also Iglesias, supra note 30.

n139 Gutierrez, supra note 7, at 231 (written lovingly and respectfully by Gabriel Gutierrez, the son of Juana Gutierrez).

n140 Pardo, supra note 6, at 248 (citations omitted).

n141 For example, when they considered their families and neighborhood to be endangered, "a group of women in the Boyle Heights Pico-Aliso housing project . . . formed the Comite Pro Paz en el Barrio (Committee for Peace in the Neighborhood) to stop violence among gang members. Father Greg Boyle, well known for his work with gangs, collaborated with the women's efforts. They held 'love marches' and barbecues to encourage peace between rival gangs, and accused police of brutality. One woman commented, 'As mothers we can cross into different neighborhoods.'" Id. at 258-59 n.11.

n142 Krauss, supra note 27, at 260.

n143 See supra note 14.

n144 See id.


n146 See National Hispana Leadership Institute (NHLI), available at http://www.nhli.org/about.htm (last visited July 14, 2000). Each year, the NHLI offers a four-week intensive leadership training program for Hispanics. Id.


n148 Moore & Head, supra note 60, at 191.

n149 See id. at 192.

n150 See id. at 192-93.

n151 This type of networking comes naturally to many Mexican American women. "The literature on Chicano families implies that women have used various strategies to exert their influence. One significant, though unexplored strategy, is the creation of alignments with other women both within and outside of the family." Maxine Baca Zinn, Chicanos: Power and Control in the Domestic Sphere, 2 De Colores 19, 24 (1976).

n152 Moore & Head, supra note 60, at 202.

n153 Anzaldua, supra note 2, at 17.

n154 See supra notes 40-41 and accompanying text.


n156 See generally Padilla, Intersectionality and Positionality, supra note 36 (citation omitted) (describes the struggles that women of color face and the need for affirmative action as one measure to help them in their struggles). See also MALDEF Programs, available at http://www.maldef.org/programs.htm (describing some of the affirmative action and equal opportunity legal battles with which MALDEF is engaged) (last visited Aug. 1, 2000).
n157 Antonia Hernandez, for example, is the president and executive counsel of MALDEF, and was selected by Hispanic Magazine as one of the 25 most influential Hispanics in D.C.. See Concepcion Hopinks, The 25 Most Powerful Hispanics in Washington D.C., Hispanic Magazine (Nov. 1997).

n158 See supra notes 40-41 and accompanying text (documenting the paucity of Mexican American women with college or advanced degrees).

n159 In the 1979-80 school year, approximately 1,670 Mexican Americans were enrolled in law school; in 1989-90, that number had not changed much, decreasing slightly to 1,663, and in 1999-00, that number had increased to 2,483. See Minority Enrollment, supra note 15. The ABA did not provide a gender breakdown, but I would guess that the numbers of Mexican American women are roughly proportional to the percentage of women enrolled in law school during those years, which were 32%, 43%, and 47%, respectively. See First Year Enrollment, supra note 15.

n160 See Minority Enrollment, supra note 15 (stating that the number of Mexican Americans enrolled in law schools during the 1999-2000 school year was 2,483, and for the prior five years, the numbers were 2,451, 2,452, 2,429, 2,495, and 2,402, respectively, a variance of no more than 93 students over a six year period).

n161 See Parker J. Palmer, Leading From Within: Reflections on Spirituality and Leadership 7 (1990). Palmer explains that:

A leader is a person who has an unusual degree of power to project on other people his or her shadow, or his or her light. A leader is a person who has an unusual degree of power to create the conditions under which other people must live and move and have their being conditions that can either be as illuminating as heaven or as shadowy as hell. A leader is a person who must take special responsibility for what's going on inside him or her self, insider his or her consciousness, lest the act of leadership create more harm than good.

Id.


n163 "The great insight of our spiritual traditions is that we co-create the world, that we live in and through a complex interaction of spirit and matter, a complex interaction of what is inside of us and what is out there. The insight of our spiritual traditions is not to deny the reality of the outer world, but to help us understand that we create that world. . . ." Palmer, supra note 161, at 5.

n164 Pardo, supra note 6, at 230.

n165 Mexican American women often disagree with the church but remain part of it. One woman unequivocally stated,

I feel no tension with the Church. I've disagreed with the Church on issues since I was about 6; disagreeing with the Church has always been a part of my life. The Pope and the Church hierarchy mean very little to me. But I am not just a "cultural Catholic." I have found a community of people with whom I pray. It is Catholic and so am I.

Teresa Godwin Phelps, The Sound of Silence Breaking: Catholic Women, Abortion and the Law, 59 Tenn. L. Rev. 547, 560 (1992) (quoting anonymous Interviewee G, presumably a Latina, based on her use of Spanish later in the same quote). See also Robert Koehler, Morales & Victor: Sistes' Stories, L.A. Times, TV Times, Aug. 23, 1992 (quoting Jean Victor). A filmmaker voiced the opinions of three sisters (nuns) who were at the center of her film, Faith Even to the Fire: "this church is our church. We may have fundamental differences, but the church is not an institution. The church is people . . . we stay in our church to change it." Id.

n166 Pardo, supra note 6, at 230.

n167 See generally Riane Eisler, The Chalice and the Blade (1987). The dominator model . . . is popularly termed either patriarchy or matriarchy-the ranking of one half of humanity over the other . . . . In [the partnership model] . . . social relations are primarily based on the principle of linking rather than ranking . . . . In this model-beginning with the most
fundamental difference in our species, between male and female diversity is not equated with either inferiority or superiority. Id. at xvii.

n168 Our Lady of Guadalupe, also affectionately known as La Morenita ("the little brown woman") appeared to the Indian Juan Diego at Tepeyac, a sacred mountain near what is now Mexico City. She ultimately performed miracles, including appearing in Juan Diego's tilma, where her image remains brilliant to this day, over 450 years later. See generally Virgil Elizondo, Guadalupe: Mother of the New Creation (1997).

n169 See Rodriguez, supra note 8, at 120. Las Madres also formed reciprocal relationships. "The organization they forged out of their anger and pain serves as a model, founded on equality and mutual respect, proving that it is possible to honor democratic values in repressive settings." Bouvard, supra note 76, at 62.

n170 See Rodriguez, supra note 8, at 152-58 (explaining how through their Marian faith, Mexican American women can radically alter the masculine view of God perpetrated by institutional churches mired in patriarchy).

n171 Id. at 153.

n172 Most fathers also work full time and are involved in parenting, but mothers typically take on disproportionately more childcare and housework. "The most recent large scale study of a nationwide, representative sample of . . . working men and women, conducted in 1992 . . . found that working mothers spend an average of nearly 15 more hours performing housework and childcare each week than their husbands. . . ." Hochschild, supra note 136, at 278-79. Mothers are also more likely than fathers to make arrangements for their children ranging from scheduling dental exams, to extracurricular activities, to babysitters. "More women kept track of doctors' appointments and arranged for playmates to come over. More mothers than fathers worried about the tail on a child's Halloween costume or a birthday present for a school friend." Id. at 7.

n173 Perez Ferguson, supra note 28, at 24.


n175 Rodriguez, supra note 8, at 76. Rodriguez also writes that "in Hispanic culture, everything is interrelated, interconnected, and interdependent, and people identify who they are in relationship to others." Id. at 60.

n176 See id.

n177 See id. at 79, 110.

n178 Id. at 122.

n179 See Ruiz, supra note 174, at 16 (discussing how the concept of commadrazgo, or godparenting, established "general patterns of reciprocity as women cared for one another as family and neighbors."). Id.

n180 Id. at 47 (discussing how Christian Americanization vis-a-vis Methodist churches stressed individualism). See also Bouvard, supra note 76, at 220-21.

n181 Ruiz, supra note 174, at 56, 65 (discussing how Americanization included seduction by consumption).

n182 Rodriguez, supra note 8, at 77.

n183 Anzaldua, supra note 2, at 78-79.

n184 Rodriguez, supra note 8, at 62.

n185 Ruiz, supra note 74, at 50.

n186 Id. at xvi.

n187 But see Rodriguez, supra note 8, at 62-63, 83 (discussing the dilemma Chicanas face as border straddlers).


n189 Id.

n190 Perez Ferguson, supra note 173, at 29.

n191 Bouvard, supra note 76, at 15.

With this symposium, marking the Fifth Annual LatCrit Conference held in Denver during May 2000, the "LatCrit" community has cause both to celebrate and to reflect. By all accounts, LatCrit V marked another watershed moment in the evolution of LatCrit, both as an organization and as a community of scholars committed to the production of an anti-essentialist, anti-subordination discourse and praxis in and beyond the legal academy of the United States. Through the financial support of the Deans at four North American law schools, this year's conference--"LatCrit V"--brought together a diverse group of scholars, activists, practicing attorneys, educators and social scientists to focus on a wide range of issues, and to articulate the diversities of perspective and position that cumulatively project, give meaning and substance to, and foster a critical edge in, the multidimensional aspirations of LatCrits' many and varied social justice agendas.

Substantively, the LatCrit V program made major inroads along several trajectories. First, by centering issues of class and economic inequality in the production of LatCrit theory and discourse, LatCrit V took the long-foreshadowed step of challenging the dichotomization of class and identity in popular discourse and mainstream legal theory. However, casting the struggle for social transformation in this "either-or" framework too often has derailed the struggle for substantive inter-and intra-group justice. It has squandered much energy, good will and potential solidarity in distracting debates, and has obscured the extent to which class inequalities are legitimated through the construction of superior/inferior identities, while identity-based subordination has been structured by a relentless history and continuing practices of material expropriation, exploitation and dispossession, both domestically and internationally.

Woven as an organizing theme throughout the LatCrit V program, the decision to center class inequalities
within, among and between communities of color challenged these self-defeating dichotomies and revealed new insights and perspectives on the ways that "class-based" and "identity-based" structures of subordination converge to create distinct problems, among others, for women of color whose lived realities remain marginalized in critical analyses of the so-called "feminization of poverty;" n7 for queers of color, whose class, race and citizenship status create particular problems that are elided as much by the politics of "coming out" through which liberation has been promised, urged and sought, as by the politics of assimilation through which relatively privileged gays and lesbians seek their inclusion in mainstream American society by compromising difference as the price of materially comfortable social tolerance; n8 and for immigrant workers of color, caught in the catch-22 of exploitation or deportation that structures their subordinate status in the resort industries of Colorado and elsewhere throughout the United States. n9 In each of these, and other, instances, as amplified in the symposium essays, LatCrit V displayed how class stratification plays a significant role in the subordination of those who are multiply marginalized--as much by their outsider status in the politics of identity that privilege whiteness, maleness, heterosexuality and English proficiency as by the violence of material dispossession constructed and perpetuated through the biases embedded in and across many different substantive fields of law and policy. n10 [*1254]

These insights into the convergence of class and identity were further illuminated by the programmatic decision to use the lens of economic inequality to interrogate--from a raceconscious, class-conscious, anti-subordination perspective--the substance and structure of traditional business law regimes. n11 Centering the biases of United States tax codes, corporate laws and commercial laws revealed important new perspectives on the way the regulation of micro-enterprises, community development projects and the structuring of in/formal markets in impoverished communities reproduce the subordination of people of color across multiple identity categories. n12 These investigations showed in a myriad of particular ways and settings, ranging from the domestic to the international, how law organizes and enforces both social and economic inequality. Indeed, the presentations at LatCrit V repeatedly revealed the many different ways in which law is implicated in maintaining structures of power and privilege (as well as structures of illegality and lawlessness) that make so-called "free markets" decidedly unfree for all but socially dominant groups and legally privileged elites. In short, LatCrit V demonstrated time and again that biases based on identity become formalized as law with the purpose and effect of materially enriching some identity groups, while dispossessing others, thus over time correlating "class" to "identity" and "identity" to "class" in structural, formal and normative ways. To the extent, and as long as, this correlation continues to be engineered through the legal organization and enforcement of [*1255] identity-based economic dis/possession, class and identity remain undeniably "cosynthetic." n13

However, LatCrit V was more than a solidly programmed encounter. Like other LatCrit conference gatherings, the lived experience and emergent record of LatCrit V bear ample witness to a basic and fundamental insight of the LatCrit project. This insight--initially only a hopeful intuition, increasingly a defining praxis--grounds the production of knowledge in the performance of a living and learning community-building process. In this process, the articulation of ever more inclusive visions of social justice and ever more penetrating analysis of the role of law in producing (and its potential for transforming) intra-and intergroup conflict is fundamentally and necessarily linked to the practices of embracing difference through the performance of sustained and mutual engagement, across our differences and over time. n14 The commitment to engage difference--as a communitybuilding practice--is a major and continuing challenge to each and all of us, both collectively and individually, precisely because it inevitably triggers moments of risk: one never can foretell for sure what the cauldron of diversities and perspectives that we call "LatCrit" will cook up. Thus, conference planners and participants never can predict what ruptures or disruptions will challenge us to seek higher levels of mutual understanding and engagement--or tempt us to retreat to the "safety" of sameness at the cost, ultimately, of our own isolation and continued dispersal. Measured against these background insights and aspirations, as well as the record of LatCrit's prior experiences engaging difference, both interpersonally and programatically, the substantive and solidaristic achievements of LatCrit V beckon celebration and reflection but, as always, in a critical and selfcritical manner.

We have cause to celebrate because the continuity and growth reflected in over five years of LatCrit Annual Conferences and symposia bear powerful witness to the perseverance, commitment, political vision and personal generosity of all who have invested their time, energy and human capital in birthing a new critical discourse and constructing a self-conscious and ever more inclusive community of multiply diverse scholars and activists in and beyond the legal academy of the
United States. We have cause to be critical because, despite its many achievements, LatCrit remains a fragile project, an imagined community--enabled and empowered by the solidarity of individuals who nonetheless are dispersed across the legal academy, excluded from the broader structures of power, privilege and opportunities both within and beyond the academy, and, oftentimes, embattled even in those institutions we are told to call "home." Given the increasing diversity of identity, position and perspective of the individuals and communities coalescing in and around the LatCrit project, we increasingly sense that this common experience of exclusion, erasure or marginality cannot be explained solely or perhaps even primarily by the particularities of any individual's race, ethnicity, gender, sexual orientation, national origin and/or any other vector of "essential" identity. Increasingly, we sense that these hostile dynamics also, and perhaps primarily, are attributable to the commonalities reflected in our personal practice of anti-essentialist, antisuordination politics as applied or directed, specifically, to traditional legal discourses and institutions--including student bodies, faculties and the bar itself. n15

As always, we also have cause to remain self-critical in reflecting on the achievements of the last five years. n16 This jurisprudential and community-building effort remains a fluid and young experiment that has no guarantee of success. It is an effort that we acknowledge has not accomplished all that we can imagine. It is an effort constrained by the politics of majoritarian backlash and the reassertion of Euroheteropatriarchal privilege n17 both within the legal academy and throughout society, onslaughts that devalue our work and deprive us of needed resources to expand the scope and depth of our collaborative efforts. LatCrit is an effort that faces many challenges now and in the foreseeable future despite our many advances over the past five years. These challenges derive both from the structural difficulties that outsiders face in the legal academy and in society, as well as from any tendency on our part toward complacency, elitism or worse. Without self-criticality, the LatCrit community courts dangers both from within and without, thus making constant, collective and individual self-vigilance the only reliable barrier that guards the continued evolution of LatCrit theory, praxis and community from the eventual but otherwise certain dissipation of our bonds, energies and struggles.

However, by "self-critical," we do not mean the angstridden self-doubts that so often are triggered by an uncritical engagement in, and dismay at, the contradictions, conundrums and limitations we inevitably confront as we try to enact an ethic of egalitarian solidarity, and to manifest and implement alternatives to dominant ways of being and doing, as much in the academy as in the society at large. Even after five years of struggle, these alternatives are possibilities that we are only just beginning to actualize through our mutual and sustained engagement in each others' experiences, perspectives and texts; however, it is precisely the profoundly transformative potential of these efforts that makes them so vulnerable to the kinds of attack that can trigger despair or self-doubt. Rather, by "self-critical," we mean a healthy and constructive reflection upon the disjunctures between our aspirations and achievements as a living and learning community. We mean critical analysis of these disjunctures undertaken in light of their actual contexts - in light of a realistic assessment of the obstacles outsider scholars confront, both internally and externally. We mean a praxis of self-criticality animated by the determination to grow together beyond our limitations through the performance of new practices--new ways of being and doing--in the "here and now" of our Annual Conferences, as well as in other institution-building initiatives through which we seek to foster the further evolution of LatCrit theory and community. We mean also a method of self-criticality performed to enable new solidarities, insights and breakthroughs of the very sort that only sustained, serious collaborations across multiple axes of difference can produce. n18

Against this background, our purpose in this Afterword is to share some critical and self-critical observations--not so much about the substantive development of LatCrit theory as reflected in this symposium and taken up in the Foreword and Cluster Introductions--but rather about the community and institutionbuilding dimensions of the LatCrit project. After five years of experience, we believe it timely and appropriate to reflect on the ethics and praxis that have helped to guide the five years of Annual Conferences, colloquia and other projects that are marked, collectively, by this symposium. We think it is also important to communicate the possibilities we see for the institutional development of LatCrit as an alternative organization within the legal academy of the United States, as well as to identify some of the obstacles currently confronting the long-term sustainability of the LatCrit project. We view this intervention as particularly timely because, after five years of struggle, the key challenge facing LatCrit today is precisely to establish an institutional framework that can ensure long-term sustainability. This longterm perspective and aspiration is animated by our increasing conviction that the "culture wars" n19 that rage around and at us make it imperative for us, who are within the legal academy of the United
States, to build alternative institutions and arrangements capable of promoting and leveraging the work of outsider scholars and activists who seek to combat injustice anywhere, and particularly in the legal academy and profession.

This long-term perspective thus counsels us to attend to the practical dimensions of producing the conditions of sustainability. As we enter the second half of LatCrit's first decade, we self-consciously and self-critically must address the practical aspects of identifying and encouraging new leadership enabled and empowered to take on the challenges of guiding LatCrit into further stages of development. To create the necessary chains of transition, we face the challenge of articulating for future LatCrit leaders the practices and principles that have guided our early efforts to plan the Annual Conferences in ways that promote the production of critical scholarship even as we consolidate a shared commitment to anti-essentialist solidarity across our differences of privilege and subordination. Coupled with this basic need to construct substantive chains of transition is the growing need to conceptualize, launch and support new projects, beyond the Annual Conferences, that can expand the opportunities for critical scholars and activists to become productively involved in collaborative efforts that are personally meaningful, socially grounded and professionally rewarding. Put differently, taking a long-term perspective means focusing on the steps that need to be taken today to ensure that whatever "LatCrit" comes to mean tomorrow—as it turns ten or fifteen or beyond—will reflect a substantive evolution that builds on these prior years of collective effort to convert the production of legal scholarship into a principled community-building praxis. n20

In this Afterword we thus turn our attention to a key task already underway within the LatCrit community, and one that becomes increasingly central to our collective progress with each passing year: institution-building. After many years of struggle within the legal academy of the United States, LatCrit and allied scholars have learned that we require institutional structures of our own if we are to pursue with integrity and efficacy, and for the longer term, our commitments to substantive social and legal transformation. n21 We have learned that we, personally and collectively, must create the conditions that make our work sustainable for the longer term, and that doing so requires us to find ways around the obstacles erected by those who control the institutions in which we work and from which we are too often offered only grudging support.

Beginning with background and context, we devote Part I to a brief recounting of the past five years' collective intellectual journeys—the substantive evolution that has transpired via the conferences, colloquia and other events that LatCrit scholars have organized and presented, or currently are planning. In Part II, we identify some key practices that have been forged from these experiences and journeys—that is, the human practices that have enabled the theory in personal and programmatic terms—while emphasizing the centrality of community-building to LatCrit theory during this first half of its first decade. And then, to grasp the momentum that LatCrit has produced thus far, in Part III we turn to the institution-building aspects of our current, recent and pending work. In this way, we hope both to celebrate the past, and to animate the present and future, of this exciting and promising yet fragile experiment in outsider jurisprudence. n22

I. Reflections on LatCrit Theory and Consciousness: Five Years of Intellectual Journeys

In this Part we unfold one account—ours—of the past five years, focusing primarily on programmatic events. We begin with an overview of LatCrit theory's origins, and then cite several examples of LatCrit experimentation during this period in order to illustrate the basic principles and practices that have shaped the collective experience of LatCrit's evolving community. These examples showcase several now fundamental features of the LatCrit record to date, such as the "rotation of centers" and the "streaming" of programs, which combine theory and praxis in the development of our programmatic encounters as well as our group publications. These examples illustrate how the LatCrit community has striven to "perform the theory" in a critical and self-critical fashion as we imagine and create the venues in which we gather for mutual engagement, growth and support. n23

A. Origins: An Overview

The "LatCrit" n24 subject position emerged within the legal academy of the United States in 1995, coming into being as a self-designated and self-conscious perspective on law and Latinas/os at a colloquium in Puerto Rico on Latina/o communities and critical race theory. n25 Since then, LatCrits have held five Annual Conferences and four colloquia to articulate LatCrit theory as a collective project of mutual engagement, and each event has generated a law review volume devoted to the proceedings of the conferences and colloquia. n26 In addition, two "free standing" joint symposia also have been co-produced with collaborating law reviews specifically in response to student interests and initiatives. n27 This ongoing collaboration with law reviews is crucial to the LatCrit project because our enterprise entails not only the production of knowledge, but also its broader...
dissemination. n28 LatCrit's basic purpose since 1995 therefore has been not only to inaugurate and cultivate an absent and overdue sociolegal discourse on law and policy towards Latinas/os qua Latinas/os, but also to ensure that this knowledge is made accessible to agents of social and legal transformation both within and beyond the legal academy. n29

To do so, LatCrits have endeavored to initiate programs and projects designed to fulfill the four functions that early adherents claimed for this enterprise based, in part, on a LatCrit's appreciation of the lessons to be drawn from the collective record of outsider jurisprudence: (1) the production of knowledge; (2) the advancement of social transformation; (3) the expansion and connection of anti-subordination struggles; and (4) the cultivation of community and coalition, both within and beyond the confines of legal academia in the United States. n30 During the first five years, we have pursued these four functions principally through the Annual Conferences that meet every May at rotating sites, typically drawing 100-150 attendees and participants. During these years, we have honed practices--like "rotating centers" and "streams of programming"--that enable the long-term planning through which we collectively perform and annually (re)invigorate our selves and our work. n31 Through the practice of geographic rotation and site-specific programming, the conference programs also have become vehicles for the otherwise far-flung LatCrit community to learn collectively about local conditions in different regions of the United States, a practice that facilitates our individual and collective efforts to see and expose the structural sociolegal patterns formed by local histories and particularities. n32 Now, as LatCrit turns five, this community stands poised to take the lessons and advances of the Annual Conferences beyond our current programmatic projects, and to take our work to the next levels of sharpness and depth.

The LatCrit community presently is engaged in various programs and projects, such as the expanded colloquium series on international and comparative law, the development of webcasting capabilities and the establishment of NGO status with the United Nations, that also are designed to pursue these functions. n33 To develop these projects for the long term, LatCrits have incorporated as a not-for-profit corporation with 501(c)(3) status that engages in fundraising for educational purposes from various sources. Consequently, a Board of Directors and two co-chairs manage LatCrit, Inc., while the Annual Conferences are developed through a General Conference Planning Committee with overlapping membership. n34 Like the Annual Conferences and their law review symposia, each of these recent initiatives--including the very act of incorporation--is designed to perform, or to practice, LatCrit theory in socially relevant and border-busting ways.

These newer projects--like the five years of conferences and colloquia--are designed to reflect and develop the seven "guideposts" adduced via the first LatCrit conference and symposium that, together with the four functions noted above, have created a baseline from which to view the cumulative gains and limits of our LatCrit experiments in outsider jurisprudence. n35 They were:

. Recognize and Accept the Political Nature of Legal "Scholarship" Despite Contrary Pressures.

. Conceive Ourselves as Activist Scholars Committed to Praxis to Maximize Social Relevance.

. Build Intra-Latina/o Communities and Inter-Group Coalitions to Promote Justice Struggles.

. Find Commonalities While Respecting Differences to Chart Social Transformation.

. Learn from Outsider Jurisprudence to Orient and Develop LatCrit Theory and Praxis.

. Ensure a Continual Engagement of Self-Critique to Stay Principled and Grounded.

. Balance Specificity and Generality in LatCrit Analysis to Ensure Multidimensionality.

These guideposts are inter-related and, in their operation, interactive. Ideally, they yield synergistic effects. They represent, as a set, the general sense of this project as reflected in the collective writings since the First Annual LatCrit Conference. Informed in part by these four functions and seven guideposts, LatCrit theory has in the last five years yielded new substantive insights and benefits that deepen, broaden and texture existing understandings of law and policy, and that build on the baseline of the first year. n36

Perhaps most notably, LatCrit conferences and projects have sought to center multiple intra-and inter-group diversities as the lenses through which to study this "meta" category called "Latina/o" n37--both within and beyond the United States. n38 In each instance, moreover, we have sought to anchor our work to the twin imperatives of anti-essentialism and anti-subordination. n39 These two concepts work in tandem: "The antiessentialist foundations of LatCrit theory, if taken seriously, demand that LatCrit theorists recall the ultimate aim and purpose of our work: the promotion of antisubordination transformation as a material bottom line . . .

Antiessentialist approaches in critical legal scholarship are closely related to anti-subordination principles
constitute (and oftentimes disrupt) racial or ethnic
mere recitation of the multiple diversities that
quantitative increase in the recognition of identities
consciousness and discursive climate than a
denotes more a qualitative shift in analytical
intersectionality and antiessentialism, n45 we
theoretical breakthroughs like multiplicity,
settings, events or issues. Building on preceding
dynamics that converge on particular persons, groups,
practice of interrogating sociolegal conditions with an
Accordingly, by "multidimensionality" we mean the
multidimensionality as the standard of critical anti-
subordination analysis and action. n43 As we and
others previously have urged, unidimensional analyses or
strategies that approach white supremacy, or male
supremacy, or straight supremacy as stand-alone or
isolated forms of oppression promise little if any
chance of producing enduring social justice change
precisely because they fail to account for the
mutually reinforcing synergies that cross-support these
different forms of oppression. n44 At best, as
experience has shown, unidimensional theories and
interventions produce only dents in vast and complex
fields of interconnected sociolegal systems that
artificially structure and maintain hierarchy among and
across human identities. As we have learned over the
past five years, only through multidimensional analysis
and praxis can anti-subordination theorists and
activists design effective and efficient strategies of
resistance and reform--strategies that [*1267] can
have a positive social effect precisely because they are
designed to mirror and combat the nature and
dynamics of interlocking structures of subordination.

Accordingly, by "multidimensionality" we mean the
practice of interrogating sociolegal conditions with an
eye toward the many overlapping constructs and
dynamics that converge on particular persons, groups,
settings, events or issues. Building on preceding
theoretical breakthroughs like multiplicity,
intersectionality and antiessentialism, n45 we
previously have urged that, "Multidimensionality
denotes more a qualitative shift in analytical
consciousness and discursive climate than a
quantitative increase in the recognition of identities
and their intersections . . . It cannot be reduced to a
mere recitation of the multiple diversities that
constitute (and oftentimes disrupt) racial or ethnic
categories . . . Multidimensionality calls for a profound
and far-reaching recognition [of the convergence of]
particularities like religion, geography, ability, class,
sexuality and other identity fault lines that run through,
and help to configure and to interconnect, all "racial"
and "ethnic" communities." n46 By multidimensional
analysis we thus mean to evoke (1) a scholarly
mindset, (2) an analytical approach and (3) a
programmatic commitment to anti-subordination
discourse and action without boundaries or borders--
including not only the borders of regions, cultures and
identities but also those of discipline and perspective.
Indeed, interdisciplinary programs and projects are,
and have been during the past five years, a key way of
fostering multidimensional analysis, discourse and
praxis. n47 [*1268]

As we consider the gains, limits and prospects of the
LatCrit intellectual project in more general terms, it
seems clear that, conceptually and substantively,
LatCrit remains firmly rooted where, in our view, it
belongs: within the more general category of outsider
jurisprudence, a category that, expansively viewed,
includes Critical Legal Studies, Feminist Critical Legal
Theory, Critical Race Theory, Critical Race Feminism,
Asian American legal scholarship and, more recently,
QueerCrit and LatCrit theory. n48 These genres of
outsider jurisprudence have in common an outsider,
and oftentimes critical, perspective vis-a-vis law and
society. We situate LatCrit within this general category
because, in general, and like LatCrit, these related
strains of outsider scholarship have striven to:
represent marginalized viewpoints; espouse critical,
egalitarian, progressive and diverse antisubordination
agendas; accept analytical inter-subjectivity; raise
political consciousness and social responsibility;
recognize and work with postmodernism; favor praxis;
and seek community. n49 In keeping with the fifth
LatCrit guidepost--learning and applying the lessons of
outsider jurisprudence--this cumulative "OutCrit" n50
record has served as LatCris' point of departure, both for
[*1269] theory and for action. While focused on
multiply diverse Latina/o communities, LatCrit theory
has imagined and conducted itself as a self-critical
joint effort of many diverse scholars to apply, to
ourselves and to our works, as well as to law and
society, the growing lessons of outsider jurisprudential
experiments. n51

As this brief overview indicates, and due in no small
part to the lessons of outsider jurisprudence, LatCris
generally have been--and seem firmly to remain--
convinced that we cannot understand, much less
dismantle, the subordination of Latina/o persons and
communities without understanding how the
oppression, inter-nationally, of African-descended
persons, Asians, queers, Native Americans and other
indigenous peoples, disabled people, women, and poor people are interconnected with the oppression of Latinas/os. LatCrit scholars and activists know full well that each and all of us must embrace questions of difference in our increasingly multicultural/multiracial societies. We understand and accept that we have to learn about the histories and experiences that produce current differences. We also believe that, to exert a transformative influence in law and society, outsiders must engage difference in self-empowering ways that do not duck difficult issues or moments, but rather center and engage them precisely to promote social transformation and inter-group justice collectively and collaboratively. Thus, we proactively have sought to center within LatCrit programs not only marginalized Latinas/os, but also other subordinated communities and identities that oftentimes are found at the margins even of outsider jurisprudence. n52 Excavating substantive interconnections to cultivate and anchor [*1270] multidimensional social justice coalitions therefore has been central to the first five years of Annual Conferences and related events. As suggested by the original guideposts, this is the trick we have sought, and seek still, to perform in all that we undertake.

B. Coming Together: Notes from Journeys of Collective Learning

The journeys--or snapshots of journeys--that we describe here necessarily are told in truncated and simplified form, and from our particular perspectives. We recount them because in our view they exemplify the work and progress of the past five years, and because they indirectly illustrate many other similar examples that neither time nor space permits us to engage here. These examples depict an ongoing, collective engagement with multiple axes of "difference." We begin with the most recent examples drawn from this year's conference, and then turn to others from prior years. Although none of these represents all that must be accomplished, cumulatively they reveal a continuing collective commitment to "performing the theory" in and through the Annual Conferences.

1. LatCrit V: From "Class-versus-Identity" to "Critical Coalitional Communities"

While a detailed discussion of the essays in this symposium is the work of the Foreword n53 and Cluster Introductions, n54 it is worth noting two distinct dimensions of LatCrit V's encounter with class and economic [*1271] inequality that, in our view, mark major conceptual and community-building advances and open important new trajectories for further LatCrit investigations. These two dimensions of the conference are reflected, first, in its emphasis on the structures and processes of economic subordination that exist within, among and between outsider communities and, equally, in its efforts to interrogate "traditional" business law subjects not previously engaged in LatCrit theory. Both moves map rich fields of inquiry that for many reasons have remained relatively dormant within outsider jurisprudence.

In the now-familiar debates over the relative priority of class and identity, the impact of class structures and inequalities on nonwhite working poor persons routinely has been marginalized by the oft-repeated tendency to focus arguments of law and policy on the competing interests and relative positions of white working poor versus middle class Blacks. n55 By focusing critical analysis on the sociolegal frameworks organizing class subordination within, among and between outsider communities, LatCrit V moves our critical attention to sociolegal sites where identity-based subordination and economic exploitation converge to produce relentless misery for many, as well as inter-and intra-group stratifications in and among subordinated communities. n56

LatCrit V thus crystallized why and how it is conceptually and substantively meaningless to pitch class against race or gender or sexual orientation, or any form of identity, in any project that aspires theoretically to articulate or politically to manifest the principles of anti-essentialism and anti-subordination. Anti-essentialism requires LatCrit and other scholars to attend to the differences of privilege and subordination within any category used to define a collective identity, while anti-subordination requires taking a critical and self-critical stance against all relations of subordination that skew the articulation of collective identities--as well as constricting the emancipatory agendas that are championed [*1272] in their collective names. n57 Put more simply, class stratification will remain a central and compelling problem in the liberation agendas of any of the many identities now coalescing in and around the LatCrit project--so long as the poor are among us and of us. n58 This simple but crucial insight was a collective achievement at LatCrit V, though its long-term impact, as always, will depend on the extent to which it is activated, explored and further articulated in the production of future LatCrit scholarship, as well as in its translation into popular discourse. n59

LatCrit V's incursions into the fields of tax, corporate and commercial law and policy also mark a needed expansion of critical perspective and interdisciplinary analysis in law and legal theory. While issues of employment discrimination, equal protection, immigration policies and language rights continue to be of particular and obvious importance, and therefore
central, to evolving LatCrit social justice agendas, LatCrit V provides ample evidence of the conceptual insights and political advances to be gained by focusing critical identity-based analyses on substantive areas of law and policy that oftentimes are not thought to be racialized, ethnicized, gendered, sexualized, classed or otherwise marked by the sociocultural imperatives of heteropatriarchy, first world nativism and white supremacy, but which nonetheless are. This push to link outsider identities to the critical analysis of "new" substantive sociolegal domains aptly reflects two key imperatives of the LatCrit project: (1) the production of knowledge that is ever-more conscious of the broader contexts in which interconnected institutional arrangements, elite practices and dominant ideologies produce the patterns of subordination that progressive social movements have too often combated in a fragmented and unidimensional fashion and (2) the identification of new sites of transformative intervention and coalitional mobilization through multidimensional analysis and action. n60 In this way, LatCrit V demonstrated a continuing [*1273] struggle to practice and accomplish, at collective and programmatic levels, the four basic functions that we have imagined for, and have struggled to fulfill through, LatCrit theorizing and activism. n61

By centering sociolegal fields regulated by traditional "business law" regimes, LatCrit V helps to advance LatCritical analyses of the centers of American economic and political power, and the legal regimes that organize and empower them. Again, the long-term impact of this conceptual intervention will depend on the extent to which it is collectively activated, explored and further articulated in the production of future LatCrit scholarship as well as our success in translating these new insights and learning into popular discourse. Thus, LatCrit V's gains help to foreground a principal point of this Afterword: the importance of attending to the practices that have enabled the substantive and thematic evolution of LatCrit theory and discourse, as well as the new practices and initiatives needed to maintain the continuity and ensure the sustainability of this kind of conceptual development.

In a different yet similar vein, LatCrit V marked another kind of advance in the evolution of LatCrit discourse and community in and through the decision to organize in plenary format a moderated focus-group discussion on Queering LatCrit Discourse: Confronting Latina/o Homophobia. n62 This focus-group discussion was designed to "build upon prior LatCrit efforts to engage sexual orientation issues and resist cultural homophobia" within and beyond Latina/o communities. n63 Recalling the eruptions that occurred three years earlier at LatCrit II in San Antonio, and that are reflected in the contributions to that earlier symposium, thus provides the necessary context for understanding and appreciating the full significance of LatCrit V's achievement in this area. n64 [*1274]

Those earlier eruptions were triggered by an explosive encounter over the place of Queer perspectives and non-Latina/o subject positions in the articulation of LatCrit theory--an encounter in which the LatCrit community was forced, collectively and spontaneously, to confront (and resolve) tensions generated by an unself-critical performance and deployment of Latina/o religious identity and, more particularly, by the proclaimed intentions of some to "infuse" LatCrit discourse and community with essentialized accounts of the Roman Catholic tradition and its purported centrality in the lives of all Latinas and Latinos. n65 The fact that, just three years later, at LatCrit V, we were able successfully--without ruptures or disruptions--to program a multiply diverse and substantively challenging plenary focus-group discussion on homophobia in Latina/o and other communities marks a major achievement in our collective growth as a living and learning community. This kind of collective achievement has never been easy, as these years of effort make clear, and as the prior experience of other outsider jurisprudential experiments also have demonstrated. n66 The key point, however, is that this successful encounter at LatCrit V did not occur in a vacuum, nor as a one-shot event. It occurred in the context of three years of sustained and continuing efforts to nurture a collective commitment to making LatCrit conferences a [*1275] context and venue in which difference can be embraced and explored from an antinessentialist, anti-subordination perspective: three years of substantive programming set the stage for this year's successful encounter in collectively addressing the otherwise highly explosive topic of Latina/o homophobia, and it is these three years of sustained effort that, in our view, mark the difference between projects aimed at abstract intellectual encounters with "novel" ideas and collaborative projects aimed at producing the kinds of shared learning and mutual engagement that make coalitional theory a lived reality and nurture community-building processes. n67

This point is key and merits further emphasis. Too often, the encounter with difference has been a "virtual" encounter engaged from within the safety of sameness, as for example when white people espouse their commitment to diversity in an all-white venue, when straight people condemn homophobia from the safety of a venue marked by heterosexual normativity, or when Latinas/os articulate a pan-ethnic discourse in venues dominated by white-identified Hispanics. n68 The struggle that has made the LatCrit project so fragile and volatile, and yet so potentially
transformative, has been the struggle to create a qualitatively and normatively different kind of venue: one in which difference can be engaged through a lived encounter across concretely embodied differences. These eruptions at LatCrit II in San Antonio, at the time, raised serious questions about even the short term viability of the LatCrit project, n72 the decision to persevere in organizing a LatCrit "III" in Miami prompted immediate follow-up programming, in which Latinas/os' religious and sexual diversities were thematized in panels and presentations that explored not only Roman Catholicism, but Santeria and other religious traditions embraced by Latinas/os throughout the hemisphere and across the globe. n73 This effort was continued at LatCrit IV in Lake Tahoe, where we pushed the programmatic envelope further by centering various native religious traditions that existed before the plantationation of Roman Catholicism to the "New World" via European colonization, as well as by continuing to develop a critical understanding of the diverse religions, faiths and spiritualities in Latina/o lives and cultures, including Roman Catholicism. n74 These follow-up programs, aimed at fostering greater knowledge and awareness of religious and sexual orientation diversities among and between Latinas/os and other minority groups, illustrate a collective effort to perform LatCrit theory's espoused commitment to antiessentialist, anti-subordination praxis in a critical and self-critical manner. It is against this background of lived eruptions and collective learning that the Queering LatCrit Discourse focus group discussion ranks among LatCrit V's major achievements in this ongoing experiment called LatCrit theory, community and praxis. n75

But this precisely is the promise and possibility we see in the achievements of LatCrit V, and throughout the years of effort that have paved its way. It is the aspiration embedded in the LatCrit guideposts, which beckon us to build intra-Latina/o communities and intergroup [*1276] coalitions, and urge us to find commonalities while respecting differences and through these practices to chart and struggle for social justice transformation. In this context, the promise of these efforts, in our view, is reflected directly in the fact that at LatCrit V the issue of homophobia was centered in self-critical fashion, not in a predominantly gay or lesbian context where such issues are ordinarily uncontroversial, but in a context where sexual orientation was but one of multiple axes of identity and perspective. n70

More specifically, while the eruptions at LatCrit II in San Antonio, at the time, raised serious questions about even the short term viability of the LatCrit project, the decision to persevere in organizing a LatCrit "III" in Miami prompted immediate follow-up programming, in which Latinas/os' religious and sexual diversities were thematized in panels and presentations that explored not only Roman Catholicism, but Santeria and other religious traditions embraced by Latinas/os throughout the hemisphere and across the globe. n73 This effort was continued at LatCrit IV in Lake Tahoe, where we pushed the programmatic envelope further by centering various native religious traditions that existed before the plantationation of Roman Catholicism to the "New World" via European colonization, as well as by continuing to develop a critical understanding of the diverse religions, faiths and spiritualities in Latina/o lives and cultures, including Roman Catholicism. n74 These follow-up programs, aimed at fostering greater knowledge and awareness of religious and sexual orientation diversities among and between Latinas/os and other minority groups, illustrate a collective effort to perform LatCrit theory's espoused commitment to antiessentialist, anti-subordination praxis in a critical and self-critical manner. It is against this background of lived eruptions and collective learning that the Queering LatCrit Discourse focus group discussion ranks among LatCrit V's major achievements in this ongoing experiment called LatCrit theory, community and praxis. n75

These examples illustrate how this year's conference once again revealed and advanced the interconnected and synergistic dimensions of LatCritical theorizing and community-building: to expand the scope and depth of our discourse, we must expand the scope and depth of our community; yet, to expand our community, we must expand our discourse.

These achievements also illustrate why and how the Annual Conferences and related LatCrit initiatives constitute an important form of outsider praxis--a critical and self-critical application of the theory we profess and articulate to a key site of contestation: the legal academy and imagination of the United States--a highly legalistic society if ever there was one. n76 This last point also bears emphasis: legal scholars are advantageously positioned to promote social justice in any legalistic society; thus, as critical legal scholars in this legalistic society, we must acknowledge not only the limitations imposed by our positions of marginality, but we also must recognize and operationalize the opportunities that our professional and institutional positions allow.

Indeed, the legal academy is a key "front" in the "culture wars" of our times because of its pivotal influence over law and policy and its key role in legitimating authority and producing elites. n77 By insisting that we [*1278] practice the theory we profess, internally in the organization of LatCrit events and initiatives as well as more broadly within our professional environments, we consciously and strategically perform the task of fighting in the corridors of academia the battles over dignity, equality, diversity and social justice being waged more broadly throughout the United States and beyond. n78 In doing so, we recognize that ours is simply one front in a complex and multifaceted social conflict, even as we embrace and activate the first LatCrit guidepost: recognizing and accepting the political nature of all legal scholarship, especially in a legalistic society. Legal academia is only one site of contestation among many--but a crucial one--along which LatCrit, OutCrit and other allied scholars must and do struggle, sometimes even in "hand to hand combat." n79

In this vein, we view the organization of programmatic events and the publication of related symposia as acts of resistance to the dominant forms of knowledge that have captured the legal academy of
78 Denv. U.L. Rev. 1249

this country, and which leverage that captivity to produce legal regimes that buttress traditional—even "original"—sociolegal skews. Because our programmatic interventions confront and reject professional and intellectual, as well as social and political, systems of subordination, we view these and similar acts of resistance as a form of praxis within, and on behalf of, the many communities that we inhabit simultaneously. Although our struggles within the legal academy at times may seem far removed from the struggles in our communities of origin, we emphasize that, from a LatCrit perspective, the project of producing, practicing and sustaining this jurisprudential insurrection is an important, indeed crucial, intervention in a continuing struggle over a key front in today's culture wars: the legal academy and its production, legitimation and deployment of legal knowledge, theory, doctrine and consciousness to craft social policy in the interest of dominant elites. n80 In short, we view the programs and publications of the past five years as one among many ways of practicing the second LatCrit guidepost: conceiving of ourselves as activist scholars committed to praxis, and to maximizing the social relevance of LatCrit discourse and theorizing.

In our view, the achievements of LatCrit V thus illustrate a continuing collective performance not only of the early commitments to the production of knowledge and advancement of social transformation, but also to exploring and advancing the interconnections among anti-subordination struggles and the cultivation of coalitional communities. n81 These experiences undeniably have raised collective levels of knowledge and consciousness. This collective learning in turn has permitted and witnessed the evolution of new possibilities and avenues for crossgroup understanding and interaction, producing new coalitional communities and enhancing their potential contributions to the project of social transformation, both beyond and, equally important, within the legal academy. These examples also illustrate why socially constructed and inherited fault lines based on religion, gender, sexual orientation, class and the like must be programmatically confronted and substantively reconfigured if outsider scholarship is to provide a basis for "real-life" experience and growth. Obviously, however, these imperatives are not limited to these particular fault lines, nor to this year's program. Accordingly, we turn now to other examples that reflect the coalitional imperative in LatCrit theory, praxis and community during the past five years.

2. Race and Ethnicity: From Domestic Paradigms to International Contexts

Similar to the spontaneous eruptions over individuated expressions of religious and Queer identities at LatCrit II, the following year at LatCrit III the conference experienced a near explosion, except that this time it was over a programmed event: a moderated roundtable discussion titled, From RaceCrit to LatCrit to BlackCrit? Exploring Critical Race Theory Within and Beyond the Black/White Paradigm. n82 This roundtable was designed selfconsciously to inaugurate in a formal way the practice of rotating centers at LatCrit conferences as a key form of collectively engaging and learning from the multiple differences and diversities that we embody as a community of scholars and activists. n83 The idea behind formalizing the practice of rotating centers was to advance a collective engagement with the otherwise-suppressed perspectives of those whose marginal and intersectional identities within our various communities offer unique opportunities. This engagement is designed both to enhance the production of new knowledge and to strengthen our solidaristic commitments and coalitional imagination by challenging us to be ever-more inclusive and ever-more conscious of the realities of subordination to which our particular experiences of privilege and oppression may otherwise blind us. In that initial instance, we did so with the decision "to center in LatCrit theory the problem of Black subordination, and to explore the anti-essentialist insights to be gained by shifting the focus of LatCrit analysis from Hispanic Latinas/os to Black Latinas/os and their intersectional commonalities with other Black identity groups." n84 This particular rotation has a specific history and context that powerfully illustrate why and how the production of anti-essentialist, anti-subordination theory depends so profoundly on our willingness to take the risks involved in embracing difference and building community, even as we think programmatically and practically about the kinds of conference events that can facilitate these objectives.

From the very first gathering, LatCrites programmatically have confronted the generally prevalent stereotype that Latinas/os are Hispanics though many, perhaps most, are not. n85 Both the 1995 colloquium in Puerto Rico that inspired the initiation of the Annual Conferences, as well as the First Annual LatCrit Conference the following year in San Diego, focused on the relationship of "race" to "ethnicity"—and of the consequences of that inquiry for intra-Latina/o and inter-people-of-color relations and coalitions. n86 From the outset, we grappled with the issues embedded in notions or aspirations of pan-ethnicity and, indeed, in the very existence of this imagined amalgamation called "Latinas/os" or, as others prefer, "Hispanics." n87 Since then, we
Similarly have confronted the stereotype that Latinas/os are not Black and Asian, or not indigenous, or as we noted above, not Queer—though many are. n88 LatCrit scholars [*1282] similarly have confronted and engaged the role of religion, gender and sexuality—and, specifically, of heteropatriarchy—in the construction of Latina/o communities, identities and hierarchies as well as their operation in broader social structures. n89 Thus, the programmatic engagements of identity during the past five years have sought consistently to interrogate race and ethnicity, while doing so multidimensionally at all times. n90

Set in this general context, the BlackCrit roundtable at LatCrit III followed on the heels of prior and sometimes rocky exchanges over the "Black-White" (or "White-over-Black") paradigm of North American race relations. These initial encounters, as articulated from an explicitly Latina/o perspective, n91 took up emergent critiques of the paradigm's binarisms, which also were being questioned from Asian Pacific American perspectives, among others. n92 However, these initial encounters raised [*1283] new questions: while it is true that LatCrit theory was born of the need to combat the erasure and marginalization of non-white, non-black Latinas/os in the dominant discourse of race and race relations, it also was obvious that the simple expedient of positioning some essentialized construct of Hispanic identity at the center of LatCrit theory was precluded by previously asserted commitments to ground LatCrit theory, discourse and programmatic initiatives in the principles of anti-essentialism, anti-subordination and multidimensionality. The question then was how to move beyond the Black/White paradigm in a way that would neither betray "our theoretical and political commitments to combating the particular forms of racism experienced by Black people, both in this country and abroad . . . nor marginalize a substantial portion of the Latina/o community (many of whom are Black)." n93 Centering the particularities of Black subordination therefore provided a meaningful point of reference for deepening our understanding of the implications of anti-essentialism, multidimensionality and anti-subordination in LatCrit theory, even as it reinforced the centrality of race in the critical analysis and transformation of white supremacy, both within and beyond Latina/o communities.

Thus, in every LatCrit conference to date, we have devoted formal program events of varying formats to the investigation of "race" from a LatCrit perspective. These events form an ongoing stream of programming and related symposia essays that, over these five years, have unfolded a careful and nuanced analysis of the traditional paradigm. n94 The earliest stages in this analytical evolution can be tracked in [*1284] several steps, as we have noted elsewhere.

The first step was centering the paradigm and noting its marginalization of Latinas/os and other non-white/non-Black people of color. The second was recognizing this paradigm as an apparatus specifically of white supremacy and acknowledging the particularized oppression of Blacks under the paradigm. The third was considering the historical sources of the paradigm, which are rooted in the exceptionalism of blackness in the social and legal history of this nation. The fourth was to acknowledge and thematize the transnational dimensions of Latina/o identities as well as the multiplicity of subject positions through which a Latina/o political identity might be constructed and contested in articulating or manipulating the antisubordination objectives of LatCrit theory. The fifth was to confront the erasure of indigenous peoples both by the paradigm and by our preceding stages of critique. n95

Since then, we have continued this work, eventually taking up the moniker—the "White-Over-Black" paradigm. This act of renaming more effectively conveys our shared understanding that black and white people are not equally positioned in the binary paradigm of race and race relations that nonetheless has marginalized the subordination of Latinas/os, Asian Pacific Americans and others in the dominant civil rights paradigm. n96 "Our collective learning process has reached the point of yielding a renamed paradigm as well as a refined sense of its applicability and explanatory power." n97

The BlackCrit roundtable and our analytical process with the traditional race relations paradigm of recent years—like the Queering LatCrit Discourse focus group at LatCrit V and its preceding programs—thus reveals a remarkably delicate project that is perpetually ongoing and calls upon even the truly oppressed, from time to time, to de-center themselves and focus on others. n98 These moments depend, in part, on the continuity enabled by organizing our engagement with particularly difficult issues across streams of programming that allow us to revisit and re-examine received formulations in light of our evolving insights and collective [*1285] growth, but these moments depend also and more fundamentally on the repeated acts of will, trust and solidarity by the many and diverse individuals, who continuously re-commit themselves to sticking together through the "blow ups" that, as we previously noted, may occur from time to time in the name and pursuit of anti-subordination theory and anti-essentialist community. n99 Perhaps more so than any other occasion, these moments have tested our collective commitment to the original
guideposts and functions, and to their practice; to date, these moments have affirmed time again that LatCrits' programmatic efforts have been anchored to the commitments with which we began this jurisprudential enterprise five years ago.

Continuing this history of programmatic and substantive engagement with race/ethnicity at LatCrit V, several authors in this symposium elaborate analyses that approach race in critical, comparative terms. This year, as in past years, the conference and symposium study race in various social contexts, and across categories of race and ethnicity, to elucidate both the particularities and patterns of color-lined social spaces and their legal buttresses. This year's essays, traveling from the specific to the general--from the particular to the universal--expand and deepen our collective insights, reflect the program's events and confirm LatCrit theorists' original and ongoing commitment to multidimensional analysis, coalitional discourse, anti-essentialist community and anti-subordinationist praxis. n100

As this recounting suggests, the overall record of the past five years confirms LatCrit theory's collective embrace of the notion that progress for Latinas and Latinos cannot come at the expense of progress made or sought by other outsider groups, whether they be racial, sexual, religious or other kinds of "minorities" or groups. It is precisely for this reason that LatCrits have approached this project, from the beginning and consistently since then, in ways that both center Latinas/os' multiple internal diversities and situate Latinas/os in larger inter-group frameworks. In both instances, LatCrit theorists and programs consistently have striven to do so not only domestically but also globally. n101 To accomplish this [*1286] larger transnational framing we not only have rotated centers and produced streams of inter-connected programming designed to link LatCritical analysis to other perspectives within outsider jurisprudence, but we also have trained our sights on busting the dichotomy of the "domestic" and the "international" in outsider jurisprudence and legal theory and analysis. n102 It is no coincidence that, at the same time as the planning of the First Annual LatCrit Conference was underway, LatCrits also were busy planning the first free-standing LatCrit colloquium devoted to human rights and international law. n103 This colloquium, which was held in Miami in 1996, reflected and confirmed the conviction that internationalism had to be integral to LatCrit projects and, since that early event, LatCrit conferences and other events have continued this linkage of the [*1287] internal and the external in and through LatCrit theory and praxis. n104 These efforts include the organization of two colloquia specifically devoted to international and comparative law held in Spain during the past couple of years. These colloquia also help set the stage for the upcoming series of rotating colloquia discussed below. n105 This year's conference likewise continues this internationalist effort, as reflected in this symposium.

For instance, this year's program and workshop on the World Trade Organization challenged the romance with corporate forms of "globalization" that erase borders for capital and capitalists, but hike them for persons and laborers while degrading the environment and reinforcing local patterns of privilege and marginalization. Similarly, this year's continuing engagement of postcolonial studies extends LatCritical efforts to compare the unfinished national projects still reeling from the aftereffects [*1288] of European imperialism. In both of these instances, this year's conference, like past years' efforts, interrogate the existence, meaning and future of formal borders in pursuit of social justice across multiple boundaries and vectors of oppression, and thus advance ongoing LatCrit studies of the inter/national. n106 The early decision to make the "international move" thus appears alive and well in the overall record of the first five years.

As we close these reflections on our intellectual journeys to date, we are guardedly optimistic about the picture we see: at bottom, the conferences and colloquia since 1995 depict LatCrit theorists experimenting with various techniques of coalitional theory and praxis to develop an anti-essentialist, anti-subordination analysis of law in social action in and beyond the United States. While seeking always to center the multiple internal diversities of Latinas/os in inter-group frameworks, we have endeavored over these years to anchor analysis and action to (1) anti-subordination principles, (2) applied critically to all contexts and all categories, and (3) applied at all times selfcritically to our own ideas, proposals and projects. Looking to the lessons of other outsider jurisprudential experiments, LatCrit theorists have kept the early guideposts and functions vital, and increasingly so. n107

Today, as in our view it should be, LatCrit theory represents an ongoing collective encounter with fundamental issues of antessentialist community and coalitional solidarity to advance antisubordination causes, while interjecting the multiple diversities of Latinas and Latinos into public policy debates ever more sharply. The long-term impact of this year's intellectual and solidaristic advances--as in prior years--will depend in part on the extent to which they are repeatedly activated in diverse venues, more deeply explored in continuing "streams" of future program events, and further articulated in the production of...
LatCrit scholarship. The long-term impact of LatCrit theory and praxis will depend, ultimately, on the individual and collective performance of these practices in the everyday settings or spaces we seek to transform—including the Annual Conferences and other LatCrit projects. [*1289]

II. LatCrit Praxis: Performing the Theory in and Through the Annual Conferences

We turn now to the practices behind the Annual Conferences, and to the underlying ethics and norms that have guided these practices—to what we do and to why we do things in these particular ways. These practices have been theorized with two factors uppermost in mind: first, to perform the theory in socially relevant and substantively principled ways; and second, to navigate the obstacles we confront in ways that promote the long-term sustainability of this fragile experiment in anti-essentialist, anti-subordination coalitional theory and praxis. Principle and practicality thus combine to hone the practices developed during the past five years and manifested, most concretely, in the context of the Annual Conferences.

From our perspective, there is no question that the LatCrit Annual Conferences are the most developed project of the LatCrit community, as reflected in the five years of successful Annual Conferences marked by this symposium. n108 Important to this success is that LatCrit organizers have succeeded in securing advance conferences sponsorships, and continue actively negotiating institutional sponsorships, for future Annual Conferences through LatCrit X and beyond. n109 This success is both part of, and in turn facilitates, long-term program planning in substantive terms. Our purpose here, therefore, is to center the practical and normative dimensions of this multi-year approach to the Annual Conferences as a form of anti-subordination, anti-essentialist praxis not only in intellectual terms but also in human and fiscal terms.

In our view, the future sustainability of the LatCrit project depends to a large extent on our ability to imagine and effectuate a different way of performing our roles as scholars and activists in the legal academy—one that prioritizes community-building over individual careerism, and thereby grounds the evolution of LatCrit theory and discourse in the pursuit of genuine intellectual and interpersonal engagement in each others' aspirations, perspectives, projects and texts, across our differences and over time. n110 This way of performing our professional identities challenges well-settled practices of the legal academy that encourage us to organize our professional lives in atomized ways that are at once elitist [*1290] and obsequious, individualistic and opportunistic, yet dependent always upon existing structures of possibilities and opportunities. n111 These, in turn, are constrained by the expected and demanded subservience to dominant discourses, understandings and imperatives—those imposed by the elite-identified gatekeepers of the status quo in our own profession and, indeed, throughout society as a whole. Challenging these settled norms and "traditions" entails substantial risk and identifiable costs, but promises also to unleash new possibilities of thought and action—as manifested thus far in the opportunities for professional growth and genuine learning that LatCrits collectively have created within the legal academy of the United States through the practice of mutual engagement and, more specifically, the community-building efforts of the last five years. n112

As noted earlier, the process of organizing LatCrit conferences, as well as the structure and substance of the conferences themselves, at all times have been conceptualized as key sites for the performance of an anti-essentialist, anti-subordination ethic within the legal academy—an ethic that conjoins the production of new scholarship with the development of genuine solidarity and mutual respect based on lively and lasting friendships among LatCrits as human beings. This approach has required and therefore has elicited substantial reflection and many discussions about the practices that are likely to create (or subvert) a community process in which individuals feel valued, appreciated and included, even as difficult, controversial topics are meaningfully and honestly engaged. From these discussions, we have distilled the four practices we view as key to the continuing success and long-term sustainability of LatCrit as a community-building project:

(1) Long-term planning, by which we mean the practice of conceptualizing LatCrit conferences, both substantively and programmatically, as a multi-year project, which therefore requires sustained commitment to mutual engagement over time, as well as the proactive search for institutional sponsorships and financial support for several future conferences in advance;

(2) A commitment to diversity and inclusion as the key to our collective learning and community-building process, by which we mean practices that give substance and meaning to an ever-more demanding commitment to expand the involvement and representation of excluded communities and identities, not only as invited participants in the programmed events of any given conference, but also as full participants in the conference planning [*1291] process, as well as in all other institution and community building initiatives through which LatCrit
leaders and organizers have and will continue to emerge;

(3) A commitment to the self-conscious exploration, articulation and performance of LatCrit organizing and interactions as an ethical praxis, by which we mean a commitment at all times and in all instances to measure our discourse, actions and interactions, as well as our ruptures and disruptions, against the ethical standards we would expect of any project committed to producing and performing a theory of coalitional solidarity and inter/intra-group justice that is relevant not only beyond the legal academy, but also, and quite importantly, within it; and

(4) Institution-building, by which we mean practices through which we imagine, launch, coordinate and secure the long-term sustainability of new collaborative projects beyond the Annual Conferences, even as we create the kind of organization that can withstand, and continue to evolve through, intergenerational transitions in leadership.

We take up the first three practices briefly in sections A-C below; however we devote the entirety of Part III to LatCrit institution-building practices because of their complexity and their overarching importance to the further development of LatCrit theory, praxis and community.

A. Long-Term Planning: Breaking the Habits of Atomized "Success"

In the context of the Annual Conferences, long-term planning has both substantive and practical dimensions. The substantive dimension focuses on the intellectual content of the conference programs while the practical focuses on logistical issues and institutional development. The two can and should be mutually reinforcing, as explained more fully below.

1. Forming the Substantive Dimension: Streams of Rotations

Substantively, long-term program planning is the framework that enables the practice of rotating centers. As we mentioned previously, as well as in other writings, we view the practice of rotating centers as crucial to the development of coalitional theory, projects and praxis precisely because it is central to the production of new knowledge, inter-group understanding, and mutual engagement. n113 However, this practice is inextricably coupled with and dependent upon yet another practice: long-term planning of the Annual Conferences, through which we conceptuallyize program events as multi-year "streams" rather than as one-time acts performed in a vacuum and isolated from the achievements or shortcomings of prior conferences or the evolving aspirations for future gatherings. Because it is literally impossible to address all issues from every perspective at once, rotating centers and long-term planning work in tandem to further the substantive development of LatCrit theory.

Thus, long-term planning is a crucial vehicle through which LatCrit organizers imagine and coordinate the rotation of centers that, over time, makes possible the development of new insights, solidarities and increasingly multidimensional analyses from one Annual Conference to the next. Without a sustained commitment to long term planning, there would be no rotation of centers; indeed, quite possibly there would be nothing at all to rotate. Long term planning also enables these interconnected streams of rotating centers to be organized across a variety of possible program formats--keynote addresses, plenary or concurrent panels, workshops, focus groups, roundtable discussions and other interactive formats--designed cumulatively to produce new knowledge, expand community, foster solidarity and enable action. This organizational framework, in turn, makes it possible to introduce and develop otherwise "explosive" topics as well as new or novel ones from year to year through the particular formats assessed most likely to be most effective given the particular context at hand. n114 This substantive approach, in sum, enables the practice of the LatCrit guideposts and the fulfillment of LatCrit's functions.

This balancing act is nonetheless quite difficult to sustain, and sometimes impossible, given the structural constraints that confront us. For example, our efforts to sustain a steady stream of programming focused on native or indigenous issues have faltered from time to time. n115 Our efforts to center Asian-Latina/o interconnections, and in particular to center Filipinas/os in LatCrit conferences, has been similarly uneven. n116 And our engagement of disability communities and issues has been ad hoc, at best. n117 In each of these instances, our aspirations and efforts to bring a LatCritical perspective to these and other areas of sociolegal concern have been delimited by our resources--human as well as otherwise. Consequently, another crucial element facing the LatCrit project as we enter the second half of the first decade is the need for growing coalitional interaction with other networks of activist scholars. n118 We must, in other words, use the opportunities for long term planning to build on LatCrit theory's commitment to inter-disciplinary and inter-group interaction if we hope to expand the "human resources" needed for the continued evolution of this collective project. n119 At the same time, growth and sustainability depend also on our efforts collectively to identify and secure new funding and resources that can
supplement the institutional sponsorships the Annual Conferences have thus far been receiving from supportive deans and faculty at law schools throughout the country- an effort that already has begun in and through the incorporation of LatCrit, Inc. as a tax-exempt nonprofit corporation. n120

Yet, even as we recognize the needs of growth, strive to meet them with the resources at hand, and thereby encounter face-to-face our human and fiscal limitations, we continue as a community to try our best. While we stall in some initiatives despite our best efforts, we simultaneously strive to launch new streams of programming anchored, as always, to the functions and guideposts. One current example is the programmatic integration of Latin American perspectives in LatCrit events, and the corollary extension of LatCrit theory to analyses and discourses concerning Latin America. n121 This centering of "north-south" frameworks is linked synergistically with ongoing effort to create a LatCritical Trans-Atlantic dialogue focused critically on Spain and its complicated role in the construction of Latina/o realities. n122 These two streams--represented by the north-south and Trans-Atlantic initiatives--help to achieve the "triangulation" of which we also write below. n123 While efforts such as these do not and cannot guarantee the success of any particular multiyear stream of programming, the exertions of the past five years have brought home at least two basic points: substantive programmatic developments like these are not likely to take place without long-term planning, and even long-term planning cannot long progress without interconnected networks of diverse scholars from multiple disciplines, regions, nations and perspectives. n124

2. Forming the Practical Dimension: Continuity and Overlapping Planning Committees

Practically long-term planning occurs mostly within the LatCrit Conference Planning Committee, a group that over the years has remained open, inclusive, flexible and adaptable--a flexibility that, in our view, needs to be preserved from year to year, even as LatCrit projects become more formalized in various ways, including the move to formalize LatCrit as an independent corporate entity. n125 This flexibility, however, increasingly must be coupled with strategic long-term planning if we are to continue securing advance sponsorships of the Annual Conferences and other LatCrit initiatives. Recognizing this, at LatCrit V, the LatCrit, Inc. Board of Directors adopted a resolution approving a series of conferences through LatCrit IX and naming the Annual Conference Planning Committee Chairs for each conference with secured institutional sponsorship. n126 Thus, the long-term conference planning process, the search for conference sponsorships several years in advance, and the newly emergent forms of LatCrit institution-building are the practices through which we seek to secure the conditions of continuity and sustainability.

Advance sponsorships allow LatCrit planners to identify future Program Chairs in advance and to integrate them into the planning process for earlier conferences, leading up to their turn at the conference planning helm. Thus, today's planning committees are composed of overlapping memberships that reflect recent, current and future institutional sponsorships, and that help to ensure both the transmission of collective memory and experience as well as the substantive continuity of the rotating centers and evolving streams of conference programs. To further develop the institutional memory that we believe is crucial to maintaining the integrity and ensuring the continuity of any collective project, we recently have initiated the practice of drafting an annual "Transition Memo" to facilitate a process in which each year builds substantively and structurally on the successes, and addresses the shortcomings, experienced at prior conferences. n127 This emergent scheme, while malleable, enables LatCrit planners to reflect on the whole range of programmed and unprogrammed events in interconnected ways, to identify missing perspectives, to incorporate previous learning into the organization of future programs and, in general, to stay grounded in the functions and guideposts of LatCrit theory. n128

In sum, there simply is no doubt in our view that the progress and future sustainability of the LatCrit project is intricately and inextricably grounded in the practice of long-term planning. This basic point is true for substantive, practical, programmatic and community-building reasons. These reasons stem directly from our bedrock aspirations to produce new knowledge and discourses that further the struggle for inter and intra-group justice across differences of class, race, nation, religion and all other vectors of identity used to organize and legitimate relations of domination and subordination across the globe. The advancement of these aspirations depends, in turn, on the degree to which we succeed in transforming, or short of that, in collectively resisting, precisely those practices, norms and traditions of the legal academy that conspire, wittingly or not, to suppress new possibilities of thought and action. n129 The nature of this struggle to restructure the means of scholarly production in the legal academy of the United States provides one threshold reason for long-term conference planning, even as it explains why the LatCrit community must remain at all times attuned to
the central importance of "human resources"--the human component - in the production and practice of LatCrit theory, its transformative possibilities and long term sustainability. n130

3. Restructuring Modes of Legal Scholarship: Interactivity and Human Relationships

Everything about way that the production and the evaluation of legal scholarship and professional "success" is currently structured in the American legal academy would have us believe that the production of new knowledge is a matter of the heroic scholar spewing forth a magnum opus from an abstract communion with the writings of absent scholars and the power of individual genius. n131 Yet five years of Annual Conferences have demonstrated clearly enough how new consciousness, discourse and knowledge emerge uniquely, synergistically and exponentially from our lived encounters with difference. These past five years have shown that, in a live encounter across difference, even the most inspired discourse or penetrating analysis is of limited value without the huge investment of time, energy and dialogue it takes to hammer out common points of reference, create shared experiences and produce the sort of common discourse that makes new insights and understandings possible--insights that really enable us to grasp the things we can (and do) agree on--despite our differences; n132 the things we continue to disagree about--oftentimes because of our differences; n133 and the new issues that never crossed our minds until our encounters across difference prompted deeper reflection and opened unexpected perspectives. n134

We have learned that the stilted and atomistic traditions of producing legal scholarship are not the only, nor even the best, way of producing antessentialist theory, much less performing anti-subordination praxis. We have learned the difference between practices whose purpose is to produce abstract discourse and practices whose purpose is to produce shared learning in a context geared to making theory and praxis interdependent and synergistic. We also have learned that this way of organizing the production of legal scholarship will not and cannot ever work as a one-time event. Just as new insights depend on a meaningful engagement of controversial issues across our differences of position and perspective, meaningful engagement depends on the development of mutual respect and a shared willingness to suspend the disbelief, suspicion, doubts and individual posturing that our differences often trigger in our encounters with each other, particularly when these encounters are framed by the elitist and careerist culture of North American legal academy that not all of us are at all times equally willing or able to discard.

n135 This is precisely why building a new discourse requires building a new community; why building a new community requires the self-conscious articulation and performance of an ethic of mutual engagement, recognition and respect; and why all of this takes time. n136 But it takes more than time.

Time passes, and often very little changes. For time to produce something other than a perpetuation or reiteration of the past, we must envision and collectively produce a future that is other than the present. The last five years of Annual Conferences have allowed us to envision and to experience to some extent what that "other future" could be like. It is a future in which the existence of a dynamic, living and learning community offers increasing opportunities for inter-personally meaningful, politically relevant and professionally rewarding collaboration and exchange to counteract the isolation, marginalization, disempowerment and stagnation that has driven too many of our colleagues from the legal academy and, therefore, from the unique forms of struggle that our collective presence in the academy both enables and demands. n137 To forge this post-subordination future, we thus need at minimum to ensure the long-term viability of the conferences as safe venues of vigorous exchange. To ensure this viability, we need to secure both the human and economic resources that make the conferences dynamic sources of new knowledge produced collectively in interactive collaborations.

[n1297] [n1298] [n1299]

Against this background, both long-term planning and sustained commitment to the community-building dimensions of the LatCrit project are key to deepening the collaborations and expanding the networks that have begun to organize around the expectation that the LatCrit Annual Conferences will continue from year to year, and that the resources to support them will materialize. Absent long-term planning and sustained commitment, this expectation is likely to be unfulfilled, due both to the vagaries of the human condition we each individually confront, as well as to the increasingly hostile sociolegal zeitgeist that marks this time. n138 Thus, a stable source of economic resources is second in importance only to the continued nurturance of our "human resources." n139 To date, LatCrit Annual Conferences have been supported principally by institutional grants, usually by supportive law school deans. n140 Typically, these grants are solicited and secured via individual scholars from their respective institutions. Thus, to produce economic resources takes human resources, for it takes the personal investment of individuals' time, energy and imagination to create, nurture and develop the venues through which we can come together to do our work. In this regard, the LatCrit project has fared
well, as individuals have chosen over time to make the necessary commitments towards the long-term viability of LatCrit Annual Conferences in both intellectual and economic terms. And this commitment is ongoing, as LatCrits continue to negotiate and obtain institutional grants to ensure the economic viability of the Annual Conferences several years in advance.

Without doubt, LatCrit's success during the past five years would have been impracticable, if not impossible, without the support not only of the individual scholars who solicited and secured institutional grants but also of the deans who have embraced this project. But as recent history has shown again, deans also are individuals sometimes embattled in the institutions that define our profession: too often, insider institutional factions or elites marks deans who support outsider projects for retaliation and/or removal. n141 Therefore, while LatCrits continue to solidify future conferences through advance institutional grants, as we should and must, we also must develop sources of economic support that steadily make us independent of the institutions that otherwise would control our future. n142 We need, in short, to stabilize our future by obtaining greater access to the economic resources necessary for long-term viability. We must, in other words, expand our funding sources beyond ongoing sponsorships of particular events or conferences by supportive deans and faculty. And to do so, via grants and the like, LatCrits must be able to present a long-term plan of action; a vision of our work and how it relates concretely to social transformation in compelling terms.

The many positive reasons for long-term planning that we have recounted here are matched equally by the more negative realities that motivate our community-building practices of mutual engagement and assistance. For instance, a failure to persist with long-term planning, in our view, would reflect a serious gap of insight into the broader context that makes the LatCrit project perpetually vulnerable, both to the internal fractures that our many differences might at any moment trigger, as well as to the external attacks that outsiders can expect, at any moment, to target "successful" outgroup interventions. n143 Without the long-term planning that is necessary to take precautions against the potentially devastating attacks of a hostile socioprofessional environment, we leave our project vulnerable to eventual devolution. Such a failure in turn would reflect another gap of insight into the historical significance of our collective presence as outsiders in the legal academy of this country, as well as the future possibilities that our self-conscious and collective self-determination within the academy might open for the future transformation of the legal academy.

Long-term planning, in sum, recognizes how our present actions set the stage, not only for the future of outsider jurisprudence, but also for the prospects of outsiders in the legal academy in years and generations to come.

These and other reasons underscore our view that long-term planning and sustained commitment are imperatives inherent in the very nature of the LatCrit project, understood not as the organization of yet another professional venue for the atomistic performance of abstract intellectual discourse and individual aggrandizement, but rather as a genuine community-building project. Based on insights drawn in part from prior outsider experiments in critical jurisprudence, this project is driven by the recognition that only our long-term collaboration offers any hope of producing new knowledge or making the principles we espouse a reality within the legal academy and, progressively throughout a globalized society increasingly regimented by law. Yet, to produce a viable vision of a post-subordination future, we need a commitment to diversity and inclusion both in the Annual Conferences, as well as in everything that LatCrits imagine and undertake. In our view, this commitment to diversity and inclusion--a practice we deem central to LatCrit's origins, past, present and future--is manifest both in the Annual Conferences as well as in other more recent initiatives.

B. Diversity and Inclusion in LatCrit Theory: Giving Life to Multidimensional Commitments

As we and other LatCrits often have observed, a commitment to diversity and inclusion has been foundational to the theory and its performance from LatCrit's inception. n145 Indeed the intellectual journeys and particular moments we recount above are examples of this commitment, as applied in the vectors of race, ethnicity, religion, sexual orientation, gender, class and the like. More generally, the panels, panelists and planning committees of the Annual Conferences consistently have been organized to ensure and affirm this collective commitment in both intellectual and human forms. n146 Every year, by self-conscious design, the conference program is planned by a diverse group, which tailors it critically and self-critically to embrace LatCrits' multiple diversities, and to do so in ways that signal and perform a sense of egalitarian inclusion in all LatCrit venues or projects. n147 This commitment likewise is reflected in our collective published record - the dozen or so symposia that LatCrits have published during the past five years. n148 Our multiple diversities are reflected not only through the essays and their authors, but also by the themes of the clusters that are organized thematically by substantive topics. n149 More recently, this commitment is reflected in the multi-racial, multi-
C. Ethical LatCrit Praxis: Performing the Theory, Building the Community, and Incubating the Future

The conceptualization of LatCrit planning and initiatives as ethical praxis is a crucial point with substantive and practical implications for the ways in which we structure our encounters and organize the kind of community that makes new learning possible through mutual engagement across and through difference. In the context of the Annual Conferences, these commitments have inspired self-conscious reflection and numerous discussions regarding the way we ensure diversity and expand the involvement of excluded communities or marginalized identities. These discussions gave meaning and substance to the LatCrit guideposts as a lived experience by enabling the growth of a living and learning community of activist scholars committed to social transformation through a sustained engagement and appreciation both of intra-Latina/o differences and inter-group commonalities. These discussions focused upon and continue to explore the ethical dimensions of LatCrit praxis as reflected in the way we interact with each other during both our conferences and the planning process through which we organize them. These discussions have made it increasingly apparent to us that the future sustainability and integrity of the LatCrit project depends significantly on the extent to which each LatCrit conference and initiative is conducted in a manner that makes the ethic of mutual respect and inter/personal, inter-group solidarity a lived experience. And this lived experience, we also have seen, must be simultaneously shared and produced by the actions, discourse and attitudes hopefully of all, or at least a great majority of, the conference participants.

A project that seeks to create a community of sustained engagement and collaboration among individuals, who are themselves marginalized (or embattled) in their own institutions or social positions, must articulate and make manifest an ethic of inclusion, accommodation, respect and personal generosity that proactively repudiates: any acquiescence to the exclusionary tendencies of elitism; the formation of new "insider/outside" dynamics; any resort to the rigid control-driven sort of bureaucratic thinking that only suppresses the living, learning (and therefore necessarily fluid and interactive) processes through which new programmatic initiatives are imagined and new voices are heard; and the disrespect that too often masks itself as "critical engagement," in which genuine intellectual exchange is derailed by hypercritical attacks that oftentimes turn out to be little more than opportunist efforts through which some individual seeks self-aggrandizement at the expense of another, and at other times, the sort of ungenerous response to a genuine miscommunication, misunderstanding or disagreement that a community as fragile as the one we are building simply cannot afford to indulge. These commitments to grounding LatCrit conferences and other initiatives upon principles of inclusion, diversity and ethical praxis thus impose additional responsibilities and burdens that differ for each of us depending on our positions in the legal academy as a whole and in relationship to the historical and institutional evolution of the LatCrit project.

In this brief discussion we mean to focus attention on the fact that while racial, ethnic and other forms of identity-based diversity have been central to the evolution of LatCrit's multidimensional discourse and coalitional imagination, these are not the only forms of "diversity" that traverse the LatCrit community--nor are they the only forms of diversity that require selfconscious, self-critical reflection and practical ethical engagement. We are constituted by all sorts of diversities. For instance, some of us are tenured while others are not, and therefore are more likely to have particular needs for exposure and assistance. Some of us already have received quite extensive professional benefits from the opportunities to speak, to publish and to be centered in plenary sessions and keynote slots of prior LatCrit programs while others have not, either because they are new to the profession or because the evolution of LatCrit discourse and community is only just now beginning to engage the issues and areas with which they are concerned. When we pause to consider this "diversity" of institutional position and professional perspective, we readily can see how it implies different needs and responsibilities among LatCrits--variations that also must be understood in light of our different levels of familiarity with the history and aspirations of the LatCrit project, the obstacles we have managed to transcend or not in the past five years, and the constraints and limitations we continue to confront as we dare to imagine the next five years and beyond.
This particular axis of "diversity" calls on each of us to consider how we best can contribute from our particular positions and perspectives to the continued evolution of a project whose future and integrity is not by any means guaranteed. For the more established scholars among the LatCrit community, ethical praxis may mean a willingness affirmatively to yield center-stage to newcomers--by reading works-in-progress, participating in concurrent panels and attending the plenary sessions and keynotes where newcomers are featured; for relative newcomers, ethical praxis may entail the kind of careful learning of the LatCrit record that is needed to avoid regressive engagements in issues and controversies already addressed at length in prior LatCrit venues, as well as involvement in LatCrit initiatives beyond the Annual Conferences and the presentation of one's individual works. Without the former kind of action, LatCrit conferences run the risk of becoming another venue for a careerist "star system," and without the latter, we run the risk of running in circles, simply repeating and rehashing previous interventions that, at prior times, may have been cutting-edge developments. Without both of these actions, we collectively invite the risk of intellectual boredom and social irrelevance. Both of these actions are forms of "reaching out" that are necessary to our collective evolution and, ultimately, to the long-term sustainability of LatCrit programs as collective ethical praxis. [*1305]

To aid this ongoing process of mutual engagement, LatCrits have produced introductory materials ranging from a Primer, currently in two volumes available on diskette and in hard copy, and which is updated periodically, to a brochure and flyer that strive to distill the past five years to a few words. All of these materials, like this Afterword, are designed to "reach out" to relative newcomers. Similarly, this year as in the past two we have striven to slot relatively "senior" LatCrits in concurrent panels, or to slot them in facilitating roles, such as moderating panels and roundtable discussions, so that the substantive slots in plenary panels and workshops may be better employed to feature the works of relative newcomers. But for these outreach efforts to work best, they require not only that conference planning committees make these and similar materials readily available, but also that all conference participants make full and active use of the LatCrit collective record to date, including but not limited to the Primer.

This mutuality of opportunity and responsibility ensures that everyone will become familiar with the advances, limitations and trajectories of past conferences and symposia, and will be better able to situate within that context the ongoing or new works and conference presentations that may, and should, be informed by that collective record. LatCrit newcomers thus need to understand the histories and directions of past and current streams and rotations while more established LatCrit scholars need to provide a ready means for this ongoing process of contextualization. In short, the notion of the Annual Conferences and similar projects as sites for the ethical practice of the theory depends increasingly on the sum of our individual commitments to navigate and embrace the particularities of position and the complexities of interaction created by the growth of the conferences.

These practices also extend beyond the planning and programming of the Annual Conferences. Because the politics of backlash make every space of anti-subordination community precious, these commitments have shaped the formation and initiation of every LatCrit project or venture thus far, including the recent incorporation of LatCrit as a not-for-profit organization and the formation of its Board of Directors. Experience during these past five years, coupled with lessons from other outsider jurisprudential experiments, increasingly have convinced us that, to help protect these spaces as much possible, LatCrits and other OutCrits must prioritize, and invest personal time and energy in, the difficult task of institution-building, a task that we see looming now over LatCrit's horizon, and to which we turn next. [*1306]

III. LatCrit Trajectories: The Institution-Building Imperative

Although the LatCrit Annual Conferences have provided invaluable opportunities for our intellectual and community-building work over the last five years, the energies, opportunities and enthusiasm generated by our mutual engagements increasingly have inspired us to seek collaborative opportunities beyond the parameters of the Annual Conference. This Part focuses on the ways in which the institutional development of the LatCrit project has sought to create frameworks designed not only to ensure the sustainability of the Annual Conferences, but also to create new venues and vehicles for expanding the opportunities for personally, professionally and politically meaningful collaboration consistent with the commitments to anti-essentialist, antisubordination theory and praxis that have informed the LatCrit project over the years. In doing so, we focus specifically on three major developments: (1) the formal organization of LatCrit, Inc. as a 501(c)(3), tax-exempt, non-profit corporation with a Board of Directors and a formal structure for transitioning leadership roles in the organization of LatCrit Annual Conferences and other projects; (2) the inauguration of a LatCrit international summer colloquium and
student-related initiatives, which have created new programmatic settings for the practice and evolution of LatCrit theory; and (3) current special projects and fundraising efforts designed to help achieve a greater institutionalization of our substantive work to promote its depth and durability. These three developments, in addition to reflecting specifically the pressing need for institution-building, also continue LatCrit efforts to ground the theory and praxis in the functions and guideposts that reflect our shared aspirations. n156

A. Incorporation: From LatCrit to LatCrit, Inc.

Since the first Annual Conference in 1995, LatCrit scholars and planners have discussed and sought ways to make the vitality and efficacy of this enterprise self-sustaining and independent. Although we always have relied on the generosity of supportive deans and faculty, we also have recognized that the long-term viability of this project could not be secure without insulating our work as much as practicable from the vagaries of institutional politics. So, from the beginning LatCrits sought to plan conferences, and to secure their sponsorships, in advance as much as possible—in fact, three-to-five years in advance. But this effort to raise advance funds for a new and unknown jurisprudential experiment was uphill, time-consuming work. The limitation was in the lack of sufficient human and other resources to focus our long-term planning efforts on anything beyond the Annual Conferences and ensuring they were conducted without the kind of implosive, disorienting eruptions that occasionally have punctuated the emergence and evolution of outsider jurisprudence. n157

This early state of affairs came to a head in the fall of the fourth year, when, despite our best collective efforts, we still lacked a firm principal sponsor for the LatCrit IV conference. Whereas in prior years—and indeed for some future years also—we had secured principal sponsors to cover the bulk of the conference expenses, by early fall of 1998, LatCrit IV remained a gap we could not fill. In some ways, then, LatCrit became "LatCrit, Inc." directly and specifically in response to the obstacles confronted in and during the planning process for LatCrit IV. n158

Coming on the heals of the success of LatCrit III, generously funded by Samuel Thompson, then-Dean of the University of Miami School of Law, LatCrit IV was graced by a large planning committee, but no principal institutional sponsor. While the Stanford-Sierra Conference site had been selected for LatCrit IV on the basis of tentative commitments, the only firm advance commitment was a limited sponsorship by the Center for Hispanic and Caribbean Legal Studies, also at the University of Miami School of Law. To preserve the pre-publicized conference site—which also was designed to rotate the conference westward for substantive reasons n159—individual members of the LatCrit IV planning committee contributed their individual funds to raise the reservation deposit necessary to secure the conference hotel and meeting facility for this event. This experience made a number of things clear: (1) LatCrits could not expect that the financial resources necessary to sustain our work would always materialize; (2) fundraising would thus remain a chronic concern unless we prioritized the cultivation of multiple and stable funding sources over a multi-year time span; and (3) securing financial resources from multiple sources would require establishing a formal framework for receiving, managing and accounting for our financial resources. [*1308]

Against this backdrop, the incorporation of LatCrit emerged as a concrete necessity, prompting the formation of a subcommittee of the larger LatCrit IV conference planning committee to carry out LatCrit’s incorporation as a not-for-profit entity. More specifically, the plan was to incorporate LatCrit in two steps: initially, and quickly, to establish the basic corporate form that would enable us to manage professionally the monies raised for LatCrit IV, and secondly, to circulate the incorporation documents to the LatCrit community at LatCrit IV for feedback and subsequent finalization. During the following year, both were accomplished.

Under this two-step approach, LatCrit, Inc. was formed under the laws of the state of Florida and the initial Board of Directors was comprised of the incorporation committee, which also undertook the responsibilities of the officers of the corporation. The incorporators were Lisa Iglesias, who as CoChair was responsible for drafting and filing the initial Articles of Incorporation and By-Laws as well as the application for 501(c) (3) tax-exempt status; Guadalupe Luna, who along with Mary Romero undertook outreach responsibilities directed toward Chicana/o scholars and cross-disciplinary networks; Pedro Malavet, who launched the LatCrit website and took up the responsibilities of Treasurer; Laura Padilla, who as onsite coordinator was responsible for the local logistics of LatCrit IV and was selected Secretary; and Frank Valdes, who as Co-Chair coordinated the
planning of the LatCrit IV program to ensure substantive progression and continuity, including arrangements for institutional sponsorships. After several rounds of revision at committee levels, these documents were reproduced and distributed on-site to the participants of the LatCrit IV conference, accompanied by several announcements during the conference explaining this process and urging feedback to the initial corporate papers.

After the conference, LatCrit, Inc. held its first annual board meeting to elect its first Board of Directors. The original incorporators were elected to the positions they held during the first stage of incorporation, but the Board of Directors also was expanded to add a diverse group of individuals, who were involved both in prior outsider jurisprudential projects and in birthing the LatCrit project, and who volunteered to work on this new Board: Sumi Cho, Jerome Culp, Angela Harris, Margaret Montoya, Ediberto Roman, and Mary Romero. This first step toward consolidating the corporate form extended basic commitments to inclusion and diversity, to continuity and balance, to antiessentialism and anti-subordination. But, this first step also marked the formalization of a new practice: using prior work on the conference planning committees as the substantive basis of eligibility for nominating and electing individuals to formal leadership positions within LatCrit's evolving organizational structures. In this way, active work on the planning committee of at least two LatCrit conferences was established as the substantive vehicle for managing new and coming transitions in LatCrit leadership—an approach with the added virtue of promoting long-term planning.

Opening access to leadership opportunities in LatCrit projects to anyone willing to invest their time and energy in these collaborative efforts brings with it the additional virtue of grounding the architects of our collective future in their substantive and personal contributions to LatCrit events and initiatives. While this approach allows and welcomes the participation of all in the core practices of the annual planning process, it also recognizes the value of direct experience and personal commitment in managing the expansion of LatCrit, Inc. and its projects beyond the Annual Conferences. In this way, therefore, we hope to build and transmit collective experience and institutional memory, while also assuring an open community for the inclusion and celebration of newcomers, which in combination should help to advance longterm planning. n160 Indirectly, this approach over time should help to produce interconnected networks of activist scholars with common—though not identical—jurisprudential experiences and frameworks as well as with a deeper understanding of the dynamics of the Annual Conferences and other LatCrit initiatives. Ideally, this approach balances opportunity and experience in ethical and substantive terms, while simultaneously cultivating the human resources necessary to the long-term sustenance of this project.

To be sure, institution-building cannot be left entirely to self-selection. In fact, self-selection, unconnected to personal commitment, lived experience and substantive contributions, cannot and could not account for the development of LatCrit as a living and learning community grounded in antiessentialist and anti-subordination principles, nor as a formal corporate entity dedicated to those principles. The vagaries of the human condition, as well as the personal and professional exigencies we each confront in different ways at different times, are ever-present, and unexpected or overriding events can intervene and derail even the most earnest of plans and commitments. Our limitations and vulnerabilities as individuals are precisely the factors that make each individual's investment of time, energy and effort a priceless "human resource" for the LatCrit community, n161 even as these same factors necessitate the development of procedures and norms that can guarantee the continued evolution and integrity of the LatCrit experiment through the transitions in leadership that we inevitably must expect, plan for and nurture.

Indeed, the LatCrit, Inc. Board of Directors already has confronted developments in the first year since LatCrit IV that amply illustrate the pressing need to plan proactively and institutionally for transitions in leadership. After making significant contributions of time and effort to the incorporation of LatCrit, Inc., as well as to the financial and organizational success of LatCrit IV, personal and professional exigencies prompted the resignations of both Laura Padilla, as LatCrit Secretary, and Pedro Malavet, as LatCrit Treasurer. With much difficulty and after extensive "recruitment" efforts, these vacancies were ultimately, and substantively, filled in time for LatCrit V, by the nomination and election of Roberto Corrada as LatCrit Secretary and Christina Prkic as Treasurer. These events highlight basic issues and needs that we must expect to recur—and, therefore, that we must anticipate and accommodate by cultivating and encouraging the kind of broad and sustained participation through which future LatCrit leaders effectively can emerge.

In anticipation of similar, yet more complex, issues of growth and transition, LatCrit planners have begun to imagine and formulate norms to guide future transitions, in particular by grounding election to the Board of Directors substantively in the experience acquired through sustained participation in, and
contributions to, the planning of LatCrit Annual Conferences and other programmatic and institutional initiatives. We also have begun the process of delineating more concretely the responsibilities of the LatCrit Board of Directors, its Officers and Co-Chairs--an effort that, in our view, will smooth the eventual and inevitable transitions in leadership through which we hope to secure the future of LatCrit, Inc. as a long-lasting institution of activist outsider scholars in the American legal academy. While the vagaries and vulnerabilities of the human condition always will require care and flexibility in the institution-building aspirations of the LatCrit community, the crucial act of formal incorporation allows us, among other important things, to nurture future generations of scholar-activists and thereby help to secure the long-term sustainability of the LatCrit project and its antisubordination aims, as well as the institutional spaces and collective networks necessary for other critical projects to emerge and flourish.

While responding initially to the need for long-term planning of the Annual Conferences, the corporate entity also allows the LatCrit community to go beyond the Annual Conference in principled ways that previously were impracticable or impossible. Thus, with the corporate form now in place, LatCrit, Inc. has developed an organizational framework \[*1311\] through which individuals and/or small groups of LatCrits can invent, present and pursue new projects, some of which we describe briefly below. In time, the formation of LatCrit, Inc. should help to expand the venues and opportunities for the continued evolution of LatCrit theory, praxis and community grounded in LatCrit's guideposts and functions, a matter to which we now turn.

B. Beyond the Conference: Expanding the Performance of the Theory

Over the last several years, efforts to give practical meaning to the theoretical evolution of LatCrit discourse time and again have prompted LatCrits to explore three distinct yet inter-related sets of possibilities: (1) new avenues of intellectual inquiry and collaboration beyond the Annual Conferences; (2) reconfigured lines of inquiry that go beyond the conceptual boundaries of a U.S.-centric perspective on law and policy; and (3) expanded challenges to the institutional boundaries that suppress student exposure to, and opportunities to learn from, the evolution of critical theories in the American legal academy. The baseline in each instance, of course, is to stay principled and grounded in the commitments to anti-essentialism and anti-subordination. While committed to meeting this challenge, only time--and our collective efforts--will determine the evolution of the initiatives we take up below.

1. Creating a LatCritical Trans-Atlantic Dialogue: Toward "Triangulation"

Perhaps most important among the recent programmatic initiatives have been the two colloquia devoted to international and comparative law, presented in Malaga, Spain, n163 as part of our continuing efforts not only to bridge false gaps between the domestic and the foreign n164 but also increasingly to "triangulate" LatCrit theory; that is, to explore the triangle of power and geography that delineates and frames Latina/o histories and realities--the triangle constructed of Spain, Latin America and Latina/o communities within the United States. n165 In social, structural and historical terms, this triangle generates and governs the existence of the category called "Latina/o." n166 Therefore, its recognition can help to \[*1312\] contextualize LatCritical analyses of the "Latina/o" condition domestically, hemispherically and globally.

These two colloquia have yielded substantive insights that permit LatCrit theorists to study and consider the recurrence of particular patterns in, for example, race relations, immigration law and policy, regional integration movements, globalization, and other areas of critical investigation in trans-Atlantic frameworks--in other words, as they are structured and manipulated in Spain and in the United States. n167 Through this trans-Atlantic dialogue we have seen and learned how these two nation-states, though they embrace and project different, even competing, forms of nationalistic white supremacy, jointly lord over Latina/o lives with similar ideologies and imperatives based on postcolonial neoliberalism, corporate globalization and Euroheteropatriarchy. n168 These colloquia, in myriad ways, have shown both the falsity of dividing our \[*1313\] analyses of law, power and privilege into the binarisms associated with labels such as "domestic" and "international," as well as the dangers for Latina/os of sentimental flirtations with "Hispanismo" as an identity ideology that helps to structure the present-day world. n169

The recognition of this triangle, and the effort at triangulation, in turn has necessitated, and effectively called for, an increased linkage of three existing scholarly fields--Latin American studies, Latina/o studies, and Spanish post-colonial studies--areas of study and scholarly discourses that, at this moment, have no necessary or sustained interaction with each other. But if joined in systematic ways, the three can help to make LatCritical analyses more cross disciplinary and discerning about the current-day implications of the triangular power matrix that has
and to some extent continues to construct Latina/o identities, positions and perspectives. n170 These colloquia thus have helped programmatically to highlight the fundamental need for crossdisciplinary engagements in outsider jurisprudence, and have confirmed early LatCrit commitments and tendencies to cross-disciplinary analysis. n171

The two colloquia in Spain, in addition to the first Colloquium on International Law, Human Rights and LatCrit Theory held in Miami in 1996, n172 also have fore-grounded the need to investigate the north-south dimensions of triangulation: the recent colloquia in Spain have underscored the past and present embroilment of that nation-state in its former colonies in the Americas, while the earlier Miami Colloquium on International Law, Human rights and LatCrit Theory underscored the need to situate critical analysis of Latina/o histories, conditions and prospects in transnational frames. These three colloquia, held over the past five years, thereby have helped set the stage for the inauguration of an even more ambitious series of rotating seminars, which we discuss below in detail. n173 Generally, these upcoming colloquia are devoted not only to developing the north-south dimensions of LatCrit theory's future evolution but also are designed to facilitate LatCrit theorists' proactive interventions in the crafting of international law and policy via international organizations. n174 Ideally, the upcoming colloquia will serve as another avenue through which the ethic and insights of LatCrit theory can be channeled toward the creation of a more egalitarian international civil order specifically through the articulation of policy as well as theory.

These colloquia and the international and cross-disciplinary analysis they have cultivated in LatCrit theory are reinforced by corresponding programming in the Annual Conferences. In other words, internationalism and cross-disciplinary approaches are fostered to elucidate multinational analyses through the colloquia as well as through the conferences; the programs of each are planned with an eye to the others, such that each is an effort to advance and support varying aspects of the rest. Indeed, the next Annual Conference--LatCrit VI, sponsored by the University of Florida College of Law--is devoted to "Centering North-South Frameworks in LatCrit Theory: Latinas/os and the Americas." n175 As with other topics, this thematization is part of a stream and follows prior years of program events, such as the panels devoted to NAIL/TWAIL networks that, in addition to similar program events, have helped bring critical perspectives on transnational issues and international law to the LatCrit conferences during the past several years. n176 As a whole, then, these mutually-reinforcing events and their corresponding publications jointly represent LatCrits' progress, hopes, limitations and prospects in our collective efforts to perform the theory in principled and ethical terms--that is, in terms that reflect a genuine commitment to the anti-essentialist and antisubordinationist foundations of LatCrit theory.

2. Throwing Lifelines from the Margins: Student-Oriented Initiatives

Our efforts to perform the theory in substantively principled ways also have prompted specific initiatives designed to address the particular, and well understood, needs of socially conscious students in many, if not most, law schools throughout the country. n177 From the beginning, LatCrits have endeavored to include socially conscious students in the Annual Conferences and, indeed, in all that we do. Thus, virtually every LatCrit conference program has featured student participants as reflected this year in the concurrent panel organized by education students [*1315] experimenting with ways of importing LatCrit theory into their work. n178 Similarly, LatCrit conference planners have worked hand in hand with student editors to publish the conference-based symposia every year to date, and this collaboration has been foundational to LatCrit's origins and development, as previously noted. n179 These efforts have involved a bundle of student-oriented outreach projects, all of which strive to make critical theory and outsider jurisprudence accessible to the students of today and tomorrow. Yet, the structural barriers to sustained student involvement in LatCrit theory and its projects are many and daunting: academic calendars, summer clerking commitments, economic resources, as well as the hostile and exclusionary appointments and promotion practices at many educational institutions throughout the country. n180 Thus, LatCrit efforts to reach students have been strategic rather than systematic; that is, our efforts during the past five years have been designed to leverage basic resources associated with our formal or informal institutional positions to break structural barriers to student involvement in outsider jurisprudence and critical theory, even as we lack access to steady sources of substantial support. n181 [*1316]

One recent example is the "Critical Global Classroom," in which we employ a summer study-abroad program as a vehicle to create opportunities for law students across the country to do what many cannot at their 'home' institutions: undertake an in-depth exploration of critical theory, and in particular outsider jurisprudence, in a theory-friendly, outsider-friendly educational environment. n182 The basic concept has been to use the curricular opportunities of a summer study-abroad program to present a set of classes, taught specifically by LatCrit and other
OutCrit scholars, that are primarily devoted to the study of outsider jurisprudence in global contexts and from a critical perspective. n183 The pedagogical purpose of this project, therefore, has been to expose students to theoretical frameworks, discourses and information they ordinarily are not taught in the normal course of legal education as currently structured: to give them the insights and vocabulary, the tools and techniques, the contacts and networks they need to pierce through the mazes of doctrine and policy that supposedly constitute the "rule of law" in this country, and to do so as agents of social justice transformation. n184 Thus, the idea of employing a [*1317] summer study-abroad program as the venue or vehicle for the Critical Global Classroom proceeds from the recognition that most law schools minimize or marginalize curricular opportunities to study, and be exposed to, critical theory or outsider jurisprudence. It is this formal, entrenched curricular structure that we seek to circumvent--and we do so necessarily from the institutional margins we occupy. As always, the challenge for OutCrits and LatCrits is: How do we make positive change that is likely to stick, given the challenge for OutCrits and LatCrits is: How do we make positive change that is likely to stick, given the institutional parameters and social politics of these times?

The summer study-abroad setting is well suited to this kind of "from-the-margins" intervention because summer programs are numerous and recognized across the country, and because enrollment in any school's summer programs is available to students all over the country. Thus, while law schools continue their curricular neglect of critical theory and outsider jurisprudence, n185 LatCrit and allied scholars can create a lifeline to interested students from coast to coast with just one, well-designed summer program. This lifeline, we should emphasize, is pedagogically powerful because it brings together students interested in this field to study and learn together with serious scholars who are experienced and expert in LatCrit and other strains of critical theory. This project circumvents not only the curricular gaps of formal legal education but also the intellectual and social isolation inflicted on outgroup or progressive students and faculty in the typical law school setting; students not only have an opportunity to study topics omitted from their formal courses of study but also have the opportunity to do so among a multiply diverse group of peers and a similarly diverse group of faculty, all of whom take their interests and concerns seriously. n186 This project brings [*1318] together a critical mass of interested students and faculty to study and advance collectively the gains of OutCrit scholars.

LatCrits have dubbed this initiative the 'Critical Global Classroom' or "the CGC" to underscore the fact that we are attempting to construct a formal classroom setting, devoted to serious sociolegal study that is global in its purview and critical in its approach. This unique study-abroad program is a student-oriented initiative synergistic with other LatCrit projects of the past several years, which similarly have been oriented toward students. For instance, two years ago LatCrits established a student-faculty listserv to operate as a kind of informal 'Cyber Classroom' devoted to LatCrit theory and, more generally, to outsider jurisprudence. n187 We also have prepared a LatCrit Primer, including a suggested table of readings, to help students in diverse locales to form local reading groups, and then to conduct a series of interactive discussion sessions. n188 The listserv and the Primer have been theorized to work hand in hand: students around the country can use the Primer as a common set of texts, which can form the basis not only of local discussion in the reading group sessions, but of cyber exchanges among students as well as faculty via the student-faculty listserv. Thus, we mail the Primers upon request to interested student reading groups, and encourage them to go beyond its introductory texts. As a result, students at law schools in every time zone have the opportunity to form interconnected reading groups, posting and exchanging comments on the listserv from time to time. Through these means and via these exchanges, students and law faculty throughout the country participate in the consolidation of a virtual community that may in time offer unique opportunities for mutual support, assistance and collaboration, including the organization of national projects and joint program events.

Keeping with these projects, LatCrits have begun to develop and institute a LatCrit "Student Scholar Program" that will feature a writing forum or component designed to open new opportunities for interested students across the country to present their works at LatCrit conferences, and to publish them in LatCrit symposia. The basic concept is to gather together the resources necessary to allow for one or more students to participate in the Annual Conferences and similar LatCrit events, and to organize a committee to evaluate the submissions and administer the project on an annual basis. Through this initiative, we hope to provide a regular venue for recognizing student accomplishments, while also creating more opportunities both for programmatic and informal interactions that may help students, particularly students of color, to position themselves [*1319] for entry into the legal professorate. As with the others described above, this project synergistically aids longstanding LatCrit efforts to involve students in the Annual Conferences in more systematic ways. n189

In all of these efforts, LatCrits have been conscious of the need to create interactive spaces and build
institutions—beyond the relatively ephemeral live moments of the Annual Conferences—that are capable of incubating post-essentialist communities and post-subordination visions on concretely human terms. In each of these projects, LatCrit theory is performed as a knowledge-producing, community-building enterprise grounded in the cumulative insights and substantive principles articulated over time in and by outsider jurisprudence. From our perspective, these programmatic and student-oriented initiatives, as a set, respond to a LatCritical analysis of curricular entrenchment, institutional politics and social dynamics that combine to impede social progress within and beyond the legal academy. It should and must be precisely so because the legal academy is a key site of contested power in this particular front of the culture wars raging round us.

The institution-building work that we do within the academy—especially in the form of student-oriented initiatives—is a "praxis" that we are well-positioned, if not uniquely-positioned, to perform, a praxis that also responds to the guideposts and functions that have grounded our work to date.

C. New Horizons, New Homes: Sustaining LatCrit Theory as Antisubordination Praxis

Four initiatives—ongoing or upcoming—are especially noteworthy examples of LatCrit's continuing efforts to construct spaces and institutions—homes—for the performance of LatCrit theory: (1) the expansion of the annual colloquium series on international and comparative law convened for the first two years in Spain to begin the 'triangulation' of LatCrit theory by linking the study Latinas/os to the study of Spain and Latin America, and which now will rotate to other sites in different countries over the next several years; (2) the establishment of NGO accreditation with the United Nations for LatCrit, Inc., which will enable our direct participation in the articulation of international legal norms and human rights in that and similar venues of international lawmakering; (3) the development of webcasting capabilities and multimedia programming, which will permit us to disseminate LatCritical information globally and in more accessible formats; and (4) the inauguration of an annual retreat, scheduled to begin immediately after the Annual Conferences, and to focus primarily on long-term planning and institutional building. Below, we briefly describe each, and how they perform the theory.

1. Charting Globalization: The Rotating Colloquia in International and Comparative Law

As described above, the past five years have witnessed four LatCrit colloquia—including the first gathering in Puerto Rico—with the last two taking place in Malaga, Spain as part of ongoing efforts to internationalize LatCrit discourse. This work now serves as the springboard for the initiation of a multi-year series of rotating seminars designed to extend both the internationalization and the triangulation of LatCrit theory. In the first two or three years, these new colloquia will convene in Latin American countries, and from there travel to other locales, such as South Africa, to ensure the continuing evolution of LatCrit theory as a transnational and multidimensional form of critical analysis. As with the Annual Conferences and other LatCrit projects, these colloquia will be an anti-essentialist, anti-subordinationist enterprise structured to fulfill LatCrit's functions and guideposts.

The basic concept is to identify several broad and flexible, yet coherent and recognizable, contemporary sociolegal themes or categories that can focus LatCrit attention across a wide variety of substantive areas, even as they enable more focused engagement in the particularities of any given society. Such themes might include: (a) the status of minorities; (b) corruption and anticorruption strategies, understood broadly to include the impact of public and private abuse of power and privilege; (c) the meaning of democracy and the tensions between human rights and globalization; (d) the meaning of substantive security, given the well understood interdependence of justice and peace; and (e) the particular problems confronting women of color across different regions and nations. While the structure of these international and comparative law colloquia remains unsettled, they are likely to be similar in structure and format to the prior LatCrit colloquia: publicized and open to all, but able to meet in plenary sessions at all times due to their smaller scale, as well as more focused in purpose and purview than the Annual Conference programs. Thus, we envision gatherings that bring together 20-40 scholars, activists and students from the LatCrit community of the United States, and from the host site and from other locales, to study, collectively and programmatically, the particular manifestations of the general themes as reflected in the realities of the host state and its region.

As with the Annual Conferences, this rotating colloquia series is being conceptualized as a multi-year project in which every gathering is interconnected to the others in substantive and human terms. We envision continuity based both on a conscious and self-critical development of interconnected programming, as well as on the sustained attendance and participation over time and across regional venues of the scholars, activists and students who join in this undertaking. As with the Annual Conferences, the objective is to ensure diversity and inclusion both in the planning process and in the program's events—while using the practice
of geographic rotation to facilitate detailed study of specific settings that simultaneously help adduce more general or structural insights. This collective approach both to planning and to programming aims to nurture egalitarian, coalitional, inter-group communities that respect difference while building on commonalities to promote anti-subordination transformation. And, as with every other project, the plan is to foster substantive and human links between these colloquia and the Annual Conferences--links that invite participants from each to join in the other, and that create synergies between the two in every possible way. n194

As with the conferences and prior colloquia, this new series also will generate scholarly publications aimed at promoting social transformation. But these colloquia also are designed to do more than expand the record of socially relevant knowledge produced via LatCrit theorizing and praxis. These colloquia are designed to produce a series of reports or papers that not only document local conditions but also chart recurrent patterns from local particularities--linking the particular to the general--to demonstrate in concrete, compelling terms the interlocking nature of structures that subordinate. In this way, and in keeping with multidimensional analysis, LatCrits may concentrate on exposing and critiquing the dynamics of transnational problems and their interlocking patterns as such, rather than in piecemeal fashion. As we describe immediately below, these interactive colloquia ideally will produce the substantive analysis and detailed record that effectively can ground future LatCrit projects focused on transnational issues and international policymaking.

2. Formalizing Praxis: International Policymaking and the LatCrit NGO

Securing recognition from the United Nations of LatCrit, Inc. as a "non governmental organization" (or "NGO") represents the second current project designed to promote the evolution of LatCrit theory as a principled form of anti-subordination praxis. With this recognition, LatCrits [*1322] will be entitled to participate formally in United Nations conferences and meetings through which the norms and rules of the emergent globalized civil order are being crafted--venues in which, for instance, international anti-discrimination conventions are being drafted and human rights formulations are being delineated. n195

As an "NGO" the LatCrit community, via LatCrit, Inc., will be able to practice the theory in various international fora that effectively form the crucible for contemporary international lawmakers.

Thus, the basic purpose of this initiative is to interject LatCritical analysis, and the lessons of outsider jurisprudence, into the deliberations and discussions that are formulating international law and policy on the rights of all humans, and in particular on the rights of women, minorities, workers, poor persons, immigrants and other vulnerable groups. These lessons include, of course, the early lessons--intersectionality, multiplicity and anti-essentialism--as well as more recent insights. n196 A fundamentally crucial aspect of this initiative, therefore, is the promotion of multidimensional critical analyses in international fora--analyses that recognize and target the interlocking nature of different forms of oppression and privilege based on different axes of social position and group identity, whether race, ethnicity, sex, gender, class, sexual orientation, religion, ability, nationality or other similar constructs. Only through multidimensional analyses that produce multidimensional interventions can LatCrits "get" at the cosynthetic nature and interconnected dynamics of entrenched supremacist ideologies and practices, whether in domestic or international settings. n197

And this is where the international and comparative law colloquia provide a synergistically substantive platform for the NGO initiative. Because the colloquia will feature programs designed to produce detailed multidimensional analyses of particular states or regions while charting interconnections among the particularities of each state or region, the reports or publications they generate effectively can serve as a basis, a platform, for the ideas, positions and agendas that we promote collectively through this NGO project. These rotating colloquia therefore will produce knowledge not only in the traditional form of academic publications, like the annual law review symposia, but also in the form of concrete, substantive strategies that will help to shape our collective formal activities as an NGO. In this way, we hope increasingly to interject multidimensional analyses and approaches into the discourses and documents [*1323] of the emergent international civil order as another form of socially relevant and principled anti-subordination praxis. As an NGO, LatCrits should aim not only to aid substantively in specific issues or venues but, more generally, also to help foster a culture or consciousness of multidimensionality in international policymaking--a mindset that remains sorely lacking both in domestic as well as in international levels of law and policy despite years of work among critical legal scholars. n198

As with the rotating colloquia--indeed, as always--LatCrits must take care in developing this project to ensure that it is genuinely coalitional with relevant persons, groups or interests from other parts of the world. More specifically, the LatCrit NGO project proactively must be designed to anticipate and avert potential associations with Anglo American arrogance
in international fora. n199 And here, again, is where this project and the upcoming colloquia intersect once more: the NGO activities not only need to be grounded in the transnational yet particular analyses adduced through the colloquia series and their planning processes. They also need to be designed, spearheaded and staffed by individuals whose sustained participation and personal commitment provide the needed experience to negotiate these delicate issues of inter-group and transnational collaboration in a spirit of mutual engagement and respect - once again linking the production of new knowledge to the nurturing and expansion of authentic community based on shared principles and practices. The colloquia, in other words, can help not only to generate the substantive positions and multidimensional agendas that we pursue as an NGO, but also the very planners and spokespersons who, in turn, represent LatCrit as an NGO in formal settings to articulate and advocate the substance of our collective analyses. n200

Thus, while the details remain necessarily sketchy at this point, over the next several years we anticipate that LatCrits will be developing the colloquia and NGO projects hand in hand to draw the maximum benefits of both. Happily, the first steps already are underway. The colloquia series already is being planned in a three-to-five year cycle with overlapping planning committees. In the meantime, LatCrits also have begun to investigate the procedure and process for securing NGO accreditation in [*1324] anticipation of the United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Forms of Oppression, which is scheduled to meet in South Africa next year, during August 2001. While these two efforts inevitably will take several years to unfold and consolidate, and while no one can predict with certainty where they ultimately will lead, these initiatives indicate a promising vitality in the LatCrit community after these five years of toil, as well as a continuing collective commitment to performing the theory always in critical and self-critical fashion, and always keeping it grounded in the functions and guideposts we have sought to bring to life during these past five years.

3. Reaching for the Global: Multimedia Projects and LatCritical Webcasting

The third current institution-building initiative is similarly synergistic with the colloquia and NGO projects described immediately above. This third project comprises several media-related projects that range from producing an overview video of LatCrit, Inc. and its projects to developing global webcasting capabilities. This initiative, like the others, builds on past practices to perform the theory in principled ways. From the outset, LatCrit program planners have videotaped all or part of prior LatCrit conferences and colloquia, slowly building a visual record of our encounters and progress--as well as our stumbles and ruptures. n201 Not coincidentally, we have done so each year with the conscious purpose of making the conference programs more widely accessible through the use of this footage. We have done so, in other words, to provide opportunities for "virtual" attendance as well as to preserve a record of our gatherings. Until now, however, this footage has remained archived, awaiting the day when LatCrits would possess the human and other resources to use this asset in a substantively productive way. n202

Fortunately, this footage now provides a partial basis for the production of a short video designed to introduce wider audiences to our collective record and diverse community, and to do so in concrete, human terms. As LatCrit turns five, this video has become extremely timely; as the LatCrit community has grown, so have the need and the calls for some form of introductory material that can convey, in readily accessible terms, a basic sense of the LatCrit community and its many diversities. This video project--along with an introductory brochure, which presently is being developed for production in both Spanish and English, [*1325] respond to these growing calls. n203 Through this video and brochure, we hope to create an effective and efficient introduction of our work, our community and our aspirations to those around the nation, the hemisphere and the globe who may be interested in forming common cause with LatCrit's anti-essentialist, anti-subordination agendas. By introducing and explaining ourselves through the devices of this video and brochure--as well as the Primer--we hope to expand the circles of communication and collaboration that represent LatCrit theory, community and praxis beyond the physical reaches attainable through traditional texts, programs and personal interactions.

At the same time, the planning committees for the Annual Conferences are moving toward videoconferencing as an alternative to the high cost and cumbersome dynamics of telephone conference calls. To date, the conference planning process has involved varying numbers of persons who communicate via email and conference calls to ensure that all LatCrit programs balance inclusion and continuity in light of past experience and future aspirations, and to ensure that our rotation of centers and streaming of programs reflect the multiple diversities of the LatCrit community. n204 However, as the substantive themes, demographic identities and geographic regions that we endeavor to cover programmatically have grown during these past five years, our collective ability to
juggle the details of the Annual Conference planning process through email and conference calls has been increasingly strained. n205 Because this strain is a result of a principled approach to conference planning that seeks to perform the theory, the cure rests not in a curtailment or abandonment of our basic commitments to openness and inclusion. Instead, the cure rests in our finding new and better ways to ensure that the conference planning process continues to be a form of ethical praxis.

Testing the technology and its possibilities, conference planners therefore have purchased and connected a pair of Logitech videocams in a pilot project designed to introduce this new format in time for the planning process of LatCrit VII, sponsored by the University of Oregon School of Law and scheduled for May 2002. We hope eventually to use the knowledge, capabilities and resources derived from these projects to build a webcasting program that will permit a direct and global transmission of LatCrit theory and outsider jurisprudence. To do so, we can imagine everything from posting the LatCrit brochure on the website for anytime viewing, to live webcasting of particular events, to producing a "lay persons" rendition of critical theory as applied to current events across the world. Indeed, we envision this initiative as perhaps leading up to a television-style program in which LatCritical analyses of current affairs [*1326] internationally are web cast in roundtable formats. This program, while still a gleam in the eye of LatCrit planners, can broadcast our summer colloquia, Annual Conferences, or other special events. The basic objective to be pursued through these efforts over the next several years is to make LatCrit theory and outsider jurisprudence more generally, widely accessible to agents of social change throughout the world via the LatCrit website on the internet: the basic idea is to employ the technology of the internet to disseminate anti-essentialist practices and anti-subordination discourses more widely and effectively. n206

4. Building the Institution: The Annual LatCrit Retreat

The fourth current project designed to perform the theory--an annual retreat devoted to the nourishment of LatCrit, Inc. as an institution through strategic long-term planning--also is designed to ensure the sustainability of LatCrit theory as a diverse discourse and community of activist scholars, activists and students committed to ethical anti-subordination praxis. While the retreats, like the Annual Conferences, are open to all and are publicized as such, the concept calls specifically for recent, current and future Annual Conference cochairs, and other members of the conference planning committees, to gather with the co-chairs of LatCrit, Inc. and other LatCrits from the Board of Directors, and also with those who are spearheading specific projects, in order to share information and resources, to coordinate activities and plans, and to identify or create coalitional synergies whenever possible. These retreats, therefore, will bring together individuals from the Annual Conferences, from the corporate entity and from the various "special projects" underway at the time to develop strategic plans in a critical and self-critical discussion of our collective aspirations, advances, shortcomings, and prospects. Meeting in various plenary sessions of differing formats over [*1327] a several-day period, these discussions annually should distill from the struggles and exigencies of the moment a common understanding of our present trajectories and future possibilities in light of our experience with the original guideposts and functions.

By scheduling the retreat to begin a day after the conference, and at the same or nearby location, we hope to facilitate attendance and participation by minimizing costs and logistics while maximizing the physical presence of LatCrits drawn to the conference. By carving out "quality time" to reflect and focus on the big picture over several days in a relatively small-group setting, we hope to foster a keener self-awareness of our collective and individual work as a form of ethical praxis that always must perform the theory. And by training attention squarely on institution-building through long-term planning, we hope to protect and develop the relatively independent spaces that enable our continual progress toward envisioning and incubating a post-subordination. This retreat, like the other special projects described here, thus represents another formal venture designed to activate and apply the anti-essentialist principles and antisubindungacionist ambitions of the fluid band of scholars, activists, students and others who, through their commitments and exertions, have helped to create LatCrit theory, praxis and community during these past five years and who, hopefully, will continue to do so at least for the next five as well. n207

But, again, to continue this work and secure the sustainability of these various projects requires not only the continuing investment of LatCrits' creativity, time and energy--among both veterans and newcomers--but also an expanding pool of economic resources to support our collective projects over the next several years. To continue the work of the past five years, we must devise means of cultivating not only the necessary, intergenerational human resources but also of raising the necessary funds to place LatCrit's growing menu of projects on a sound and stable financial footing for the long term. n208 To continue LatCrit theory, praxis and community, in
other words, we must continue to build the institutions capable of housing the past, present and future of this vibrant and promising yet young and fragile jurisprudential experiment. It is for this purpose, chiefly, that we contribute this Afterword to this wonderful symposium.

Conclusion

In this Afterword, we have sought to celebrate the first half of LatCrit's first decade in tempered yet hopeful tones. Our hopes are fueled by the progress of the intellectual journeys that we have taken as a community during the past five years. Unfinished though they are—and always will be—these journeys depict significant progress both in the substantive development of LatCrit theory as well as in the consolidation of a multiply diverse community grounded in a mutual commitment to the critical and self-critical performance of the theory in all that we undertake. Our hopes similarly are fueled by the broad array of new projects that are poised to take us collectively and synergistically beyond the Annual Conferences. At the same time, our hopes are tempered both by the fundamental fragility of this experiment and by the sociolegal climate of culture war, backlash and retrenchment that envelops us, and that licenses or emboldens institutional hostility to outsider jurisprudence and scholars. Fragility and hostility do not a good combination make. And yet, it is the lot of outsider jurisprudence, including LatCrit theory.

What outsider scholars have accomplished thus far, as a community, is remarkable. But the progress forged to date is neither secure nor self-sustaining. Whatever plans or successes we might share today could be gone tomorrow—unless we remain at all times cognizant of our collective limitations or shortcomings and vigilant against their indulgence, manipulation or exploitation. In our view, among these vulnerabilities is undue dependence on institutions that are not our own because—despite the platitudes—fundamentally they do not share our commitments to anti-essentialist, anti-subordinationist theory and praxis. As experience has shown, we simply cannot expect elite-identified institutions that control legal education for the benefit of traditional Euro-heteropatriarchal elites to transform themselves, nor allow us easily to transform them.

In sum, the portrait of LatCrit at five that we depict here displays a vital but tentative experiment in outsider jurisprudence. To ensure that LatCrits and OutCrits will have something more to celebrate five years hence, we must turn now to the business at hand: institution-building. And to that end, we issue a call to all: join the growing LatCrit community, now, in the project of ensuring the longterm sustainability of outsider jurisprudence as a form of praxis that performs the theory to incubate a post-subordination future.

Though we cannot know at the outset where the new initiatives described above and similar or related efforts might take us, and though we never can forget the complex fragility of this collective experiment, we do know that institution-building must be the next collective priority. Otherwise, the promise and potential of our past work and progress in time will dissipate, or perhaps evaporate, under the pressure of backlash, and even inertia. By building communities and institutions to perform the theory now in critical and self-critical ways, we hope to set the stage for a collective celebration of LatCrit at ten—and perhaps even beyond—as a form of ethical praxis grounded solidly and self-critically in anti-essentialist, anti-subordination principles. In these and related ways, we proffer LatCritical contributions to the ongoing evolution of outsider jurisprudence in the United States. In these and ongoing ways, the LatCrit community seeks to incubate and secure a just civil society, both in local and global terms. In these ways and over time, we progressively institutionalize LatCrit principles and practices to join with the likeminded everywhere in critical coalitions toward a postsubordination future.

Appendix

LatCrit at V: List of Publications


LatCrit at V: Calendar of Programs

1. October 1995, Colloquium on Representing Latina/o Communities: Critical Race Theory and Practice, San Juan, Puerto Rico


3. October 1996, LatCrit Colloquium on International Law and Human Rights, Miami, Florida


7. June 1999, First Annual Colloquium on International and Comparative Law, Malaga, Spain


9. June 2000, Second Annual Colloquium on International and Comparative Law, Malaga, Spain


14. August 2002, Third Annual Colloquium on International and Comparative Law, Santiago, Chile and Buenos Aires, Argentina

LatCrit at V: Organizational Chart [*1333] CHART

[SEE TABLE IN ORIGINAL]

FOOTNOTE-1:


n2 LatCrit V received generous support of varied amounts from the University of Denver College of Law, the Center for Hispanic and Carribbean Legal Studies at the University of Miami School of Law, the University of Colorado, and Arizona State University.

n3 LatCrit V's Conference Schedule and Conference Program Outline can be found at Conference Materials and Articles <http://www.latcrit.org> (also on file with authors).

n4 This interrogation of class has been foreshadowed in the works of numerous LatCrit scholars at previous LatCrit Conferences. See, e.g., Iglesias & Valdes, Afterword--Coalitional Theory, supra note
n5 This dichotomization at times has had profoundly disruptive and destructive impacts on the prospects for coalitional solidarity among progressive networks within the legal academy, as reflected in the early 1990s by the tensions between leaders of the Critical Legal Studies network and an emergent Critical Race Theory. For early LatCrit reflections on the conflicts between CLS and CRT over the relative priority of class and identity, see Sumi K. Cho, Essential Politics, 2 Harv. Latino L. Rev. 433, 449 (1997) (recounting public disruption triggered by the supposed conflict between class-based and identity-based approaches to critical legal theory at the 1995 Critical Networks Conference on Class and Identity Politics). For an account reflecting on the implications of the CLS-CRT debate for LatCrit theory in engaging Third World liberation projects and discourse, see Elizabeth M. Iglesias, Foreword--LatCrit Theory: Some Preliminary Notes Towards a Transatlantic Dialogue, 9 U. Miami Int'l & Comp. L. Rev. 1, 9-18 (2000-01) [hereinafter Iglesias, Foreword--Transatlantic Dialogue].


n9 As in prior conferences, LatCrit V organizers programmed a plenary panel focused specifically on issues of particular relevance to the local community in the region to which the conference rotated. See Colorado Local Issues: Histories of Racism, Classism & Heterosexism, LatCrit V Conference Substantive Program at Conference Materials and Articles <http://www.latcrit.org> (also on file with authors). This emphasis on local issues has a dual purpose of using the opportunities presented by regional rotations to educate the LatCrit community about the
particularities of subordination confronting different communities in different ways across different geographical regions, and using the annual conferences as a vehicle for facilitating connections between the conference participants and local activists that might evolve potentially into more sustained collaborations. See Iglesias & Valdes, Afterword--Coalitional Theory, supra note 1, at 510 (reflecting on the value of engaging local communities in and through the annual conferences). At LatCrit V, the local issues panel explored successful coalitional efforts against four local projects aimed at legalizing discrimination against sexual minorities, eliminating affirmative action, retaining title to stolen land use rights, and the exploitation of immigrants in the Colorado resort industry. For related issues, see generally Norberto Valdez, Marcia Fitzhorn, Cheryl Matsumoto & Tracey Emslie, Police in Schools: The Struggle for Student and Parental Rights, 78 Denv. U. L. Rev. 1069 (2001) (examining impact of stationing police in schools through case study of Northern Colorado); see also Mary Romero, State Violence and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member, 78 Denv. U. L. Rev. 1089 (2001) (reading the criminalization of Latino immigrants in and through the social and legal construction of Latino criminality).


n11 This effort to expand the range of substantive fields marked for anti-essentialist, anti-subordination analysis was programmatically centered at LatCrit V in the opening moderated group discussion entitled Political Economies of Subordination in LatCrit Perspective: "Piercing the Veils" of Class and Identity in Traditional Curricula LatCrit V Conference Substantive Program at Conference Materials and Articles <http://www.latcrit.org> (also on file with authors).

n12 Id.
n13 See Peter Kwan, Jeffrey Dahmer and the Cosynthesis of Categories, 48 Hastings L.J. 1257 (1997) (introducing the concept of cosynthesis) [hereinafter Kwan, Jeffrey Dahmer]; Peter Kwan, Complicity and Complexity: Cosynthesis and Praxis, 49 DePaul L. Rev. 673 (2000) (developing the concept); for similar concepts, see infra note 45 and sources cited therein.


n16 To ensure the sharpness as well as the integrity of LatCrit interventions, LatCrit theory and praxis endeavors both criticality and self-criticality. See, e.g., Iglesias & Valdes, Afterword--Coalitional Theory, supra note 1, at 582-88; Margaret E. Montoya, Academic Mesizaje: Re/Producing Clinical Teaching and Re/Framing Wills as Latina Praxis, 2 Harv. Latino. L. Rev. 349, 365-73; see also infra notes 108-55 and accompanying text on the ethics of LatCrit conference planning as one key example of critical and self-critical praxis. Indeed, this commitment to self-critique has helped to shape LatCrit theory since its inception, being the sixth "guidepost" adduced in the works of the first conference and symposium: "The perpetual need for self-awareness and self-critique in all areas of our work" therefore has been a constant feature of the ethics and praxis that have come to define LatCritical projects. Francisco Valdes, Foreword--Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment, 2 Harv. Latino L. Rev. 1, 55-56 (1997) [hereinafter Valdes, Foreword--Poised at the Cusp]; see also infra notes 35-36 and accompanying text on the LatCrit guideposts.
n17 For discussion of the term "Euroheteropatriarchal," see infra note 50 and sources cited therein.

n18 Id. Iglesias, Foreword—LatCrit III, supra note 14, at 672-73 (urging LatCrits to recognize and collaboratively engage the community building and transformative imperatives of "the here and now of this moment") (italics in original). For further reflections on the kinds of practices through which LatCrits have sought specifically and self-consciously to make the annual conferences a community building experience, see infra notes 108-23 and accompanying text.

n19 For discussion of the term "culture wars," see infra note 77 and sources cited therein.

n20 See infra notes 76-81 and 131-38 and accompanying text on the LatCrit conferences as a means of challenging standard norms relating to the production of legal scholarship.

n21 Past experience teaches that institution-building is increasingly urgent, and indispensable, precisely because past experience teaches that mainstream support for LatCrit theory, praxis and community will diminish or evaporate just as soon as we approach the point of making a substantive, material or shall we say "practical" difference in transforming dominant sociolegal arrangements, particularly when these arrangements happen to be the institutions in which we work. Outsider scholars long ago named the politics of "interest convergence," in which privileged groups profess support for the subordinated, so long as their work remains mostly talk, but talk, though not always cheap, ultimately cannot substitute for action, nor for meaningful change. See, e.g., Derek Bell, Brown v. Board of Education & the Interest Convergence Dilemma, 93 Harv. L. Rev. 518 (1980). While recognizing and appreciating the institutional support we sometimes do, in fact, receive, outsider scholars also have documented the "spirit murder" suffered at the hands of those very institutions we might otherwise want to call "home." See, e.g., Cho, supra note 5; Montoya, Silence and Silencing, supra note 15; Roberts, The Paradox of Silence, supra note 15; Bender, Silencing Culture and Culturing Silence, supra note 15; Smith supra note 15.

n22 For discussion of the term "outsider jurisprudence," see infra note 36 and sources cited therein.

n23 See infra notes 108-12 and accompanying text on LatCrit efforts to "perform the theory" via the annual conferences and other projects; see also generally Sumi Cho & Robert Westley, Historicizing Critical Race Theory's Cutting Edge: Key Movements that Performed the Theory, in Crossroads, Directions and a New Critical Race Theory (Francisco Valdes, Jerome McCristal Culp, Jr. & Angela P. Harris eds.) (forthcoming 2002) (describing student movements in California in similar terms).

n24 "LatCrit theory" is, in many ways, a crossroads for many different critical discourses and perspectives precisely because the evolution of LatCrit theory has been substantially enriched by the active and continuous participation of a highly diverse and extraordinarily talented assortment of Asian and Pacific American critical legal scholars, RaceCrits, QueerCrits, FemCrits and other OutCrit scholars. See, e.g., Keith Aoki, Language is a Virus, 53 U. Miami L. Rev. 968 (1999) (noting extent of Asian American participation in LatCrit conferences and community); Barbara J. Cox, Coalescing Communities, Discourses and Practices: Synergies in the Anti-Subordination Project, 2 Harv. Latino L. Rev. 473 (1997) (reflecting on relevance of LatCrit project to white lesbians); Jerome McCristal Culp, Jr., Latinos, Blacks, Others and the New Legal Narrative, 2 Harv. Latino L. Rev. 479 (1997) (reflecting on relevance of LatCrit project to African Americans)[hereinafter Culp, Latinos, Blacks, Others]; Stephanie M. Wildman, Reflections on Whiteness & Latina/o Critical Theory, 2 Harv. Latino L. Rev. 307 (1997) (reflecting on the significance of the LatCrit project from a white critical feminist perspective). These scholars have performed the unprecedented act of solidarity of investing their intellectual capital and professional resources in the creation and continued evolution of a discourse, whose initial and immediate
purpose has been to combat the relative invisibility of Latinas/os in the production of critical legal discourse, even as they also remain deeply involved in developing other strains of critical theory. See Iglesias, Foreword--Transatlantic Dialogue, supra note 5, at 8 n.19. It is thus somewhat misleading to speak of "LatCrit theory" in the singular. Nonetheless, the multiple diverse critical legal scholars who coalesced around the collective effort to articulate LatCrit theory "exhibited ... a sense of shared groupness." See Francisco Valdes, Foreword--Latina/o Ethnicities, Critical Race Theory, And Post-Identity Politics In Postmodern Legal Culture: From Practices To Possibilities, 9 La Raza L.J. 1, 7, n.25 (1996) (hereinafter Valdes, Foreword--Latina/o Ethnicities]; see also infra notes 37-52 and 85 and sources cited therein on LatCrit and Latina/o diversities.

n25 The proceedings of that colloquium appear in Colloquium, Representing Latina/o Communities: Critical Race Theory and Practice, 9 La Raza L.J. 1 (1996); see also supra note 1 and sources cited therein on LatCrit origins.


n28 Valdes, Foreword--Latina/o Ethnicities, supra note 24, at 11-12 (grounding the publication of LatCrit conferences in the need to "build relationships among and between Latina/o legal scholars and journals and in this way ... foster the work and success of both"); see also infra notes 129-44 and accompanying text on the employment of the LatCrit conferences and symposia to restructure the norms and habits for the production of legal scholarship.

n29 See infra notes 201-06 and accompanying text in new projects designed to expand these efforts beyond traditional texts.

n30 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, 7-8 (1998).

n31 See infra notes 82-106 and 113-14 and accompanying text on "rotating centers" and "streams of programming".

n32 Iglesias & Valdes, Afterword--Coalitional Theory, supra note 1, at 555-61 (urging LatCrits to "avoid essentialist tendency to seek universal truths in generalities and abstractions, rather than seeking universal liberation in and through
the material ... transformation of the particular and contingent.") The linkage of the specific to the general - the mapping of particularities in larger patterns and schema - is the seventh "guidepost" for the development of LatCrit theory and praxis raised during the first annual conference and symposium. For a review of the seven guideposts, see infra notes 35-36 and accompanying text.

n33 See infra notes 156-208 and accompanying text on the projects that build on the annual conferences.

n34 See infra notes 158-62 and accompanying text on the organization of LatCrit, Inc. as a not-for-profit organization.

n35 For an early assessment of LatCrit guideposts as reflected in the proceedings of the First Annual LatCrit Conference, see Valdes, Foreword--Poised at the Cusp, supra note 16, at 52-59.

n36 In addition to the seven guideposts noted above, an eighth was originally presented as a "final observation" based on the preceding seven: "acknowledging the relationship of LatCrit to Critical Race theory" and, in particular, the "intellectual and political debt that LatCrit theorizing owes to Critical Race theorists." Id. at 56-59. This point expresses one perspective on the immediate origins and closest precursors of LatCrit theory, although other accounts have been preferred to provide a broader context. See, e.g., Johnson & Martinez, supra note 1 (discussing the relationship of LatCrit theory to Chicana/o studies). This point also underscores a key theme in this Afterword and, indeed, in LatCrit theory during the past five years: that LatCrit theory is a genre of "outsider jurisprudence" and that LatCrit theorists have consciously sought to learn, apply and develop the lessons of preceding or current experiments within the more general category of outsider jurisprudence, including the efforts of feminist, critical race feminist, Asian, Queer and other "OutCrit" scholars. The term "outsider jurisprudence" is Professor Mari J. Matsuda's. See Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2323 (1989) [hereinafter Matsuda, Public Response]. For a description of the term "OutCrit," see infra note 50; see also generally infra notes 48-51 and accompanying text on the relationship of LatCrit and outsider jurisprudence; Iglesias, Foreword--Transatlantic Dialogue, supra note 5 (mapping links between LatCrit theory and seven strains of critical scholarship that preceeded its emergence).

n37 It bears mention at the outset that Latina/o "presence" in the lands now known as the United States is due principally to American expansionism and imperialism; Mexicans, Puerto Ricans and other Latinas/os now in the United States originally did not cross any borders to arrive or migrate here the border crossed them. Rodolfo Acuna, Occupied America (3d ed. 1988) (assessing Chicana/o communities as internal colonies); see generally Gilbert Paul Carrasco, Latinos in the United States: Invitation and Exile, in Immigrants Out! The New Nativism and the Anti-Immigrant Impulse 190 (Juan F. Perea ed., 1997) (reviewing the history of United States labor policies designed to attract Latina/o migrant workers, who then are not only exploited and maltreated but also disdained as "illegal immigrants"); Sylvia R. Lazos Vargas, History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa the Spanish-American War, 1896-1900, 78 Denv. U. L. Rev. 923 (2001) (discussing the Spanish American War as a "key turning point in racial formation of Latino/as, American foreign policy, and American democracy"); Gerald P. Lopez, Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy, 28 UCLA L. Rev. 615 (1981) (evaluating the structural dis/incentives to immigration from Mexico to the United States); Marifeli Perez-Stable, The Cuban Revolution: Origins, Course, Legacy 14-60 (2d ed. 1999) (outlining the "mediated sovereignty" of Cuba under the tutelage of the United States following its "independence" from Spain after the conclusion of the Spanish-American War in 1898); Maria de los Angeles Torres, In the Land of Mirrors: Cuban Exile Politics in the United States 74-83 (1999)
(reviewing the history of North American political and economic interventionism that contextualizes the "exile" of Cubans in the United States); Ediberto Roman, Empire Forgotten: The United States' Colonization of Puerto Rico, 42 Vill. L. Rev. 1119 (1997) (critiquing the colonial position of Puerto Rico as a "commonwealth of the United States, also resulting from the conclusion of the Spanish-American War in 1898); see also Symposium, Understanding the Treaty of Guadalupe Hidalgo on Its 150th Anniversary, 5 S.W.J.L. & Trade Am. 1 (1998). American adventurism and interventionism throughout the Americas under policy imperatives such as the Monroe Doctrine and the Cold War similarly have catalyzed Latinas/os' presence in the United States - it is no coincidence that Latina/o groups in the United States hail mostly from the places in which the United States has most interfered, such as Mexico, Puerto Rico, Cuba, Nicaragua, Guatemala, the Dominican Republic and El Salvador. See generally Arlene M. Davila, Sponsored Identities: Cultural Politics in Puerto Rico (1997); Walter LaFeber, Inevitable Revolutions: The United States in Central America (2d ed. 1993); The Puerto Rican Movement: Voices from the Diaspora (Andres Torres & Jose E. Velazquez eds., 1998); The Dominican Americans (Silvio Torres-Saillant & Ramona Hernandez eds., 1998).


Conventional labels used socially in the United States are captured formally in the current census, which amalgamates "Spanish/Hispanic/Latino" into a single category, and then subdivides it into subgroup varieties like "Mexican, Mexican Am., Chicano" and "Puerto Rican" and "Cuban." See United States Department of Commerce, Bureau of the Census, Form D-1, Question Seven (2000) (copy on file with authors); see generally Alex M. Saragoza, Concepcion R. Juarez, Abel Valenzuela, Jr. & Oscar Gonzalez, History and Public Policy: Title VII and the Use of the Hispanic Classification, 5 La Raza L.J. 1 (1992) (discussing federal adoption of the "Hispanic" label and critiquing the conglomeration of the Spanish-HispanicLatina/o labels into a single identity category).

n39 "Essentialism" and "anti-essentialism" are key concepts in LatCrit theory, however, both terms mean different things in different contexts. Generally, "essentialism" is a label applied to claims that a particular perspective reflects the common experiences and interests of a broader group, as when working class men purport to define the class interests of "workers," or white women purport to define the interests of all "women," without acknowledging intragroup differences of position and perspective. Indeed, essentialist categories are routinely invoked precisely in order to suppress attention to intragroup differences, and thereby to consolidate a group's agenda around the preferences of the group's internal elites. By contrast, "anti-essentialist" theory seeks to reveal intragroup differences precisely in order to expose relations of subordination and domination that may exist within and among the members of any particular group. See, e.g., Elizabeth M. Iglesias, Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA, Not! 28 Harv. C.R.-C.L. L. Rev. 395 (1993) (revealing how essentialist categories of race and class underpinning American labor and
employment law regimes result in the exclusion and/or submergence of women of color within, majoritarian labor unions - thus making the struggle for collective empowerment and recognition a matter of reunitifying collective political identities that have been fragmented and fragmenting identities that have been unified through the deployment of race, class and gender essentialism) [hereinafter Iglesias, Structures of Subordination]. Though anti-essentialist theory has routinely been attacked for fragmenting, that is "Balkanizing," group solidarity and undermining more universal struggles for progressive social transformation, anti-essentialist theory seeks rather to ground collective solidarity on substantive inter and intragroup justice. Iglesias, Foreword--LatCrit III, supra note 14, at 629; Iglesias, Foreword--Transatlantic Dialogue, supra note 5, at 25 n.65 (noting ironically that "Balkanization" has been the charge launched by proponents of pre-existing critical theories against every new strain of critical legal discourse). For readings on "anti-essentialism" and related concepts like "intersectionality" and "multiplicity," see infra note 83 and sources cited therein.

n40 See Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323 (1987) (urging "looking to the bottom" as jurisprudential method); see also Iglesias & Valdes, Afterword--Coalitional Theory, supra note 1, at 515-21 (urging the same point in the context of LatCrit theory, specifically).

n41 Valdes, Foreword--Poised at the Cusp, supra note 16, at 515.


n43 Id. at 798-801; 214-17.

n44 See, e.g., Iglesias, Structures of Subordination, supra note 39 (deconstructing the way race, class and gender essentialism are embedded in the articulation of individual and collective worker rights and their interconnected and mutually reinforcing impact on the subordination of women of color in American workplaces); Valdes, Queer Margins, supra note 10, at 1320-33 (reviewing causes and limitations of single-axis analysis in sexual orientation scholarship and providing four "ways and means" of advancing multidimensional analysis in Queer legal theory); see also Mari J. Matsuda, Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition, 43 Stan. L. Rev. 1183, 1189 (1991) (urging anti-subordination analyses to "ask the other question" as a means of theorizing across single-axis group boundaries); infra note 45 and sources cited therein on intersectionality, multiplicity and related concepts.


n46 Iglesias & Valdes, Expanding Directions, supra note 42, at 798; 214 (emphasis in original).

n47 Cross-discipline dialogue has been a conscious and consistent element of the annual LatCrit conferences, as reflected by their programs, all of which are posted to the LatCrit website along with related conference materials and other information on LatCrit projects and plans. See <www.latcrit.org>.


n49 LatCrits have recognized these similarities among the various and "different" genres of outsider jurisprudence from the beginning. Valdes, Afterword--Theorizing "OutCrit" Theories, supra note 48, at 1321-22.

n50 The "OutCrit" denomination is an effort to conceptualize and operationalize the social justice analyses and struggles of varied and overlapping yet "different" subordinated groups in an interconnective way. By "OutCrit" we thus mean (at least initially) those scholars who identify and align themselves with outgroups in this country, as well as globally. Therefore, among them are the legal scholars who in recent times have launched lines of critical inquiry within legal culture, including critical legal studies. See supra note 36 and sources cited therein on outsider jurisprudence. But by "OutCrit" we mean additionally an embrace of multidimensional approaches to all antisubordination theory and praxis, including specific projects that might be focused principally on antiracist, antisexist and antihomophobic objectives. See supra note 45 and sources cited therein on multidimensionality and related concepts. We mean a personal and proactive, as well as intellectual and collective, embrace of the historic and unfinished struggles against the interlocking legacies of white, Anglo, male and straight supremacies. In the converse, we mean a principled, concurrent and actual rejection of narrow and regressive nationalisms, or essentialisms, based unidimensionally on race, ethnicity, gender, sexual orientation or other single-axis categories of affinity or identification. Fundamentally, "OutCrit" signifies a position of multidimensional struggle against the specific kinds of racist, nativist, sexist and homophobic ideologies and elites that combine to produce and perpetuate "Euroheteropatriarchy." See generally Francisco Valdes, Unpacking Hetero-Patriarchy: Tracing the Conflation on Sex, Gender and Sexual Orientation to Its Origins, 8 Yale J.L. & Hum. 161 (1996) (describing some of the sex/gender and sexual orientation norms that underlie and animate androsexism and heterosexism to produce the patriarchal form of homophobia - heteropatriarchy - that still prevails in Euroamerican societies, including the United States, today); see also Francisco Valdes, Outsider Scholars, Legal Theory and OutCrit Perspectivity: Postsubordination Vision as Jurisprudential Method, 49 DePaul L. Rev. 831 (discussing the relationship between
Euroheteropatriarchy and OutCrit theory and praxis). OutCrit positionalities, in short, is framed around the need to confront in personal, collective and coordinated ways the mutually-reinforcing tenets and effects of the sociolegal forces that currently operate both domestically and internationally under Euroheteropatriarchy.

n51 This point reflects the fifth LatCrit guidepost noted above: "LatCrit scholars must use the lessons of the past as our point of departure, acknowledging the work of scholars from various disciplines and subject positions who precede, or collaborate with, us ... LatCrit theorists must see ourselves as inheritors and collaborators within an activist and expansive community of outsider scholars ... Being constantly aware of the past and its lessons while striving to apply those lessons progressively therefore serves as the fifth inaugural guidepost" of LatCrit theory, community and praxis. Valdes, Foreword--Poised at the Cusp, supra note 16, at 55; see also supra note 35-36 and accompanying text on the LatCrit "guideposts."

n52 A successful example of these efforts is the Queer programming discussed below, infra notes 62-75, which necessarily had to overcome both the homophobia of Latina/o and other cultures as well as the marginality of "sexual orientation" in outsider scholarship generally. See, e.g., Elvia R. Arriola, Gendered Inequality: Lesbians, Gay Men, and Feminist Legal Theory, 9 Berkeley Women's L.J. 103 (1994) (questioning feminist categories around sex, gender and sexuality that marginalize lesbian/queer issues); Patricia A. Cain, Feminist Jurisprudence: Grounding the Theories, 4 Berkeley Women's L.J. 191 (1989-90) (critiquing the invisibility of minority sexual orientations in feminist analyses of law); Darren Lenard Hutchinson, Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Antiracist Politics, 47 Buff. L. Rev. 9-113 (1999) (critiquing the silence on sexual orientation within race/ethnicity discourses); Berta Hernandez-Truyol, Latina Multidimensionality and LatCrit Possibilities: Culture, Gender and Sex, 53 U. Miami L. Rev. 811 (1999)]hereinafter

Hernandez-Truyol, Latina Multidimensionality]; Iglesias, Foreword--LatCrit III, supra note 14, at 614-17 (reflecting on implications of Latina/o homophobia for liberation projects organized around either the struggle against internalized oppression or the reclamation of some insider position through self-valorization); Iglesias, Structures of Subordination, supra note 39, at 493-97 (reflecting on imperatives implicated for legal transformation by the existential crises experienced specifically by Latina lesbians and by implication all others similarly situated at the intersection of class, race, gender and sexual orientation structures of subordination); Valdes, Afterword--Theorizing "OutCrit" Theories, supra note 48, at 1280-82 (describing pervasive heteronormativity of this country and its legal institutions, from which outsider jurisprudence arose). Less successful examples include LatCrit efforts to center disability issues, indigenous people, Filipina/o communities and other marginal identities within Latina/o and outgroup settings. See infra notes 115-18 and accompanying text on these and similar efforts.


n55 See, e.g., Stephen L. Carter, Reflections of an Affirmative Action Baby (1991); Deborah C. Malamud, Affirmative Action, Diversity, and the Black Middle Class, 68 U. Colo. L. Rev. 939 (1997); Frances Lee Ansley, Classifying Race,


n57 See, e.g., Iglesias, Structures of Subordination, supra note 39 (examining how white male union power is structured around the denial of collective rights to subordinated groups within majoritarian unions and deconstructing underlying misconception that posit race-less class as more universal worker identity and therefore rightly privileged over race or gender identities in the organization of collective action)

n58 Iglesias & Valdes, Afterword--Coalitional Theory, supra note 1, at 535-45 (grounding this imperative in the ready synergies between LatCrit social justice agendas and the revolutionary vision expressed in liberation theology).

n59 This point returns us to a basic challenge: ensuring the widest possible accessibility for the works we produce. See supra notes 25-29 and accompanying text on early LatCrit efforts to ensure the dissemination of our collective work; see also infra notes 201-06 and accompanying text on upcoming projects, like the multimedia and webcasting initiatives, that similarly are designed to continue these early efforts.


n61 See supra note 30 and accompanying text on the four functions of LatCrit theory and praxis.

n62 Queering LatCrit Discourse: Confronting Latina/o Homophobia, see
LatCrit V Conference Program Outline, <http://www.latcrit.org> (copy also on file with authors).

n63 Id. at 6.


n65 E.g., Valencia, supra note 59; compare Iglesias & Valdes, Afterword--Coalitional Theory, supra note 1, at 511-61 (elaborating a critical and self-critical approach to LatCritical analysis of organized "religion" and its impact on Latina/o histories and realities).

n66 The birth and growth of outsider jurisprudence have been punctuated by various ruptures, perhaps most notably the rupture with critical legal studies that gave way to the emergence of critical race theory. For a collection of works that recount those events, see Symposium, Minority Critiques of the Critical Legal Studies Movement, 22 Harv. C.R.-C.L L. Rev. 297 (1987); see also Symposium, Critical Legal Studies, 36 Stan. L. Rev. 1 (1984) (describing and presenting critical legal studies). In turn, similarly conflicted experiences marked the critical race theory workshops that followed that early rupture. See, e.g., Stephanie L. Phillips, The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History, 53 U. Miami L. Rev. 1247 (1998) (describing the early workshops); Valdes, Afterword--Theorizing "OutCrit" Theories, supra note 48, at 1288-91 (describing the later workshops). Of course, similar dynamics also have surfaced with feminist legal theory. See, e.g., Catharine A. MacKinnon, Keeping it Real: On Anti-"Essentialism" in Crossroads, Directions and a New Critical Race Theory, supra note 23 (forthcoming 2002); Catharine A. MacKinnon, From Practice To Theory, or What Is a White Woman Anyway?, 4 Yale J.L. & Feminism 13 (1991) (responding to controversies about race and gender within feminist legal theory); Leti Volpp, Feminism Versus Multiculturalism, 101 Colum. L. Rev. 1181 (2001) (critiquing the sometimes oppositional juxtaposition of the two). As this account confirms, LatCrit conferences and discourses have not been immune to this phenomenon; see also Valdes, Afterword--Theorizing "OutCrit" Theories, supra note 48, at 1308-11 (recounting "contentious engagements" at various LatCrit conferences, including the first one).

n67 Iglesias, Foreword--LatCrit III, supra note 14, at 682.

n68 Id. at 627 (explaining how the practice of rotating centers is designed to challenge a model of multiculturalism "that continues to cast Black subordination as primarily 'a Black thing,' Hispanic subordination as 'a Hispanic thing,' Asian subordination as 'an Asian thing,' and so forth"); Id. at 625 n.111 (explaining difference between the model of rotating centers and the organization of essentialist subgroups or "caucuses" within a broader collectivity).

n69 Id. at 626-7 (reflecting on the way commitment to anti-subordination across difference positions "the anti-essentialist critique beyond rather than, as often is charged, at the center of the political fragmentation and Balkanization that threatens to sunder every universal into a proliferation of atomized and ineffectual particularities").

n70 See supra notes 62-67 and infra notes 72-74 and accompanying text on the "Queer" example and how LatCris have tried to engage the issues generated by this axis of difference programmatically over a three-year period.
n71 Iglesias, Foreword--LatCrit III, supra note 14, at 625 (explaining how the practice of rotating centers seeks precisely to center the particularity of one group's subordination as a matter of universal concern for the entire community, rather than a separate concern of those particularly burdened); Id. at 678 (reflecting on the way the practice of rotating centers implies a profound normative and political challenge not just to eliminate oppression, but also to give up privilege as a result of one's solidarity with others oppressed by systems that may in fact privilege some of us in any given context).

n72 Id. at 576 n.3.

n73 Plenary Panel One at LatCrit III was titled "Between/Beyond Colors: Outsiders Within Latina/o Communities" and included presentations focused on Latina/o religious diversities while Patricia Fernandez-Kelly delivered a keynote address on "Santeria in Hialeah: Religion as Cultural Resistance" that explored the sociology of non-Western religious beliefs and practices in the working-class and predominantly Cuban city of Hialeah, Florida. See LatCrit III Final Program at 2, at Conference Materials and Articles <http://www.latcrit.org> (copy also on file with authors); Hernandez-Truyol, Latina Multidimensionality, supra note 53, at 81824.

n74 The LatCrit IV program opened with a religious ceremony based on pre-Columbian rites of the Aztec people, and featured a concurrent panel on "Religion, Gender and Sexuality: Conscience in LatCrit Theory" that produced various essays on religion and LatCrit theory. See LatCrit IV Program Schedule at 5, <www.latcrit.org> (copy also on file with authors). The Symposium similarly includes essays devoted to this topic. See Guadalupe Luna, Gold, Souls and Wandering Clerics: California Missions, Native Californians and LatCrit Theory, 33 U.C. Davis L. Rev. 921 (2000); Laura Padilla, Latinas and Religion: Subordination or State of Grace?, 33 U.C. Davis L. Rev. 973 (2000); Terry Rey, "The Virgin's Slip is Full of Fireflies": The Multiform Struggle Over the Virgin Mary's


n76 By "legalistic" we mean a society highly regimented by legal institutions and processes, in which the mediation of social conflict is purportedly grounded in "the rule of law" and "equal justice under law." Without doubt, in this sense, this society is highly legalistic. See generally Mary Ann Glendon, A Nation Under Lawyers (1994) (discussing this country's longstanding legalistic culture).


n78 Iglesias, Foreword--LatCrit III supra note 14, at 57980 (discussing the LatCrit project as a microcosm of the struggles confronting global society).

n79 For additional elaboration of these points, see Francisco Valdes, Insisting on Critical Theory in Legal Education: Making Do While Making Waves, 12 La Raza L.J. (2001) 137-148 (noting that "outsiders wage hand-to-hand combat" daily to promote anti-subordination principles both within and beyond the legal academy) [hereinafter Valdes, Making Waves]; see also, Charles R. Lawrence III, Essay, Two Views Of The River: A Critique Of The Liberal Defense Of Affirmative Action, 101 Colum. L. Rev. 928, n.116 (2001) (quoting Historian Roger Wilkin's response to the question why the children of middle-class blacks like himself should benefit from affirmative action: "Because fighting racism in white institutions is hand to hand combat. If my daughter is among the besttrained and most committed freedom fighters, we must have her here with us. We need every warrior we can muster.") [hereinafter Lawrence, Two Views Of The River].

n80 Iglesias, Global Markets, Racial Spaces, supra note 6, at 1072-73 (reflecting on the significance of legal knowledge, theory, doctrine and institutions as crucial sites of contestation in the project of social transformation).

n81 See supra note 30-36 and accompanying text on the four functions and seven guideposts of LatCrit theory.


n83 LatCrit scholars from the very beginning have grappled with racial, ethnic and other forms of diversity both within and beyond Latina/o communities. See, e.g. infra notes 85-87 and sources cited therein on race and ethnicity in LatCrit theory and outsider jurisprudence. This commitment to diversity and inclusion is embodied in LatCrits' embrace of anti-essentialism and is reflected in the symposium based on the First Annual LatCrit Conference, which presents clusters or panels of essays authored by a richly diverse group of scholars that are organized around themes such as: "Latina/o Identity and Pan-Ethnicity: Toward LatCrit Subjectivities" and "Races, Nationalities and Ethnicities: Mapping LatCrit (Dis)Continuities" and "Multiplicities and Intersectionalities: Exploring LatCrit Diversities." For the papers of the LatCrit I conference, see Symposium, LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship, 2 Harv. Latino L. Rev. 1 (1997). Programmatically, this commitment is practiced through our efforts to center marginalized issues in LatCrit projects in streams and rotations of conference and related events. See infra notes 113-14 and accompanying text on these points and the conference planning practices associated with them. Indeed, as we have emphasized during the past five years, both intra-Latina/o and inter-group diversities must be engaged critically and self-critically in order for multidimensional analysis to mean anything substantively. See, e.g., Iglesias & Valdes, Expanding Directions, supra note 42, at 214-17; 798-803.
n84 Iglesias & Valdes, Expanding Directions, supra note 42, at 211, 795.

n85 See, e.g., Luz Guerra, LatCrit y La Des-Colonizacion Nuestra: Taking Colon Out, 19 UCLA Chicano-Latino L. Rev. 339 (1998). This point, of course, is precisely what has been elucidated programmatically via the "blackness" stream of programming that we discuss below. See infra notes 91-98 and accompanying text on race and blackness in LatCrit conference programs. For demographic portraits of Latina/o heterogeneity, see Hernandez-Truyol, Building Bridges, supra note 45; Gerald P. Lopez, Learning About Latinos, 19 UCLA Chicano-Latino L. Rev. 363 (1998); Juan F. Perea, Los Olvidados, 70 NYU L. Rev. 965 (1995); Gloria Sandrino-Glasser, Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity, 19 UCLA Chicano-Latino L. Rev. 69, 75-77 (1998).


n88 See supra notes 62-67 and 72-76 and accompanying text on the sexual orientation stream of programming; see also, e.g., Robert S. Chang, Racial Cross-Dressing, 2 Harv. Latino L. Rev. 423 (1997) (observing how the author, "Asian American" also "could be" Latino); Culp., Latinos, Blacks, Others, supra note 24 (situating LatCrit in the landscape of nonwhite outsider jurisprudence); Cheryl Little, Inter-group Coalitions and Immigration Politics: The Haitian Experience in Florida, 53 U. Miami L. Rev. 717 (1999); Guadalupe Luna, On the

n89 See supra notes 64 and 74 and sources cited therein on religion, gender and sexuality in LatCrit theory.

n90 For example, LatCrit IV featured a follow-up plenary panel titled, "The Meanings and Particularities of Blackness: Latina/o Identities and LatCrit Theory" while undertaking another rotation designed to center mestiza/o identity and indigenous peoples in LatCrit discourse through the organization of Plenary Panel Two, titled "Mestizaje, Identity and the Power of Law in Historical Context" that engaged racializing structures in different national/regional settings, ranging from the Philippines to Puerto Rico. This new rotation was continued this year as well, via Plenary Panel Five at LatCrit V, titled "Post/NeoColonialisms in LatCrit Theory: Continuing the Dialog." At the same time, both workshops at LatCrit IV were similarly designed to continue the original streams of race-focused programs. The first, titled "Mestizaje and Contemporary Latina/o Identities: Current Problems in Denying, Reclaiming and Overclaiming Mestiz/a/o Identity," complemented that year's Plenary Panel Two, and the second, titled "Engaging Affirmative Action Struggles: A Strategic Planning Session," focused on policymaking praxis in the United States. See LatCrit IV: Substantive Program Outline, Conference Materials and Articles <http://www.latcrit.org> (copy also on file with authors). This stream of race-related programming continued this year, with Plenary Panel One of the LatCrit V program devoted to 'Comparative Racializations: Constructing Inter-group AntiRacist Frameworks" and Plenary Panel Four focused on "Colorado Local Issues: Histories of Racism, Classism and Heterosexism." Two other program events were centered on race this year. The first, a concurrent panel, was titled "The Development of Puerto Rico Citizenship: Construction of Racial Identities" and the second, a workshop, was titled "Documenting Racial Histories and Realities: Techniques in Pedagogy and Scholarship." See LatCrit V: Program Schedule Conference Materials and Articles <www.latcrit.org> (copy also on file with authors); see also supra note 86 and sources cited therein on "race" and "ethnicity" in LatCrit theory.


For reflections on the significance of Asian Pacific American Critical Legal Scholarship to the LatCrit Project, see Iglesias, Foreword--Transatlantic Dialogue, supra note 5, at 25-28; Iglesias, Out of the Shadow, supra note 6 (mapping out common context of struggle for Latinas/os and Asian Pacific Americans around three points of reference: (1) the centrality of international relations and transnational identities; (2) national security ideology; and (3) the structure of the inter/national political economy, with reflections on relevance of this critical project to the imperatives of anti-essentialist coalitional solidarity with Black peoples both within and beyond the United States); see also Robert S. Chang & Keith Aoki, Centering the Immigrant in the Inter/National Imagination, 85 Cal. L. Rev. 1395 (1997); 10 La Raza L.J. 309 (1998) (presenting issues of common concern to Latinas/os and Asian Americans, including inter-group relations).

n93 Iglesias, Foreword--LatCrit III, supra note 14, at 62325; see generally Leslie Espinoza & Angela P. Harris, Afterword--Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race, 85 Cal. L. Rev. 1510 (1997); 10 La Raza L.J. 499 (1998) (discussing LatCrit efforts to grapple with race in antiessentialist, anti-subordinationist inter-group terms).

n94 For more detailed descriptions of the race-related "stream" of conference programming, see supra note 90 and sources cited therein; see also supra note 86 and sources cited therein on "race" and "ethnicity" in LatCrit theory.

n95 Iglesias & Valdes, Afterword--Coalitional Theory, supra note 1, at 562-63 (describing the deconstructive process).

n96 See Mutua, supra note 82, at 1189-90 (critiquing the "Black-White paradigm" formulation and its use in LatCrit texts, and suggesting alternatives and reasons for them).

n97 Valdes, Afterword--Theorizing "OutCrit" Theories, supra note 48, at 1312-13, n.149 (describing the collective analytical process).

n98 Iglesias, Foreword--LatCrit III, supra note 14, at 626 (recognizing this imperative but also underscoring centrality of LatCrit community building as framework for such engagements given understanding that "only members of a community committed to fostering an inclusive and collaborative anti-subordination project for the long haul can afford to decenter their own compelling problems to focus, instead, on the problem's confronting people other than themselves.") (italics in original)

n99 See supra notes 64 and 66 and sources cited therein on conference-related "blow-ups" in LatCrit settings and in other outsider venues.

n100 See supra notes 7, 9, 54 and sources cited therein for examples from this year's symposium.

n102 See, e.g., Jose E. Alvarez, North American Free Trade Agreement's Chapter Eleven, 28 U. Miami Inter-Am. L. Rev. 303 (1996-97) (discussing and urging RaceCrit-LatCrit analysis of internationally law generally, and of the North American Free Trade Agreement specifically); Celina Romany, Claiming a Global Identity: Latina/o Critical Scholarship and International Human Rights, 28 U. Miami Inter-Am. L. Rev. 215 (1996-97) (calling on LatCrits to build on international human rights accords as well as to recognize their limitations); Natsu Taylor Saito, Beyond Civil Rights: Considering "Third Generation" International Human Rights Law in the United States, 28 U. Miami Inter-Am. L. Rev. 387 (1996-97) (explaining how the domestic civil rights paradigm neglects second generation social, economic and cultural rights and third generation group rights recognized in international human rights discourse); Berta Esperanza Hernandez-Truyol, Building Bridges: Bringing International Human Rights Home, 9 La Raza L.J. 69 (1996) (illustrating how incorporation of human rights can expand parameters of domestic civil rights paradigm); Iglesias, Foreword--Human Rights and LatCrit Theory, supra note 60, at 179-82 (noting how the fragmentation of domestic and international law in American legal consciousness and discourse undermines possibilities for collaboration between domestic civil rights and international human rights advocates and suppresses emergence of transnational solidarity networks so crucial in an era of increasing globalization); Iglesias, Out of the Shadow, supra note 6, at 362 (criticizing domestic myopia of U.S. civil rights paradigm in favor of a broader more inclusive framework focusing on the centrality of international law and relations, national security ideology and political economy in the production of racial subordination both within and beyond the United States); Iglesias, Global Markets, Racial Spaces, supra note 6, at 1041-43 (developing theory of "institutional class structures" as framework for examining the way structures of power and powerlessness are legally organized through both domestic and international regimes and illustrating theory through analysis of two legal regimes - one domestic and the other international); Enid Trucios-Haynes, LatCrit Theory and International Civil and Political Rights: The Role of Transnational Identity and Migration, 28 U. Miami Inter-Am. L. Rev. 293 (1996-97) (reflecting on transnational identities and the need for more collaboration between domestic civil rights movement and international human rights movement).


n104 For instance, the LatCrit III program featured presentations and events focused on internationalist frameworks, including Latin America and the Caribbean. To review the LatCrit III program, visit <www.latcrit.org>. These events in turn produced various essays for that symposium, including: Griffith, Drugs and Democracy, supra note 101; Sharon K. Hom, Lexicon Dreams and Chinese Rock and Roll: Thoughts on Culture, Language, Translation as Strategies of Resistance and Reconstruction, 53 U. Miami L. Rev. 1003 (1999); Martinez, Property, supra note 101; Mertus, Mapping Civil Society Transplants, supra note 101; Roman, Reconstructing Self-Determination, supra note 101. To follow up on these events and essays at both LatCrit IV and V, those programs featured events to connect LatCrit theorists to the "NAIL/TWAIL" networks - the "New Approaches in International Law" and the "Third World Approaches to International Law" networks of scholars. For explanation of the vision underlying this programmatic outreach effort, see Iglesias, Out of the Shadow, supra note 6 at, 372, n.65 (noting lack of cross fertilization between NAIL/TWAIL and CRT scholars, and how the centrality of the international in LatCrit theory should open the way to this cross fertilization). For related efforts to develop

n105 See infra notes 163-74 and accompanying text on the Spain colloquia devoted to LatCrit theory and international and comparative law.


n107 See supra notes 35-36 and accompanying text on LatCrit guideposts and functions based on early exchanges and texts.

n108 See supra notes 23-52 and accompanying text on conference programs and planning.

n109 Firm commitments of institutional sponsorship have been obtained from the University of Florida, Fredric Levin College of Law (LatCrit VI), the University of Oregon School of Law (LatCrit VII) and Cleveland Marshall School of Law (LatCrit VIII). Active negotiations are currently underway through LatCrit X.

n110 Iglesias, Foreword--LatCrit III, supra note 14, at 663 (reflecting on the practices of mutual recognition and their importance, not only for community building, but also for producing new knowledge and ensuring its broader dissemination). Community building and coalition-building have been central to LatCrit during these five years. See supra note 16 and accompanying text on LatCrit's guideposts and functions; see also Valdes, Afterword--Theorizing "OutCrit" Theories, supra note 48, at 12991305 (describing the community-building elements of the conferences).

n111 See generally Julius Getman, In The Company Of Scholars: The Struggle For The Soul Of Higher Education (1992) (showing members of the legal academy
preoccupied with prestigious titles and trappings).

n112 Iglesias, Foreword--LatCrit III, supra note 14, at 65557 (reflecting on the "costs and benefits" confronting minority scholars when deciding how to construct their professional identities).

n113 See supra notes 67-71 and 82-105 and accompanying text on rotating centers in LatCrit theory.

n114 See supra notes 62-75 and 82-101 and accompanying text on conference dynamics and their management.

n115 While efforts to engage native and indigenous communities date back to the very first conference, it was not until LatCrit III that a "stream" of programming began with a concurrent panel on "Race, Nation and Identity: Indigenous Peoples and LatCrit Theory." At LatCrit IV, a combination of a plenary panel and a workshop were presented on Latina/o mestizaje and indigenous populations, see supra note 90 on these events, as well as a concurrent panel on "Native Cultures, Comparative Values, and Critical Intersections." This stream continued this year with Plenary Panel Five, titled "Post/NeoColonialisms in LatCrit Theory: Continuing the Dialogue." To review the programs of the LatCrit conferences, see <www.latcrit.org> (copies also on file with authors). For further readings on LatCrit efforts to grapple with indigenous concerns, see Guerra, supra note 85; Siegfried Weissner, Esa India! LatCrit Theory and the Place of Indigenous Peoples Within Latina/o Communities, 53 U. Miami L. Rev. 831 (1999). For reflections on the significance of indigenous peoples and identities to the LatCrit project, see Iglesias, Foreword--LatCrit III, supra note 14, at 617-22.

n116 While Asian-Latina/o relationships have received extended attention, see supra note 92 and sources cited therein, programmatic events focused on Filipina/o populations and issues have been difficult to sustain: while presentations at times have centered Filipina/o concerns or scholars, conference planners have been unable to sustain a stream of program events to cultivate in stages our collective awareness of the Filipina/o condition. See generally On Becoming Filipino: Selected Writings of Carlos Bulosan (E. San Juan, Jr. ed., 1995) (presenting a series of writings that link current realities to neo/colonial histories). Perhaps the most notable LatCrit program events focused on Filipina/o issues took place last year, when LatCrit IV featured several Filipina/o-oriented events, including the keynote address by Filipino scholar Oscar V. Campomanes. For a description of the themes of the plenaries at LatCrit IV, see LatCrit IV: Substantive Program Outline <http://www.latcrit.org>; see also Victor C. Romero, "Aren't You Latino?": Building Bridges Upon Common Misperceptions, 33 U.C. Davis L. Rev. 837 (2000) (situating Filipina/os in LatCrit theory); Leti Volpp, American Mestizo: Filipinos and Antimiscegenation Laws in California, 33 U.C. Davis L. rev. 795 (2000) (recounting and analyzing the racial history of Filipina/os in the U.S., and in the context of LatCrit theory and Latina/o identities); see generally supra notes 113-14 on LatCrit programming efforts and streams.

n117 From time to time, presentations have focused on disability issues, but no stream is in place.

n118 Prior and ongoing efforts have focused on the NAIL/TWAIL networks, see supra note 104, and on Chicana/o scholars, as reflected in this year's concurrent panel on "Chicana/o Studies and LatCrit Theory: Exploring Intersections." See LatCrit V: Final Program Schedule, <www.latcrit.org> (copy also on file with authors). For further reading on the LatCrit relationship to Chicana/o studies and scholars, see Johnson & Martinez, supra note 1; Montoya, supra note 1. For reflections on these accounts, see Iglesias, Foreword--LatCrit III, supra note 14, at 673-76, 679-82.

n119 We use the term "human resources" throughout this Afterword to draw attention to an oft-forgotten fact that in the absence of capital, status or other forms of power through which collective action is ordinarily coordinated in this society, all we have is the good will we confer upon
each other, the time and energy we voluntarily expend to make our collaborations a collective success, and the sense of solidarity and genuine inquiry that make this all possible. All of these are, however, real and immeasurably valuable resources that we simultaneously share and newly create through our collective involvement in each other's issues, projects and texts, as well as through our sustained commitment to the success of our collaborations over time.

n120 See infra notes 157-62 and accompanying text on LatCrit's incorporation.

n121 For instance, next year's conference theme, for LatCrit VI, is "LatCrit Theory in North-South Frameworks"; see also infra notes 170-74 and accompanying text on hemispheric studies and LatCrit theory.

n122 See infra notes 163-69 and accompanying text on trans-Atlantic studies within LatCrit theory.

n123 See infra notes 163-76 and accompanying text on "triangulation" within LatCrit theory.

n124 The effort to build "networks" of course is ongoing, and works in tandem with community-building and coalition-building imperatives. See supra notes 14-18 and accompanying text on networks, communities and coalitions as key to the work of the past five years. The key point here is that building networks is also central to the production of genuinely new knowledge.

n125 See infra notes 157-62 and accompanying text on the incorporation of LatCrit, Inc.

n126 Pursuant to the Board of Directors' Resolution, the Planning Committee for LatCrit VI will be co-chaired by Professors Berta Hernandez-Truyol and Roberto Corrada; the Planning Committee for LatCrit VII will be co-chaired by Professors Steven Bender and Hernandez-Truyol; and the Planning Committee for LatCrit VII will be co-chaired by Professors Tayyab Mahmud and Steven Bender. This structure of overlapping co-chairs reflects a selfconscious effort to enable new leadership to emerge, even as we create institutional memory through the on-going participation of prior co-chairs.

n127 Copies of the Transition Memo from LatCrit IV to V are on file with the authors.

n128 For an overview of existing arrangements, see the "LatCrit Organizational Chart" presented in the Appendix to this Afterword.

n129 See infra notes 131-44 and accompanying text on LatCrit conferences as an effort to reshape the norms and dynamics of scholarly production in the legal academy of the United States.

n130 See supra note 119 on "human resources" and LatCrit theory.

n131 Without endorsing the anti-intellectual and exclusionary animus that oftentimes underpins attacks on legal scholarship, particularly non-mainstream and minority scholarship that introduces interdisciplinary and theoretical perspectives to the critical analysis of legal doctrine, institutions and process, see e.g., Derrick Bell & Erin Edmonds, Students as Teacher, Teachers as Learners, 91 Mich. L. Rev. 2025, 2031-38 (1993) (defending need for "nontraditional" legal scholarship including interdisciplinary, critical race, feminist, and critical legal studies as it provides a vehicle to influence the legal system and obtain justice for minorities and women) responding to Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34 (1992) (attacking "non-traditional" legal scholarship as being impractical and leading to the demise of proper training for lawyers), it nevertheless is true that the "traditional" production of legal scholarship is deeply embedded in and corrupted by the hierarchies (both among students and faculty) that are organized around the publication of law reviews. See, e.g., Kenneth Lasson, Scholarship Amok: Excesses in the Pursuit of Truth and Tenure, 103 Harv. L. Rev. 926, 948-9 (1990) (noting that oftentimes "image" is as important as "substance" in the assessment of individual professional status and the relationship between perceived status and fancy placements in
Ivy League law reviews); see also David P. Bryden, Scholarship About Scholarship, 63 U. Colo. L. Rev. 641, 643-44 (1992) (noting that "academic prestige derives almost entirely from one's reputation as a scholar, and the scholarly reputation of one's faculty. To enhance this reputation, it is important above all to be prolific, and preferably to write about topics that are discussed in class by scholar-readers"); see generally William R. Slomanson, Legal Scholarship Blueprint, 50 J. L. Educ. 431 (2000) (describing generally prevailing conventional practices). Thus, the production of anti-subordination scholarship depends on our ability to resist attacks on the theoretical nature of critical scholarship, as well as the many temptations to buy into the professional hierarchies that currently dominate the production and reception of legal texts.

n132 While any consensus is as fragile as the community through which it is articulated, in our view, the last five years of LatCrit discourse and praxis have established some well-settled understandings about the nature of the LatCrit project, most specifically its commitment to: (1) anti-essentialism and antiusubordination as critical method and normative imperative; (2) the pursuit of inter-and intra-group justice through multidimensional analysis and solidarity among people of color and anti-racist outsiders; and (3) the transformation of the legal academy (and civil society in general) through mutual engagement and collaborative selfempowerment. As LatCrit turns five, there can be no doubt that it would long ago have perished had it not been nurtured and guided by the many individuals who have shared these commitments. See supra notes 35-36 and accompanying text on the guideposts and functions that have helped shape our collective work thus far.

n133 Because every LatCrit conference thus far has "pushed the envelope" by centering new identities, controversies and problems, each conference has produced an abundance of issues on which to disagree, including but not limited to: (1) the relevance of "race" versus "ethnicity" to multiply diverse and transnational Latina/o communities and diasporas; (2) the relationship of Latinas/os to Asian Americans, and of both to the "white over black" traditions of the United States; (3) the relationship of Latina/o mestizaje or racial intermixture to indigenous identity and contemporary native communities; (4) the relevance of categories other than race in the struggle against white supremacy; (5) the significance of religion, spirituality and related identities to multiply diverse Latinas/os throughout the Americas and globe; (6) the relevance of Third World law reform and liberation struggles to LatCrit theory and the terms of those engagements and, most recently; (7) the significance of identity to class and of class to identity, especially in this era of corporatist globalization. To review the conference programs, see <www.latcrit.org>; to review the symposia, see supra notes 25-27 and sources cited therein.

n134 The events lived at LatCrit conferences over the last five years have sparked many new insights that in turn have had programmatic and interpersonal significance. Over the last five years, LatCrit scholars have pressed the boundaries of domestic civil rights ideology by insisting on a critical analysis of language rights, immigration rights, national security ideology, political economy and international law; they have opened new avenues of inquiry into the significance of religion and religious identity, the histories and lived experiences of Afro-Latinas/os both within and beyond the United States, the domestic and international dimensions of the digital divide, and the relationship between Indigenous struggles for sovereignty and Chicana/o identities; they also have excavated the otherwise suppressed histories of U.S. colonialism and its manifestations in law. Cumulatively, these and other efforts have revealed the exponential growth enabled by the programmatic experiments we describe here.

n135 Iglesias, Foreword--LatCrit III, supra note 14, at 656; see generally Getman, supra note 106; Duncan Kennedy, Legal Education and the Reproduction of Hierarchy (1983).
The significance of minority presence in the legal academy must be read against the background history of the legal profession in which the organization and the formalization of legal education were shaped in explicit ways by the social, cultural and political dominance of white, Anglo-American nativist-racism as well as societal sexism. See, e.g., Daria Roithmayr, Deconstructing the Distinction Between Bias and Merit, 85 Cal. L. Rev. 1449, 1475-92 (1995) (recounting how the American Bar Association, the Bar Examination, the Law School Aptitude Test and other "gatekeeping" mechanisms were originated and calculated to be racist, anti-immigrant, sexist and anti-Semitic); William C. Kidder, The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity, Tex. J. Women & L. 167 (2000); see also Robert Stevens, Law School: Legal Education in America From the 1850s to the 1980s (1983); see generally Nicholas Lemann, The Secret History of the American Meritocracy (1999). The conflicted repercussions of those racist-native-saxist motives continue to be embedded in the norms, practices and consequences of legal education today. See, e.g., Lawrence, Two Views of the River supra note 79; Susan Sturm & Lani Guinier, The Future of Affirmative Action: Reclaiming the Innovative Ideal, 84 Cal. L. Rev. 953 (1996); see also infra note 180 and sources cited therein on the isolation and hostility still encountered by people of color and women in legal education.

See supra note 77 and sources cited therein on cultural warfare, backlash politics and legal retrenchment; see also infra note 143 and sources cited therein on the smear campaign directed at Critical Race Theory.

See supra note 119 on "human resources" and LatCrit theory.

See, e.g., supra note 109 on recent and upcoming sponsorships.

See generally John A. Miller, The Modern Law Dean, 50 J.L. Educ. 398 (2000) (describing recent trends in law deanships that increasingly emphasize money-making activities at the expense of other values, including diversifying the legal professions); see also supra note 137 and infra note 180 and sources cited therein on the historic exclusion and contemporary marginalization of outsiders in legal education. In this vein, the LatCrit community owes a debt of gratitude to the numerous law school Deans whose generous support over the years has enabled the growth of this new discourse and community, including Sam Thompson (the 1995 Colloquium in Puerto Rico and the 1996 International and Comparative Law Colloquium in Miami), Michael Dessent (LatCrit I in 1996), Barbara Aldave (LatCrit II in 1997), Sam Thompson (LatCrit III in 1998), Rex Perschbacher (LatCrit IV in 1999); Nell Newton (LatCrit V in 2000), Jon Mills (LatCrit VI in 2001), Rennard Strickland (LatCrit VII in 2002), Steven Steinglass (LatCrit VIII in 2003) and Dennis Lynch, who to this date continues to support the LatCrit project by honoring established commitments to the Center for Hispanic and Caribbean Legal Studies at the University of Miami School of Law, which cosponsors the Annual Conferences and supports other LatCrit events or projects. Deans at other schools also have lent support to co-sponsor LatCrit events, including the Deans of: California Western School of Law, Loyola--L.A. Law School, University of San Diego School of Law, Santa Clara University School of Law, Seattle University School of Law, Stanford University School of Law, University of Southern California Law School, Southwestern University School of Law, University of California at Berkeley--Boalt Hall School of Law, University of California at Davis School of Law, University of California at Los Angeles School of Law, and Willamette University College of Law. The LatCrit community is grateful to these Deans and insitutions for their support in key moments.

See infra notes 157-62 and accompanying text recounting the transition from LatCrit to LatCrit, Inc.
An apt, and close-to-home, example is the smear campaign mounted against Critical Race Theory by white, mainstream commentators. These attacks have gone so far (afield) as to connect anti-subordination legal theory, including CRT, with anti-Semitism. See Daniel A. Farber & Suzanna Sherry, Is the Radical Critique of Merit Anti-Semitic, 83 Cal. L. Rev. 853 (1995). More recently, these attacks have extended into the popular media, outlandishly imputing to CRT the spectacle (and verdict) of the Simpson murder trial. See, e.g., Jeffrey Rosen, The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law and the Triumph of Color in America, New Republic, Dec. 9, 1996, at 27. For a very recent analysis of this campaign to delegitimate CRT specifically and nonwhite outsider jurisprudence more generally, see Jerome McCristal Culp, Jr., To the Bone: Race and White Privilege, 83 Minn. L. Rev. 1637 (1999). Reflecting these fault lines, similar dynamics have arisen among scholars of color. See, e.g., Randall L. Kennedy, Racial Critiques of Legal Academia, 102 Harv. L. Rev. 1745 (1989). For rejoinders, see Colloquy, Responses to Randall Kennedy's Racial Critiques of Legal Academia, 103 Harv. L. Rev. 1844 (1990); see also Jerome McCristal Culp, Jr., Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy, 77 Va. L. Rev. 539 (1991); Alex M. Johnson, Jr., Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship, 79 Iowa L. Rev. 803 (1994).

See generally Cho & Westley, supra note 23 (discussing the importance of demographic changes in the legal academy of the United States, and the increase in students and faculty of color as elemental to the emergence of a nonwhite outsider jurisprudence during the 1980s).

See supra notes 23-47 and accompanying text on LatCrit programs and planning.

See, e.g., Valdes, Afterword--Theorizing "OutCrit" Theories, supra note 48, at 1299-1311 (describing the first three years).

This point is perhaps most extensively treated in the Transition Memo from LatCrit IV to V (copy on file with authors).

For a listing, see the "List of Publications" presented in the Appendix to the Afterword.

To review past conferences and events, visit <www.latcrit.org>.

See infra notes 157-62 and accompanying text on the LatCrit incorporation process.

See generally Transition Memo, LatCrit IV to V (copy on file with authors).

See supra notes 37-47 and accompanying text on these commitments in LatCrit theory and praxis.

The need for all LatCrit scholars, including newcomers, to engage the collective written record is discussed more fully in Kevin R. Johnson, Foreword--Celebrating LatCrit Theory: What Do We Do When the Music Stops?, 33 U.C. Davis L. Rev. 753 (2000). For a fuller discussion of more recent LatCrit projects, see infra Part III (describing LatCrit initiatives beyond the Annual Conferences that, like them, are open to newcomers).

Each year, conference planners seek to advance LatCrit discourse through the introduction of new participants, perspectives, identities, controversies and problematics. The success of these efforts depends mightily on the extent to which understandings reached through prior encounters and reflected in published symposia inform the debate. While veteran LatCrits must remain sensitive to the gaps of information and experience any newcomer necessarily confronts at the beginning, newcomers also need to familiarize themselves with the theoretical and political advances that already have been made (or attempted and the reasons for their failures) so that the annual conferences can continue to foster new learning and to nurture new solidarities.

Copies of the LatCrit Primer and the LatCrit brochure and flyer are on file with the authors.
n156 See supra notes 35-36 and accompanying text on LatCrit guideposts and functions.

n157 See supra notes 62-75 and 82-101 and accompanying text on conference controversies and their management.

n158 Held at the Stanford Sierra Conference Center near Lake Tahoe in May 1999, LatCrit IV was organized by a planning committee that included Rudy V. Busto, Robert Chang, Roberto Corrada, David Cruz, Laura Gomez, Elizabeth Iglesias, Guadalupe Luna, Pedro Malavet, Estevan Rael y Galvez, Dorothy Roberts and Francisco Valdes.

n159 Because the conference programs are employed to highlight selected local issues, the geographic rotation westward was designed to facilitate programming focused on Native Americans and Filipinas/os. For more on these efforts, see supra notes 31-32, 90 and 115-116. This type of physical or geographic rotation, as we note above, also is designed to promote the seventh LatCrit guidepost: balancing specificity and generality as a way of discerning interlocking patterns of subordination. See supra notes 35-36 and accompanying text on the LatCrit guideposts.

n160 This point bears emphasis. Participation in LatCrit planning and institution-building initiatives, as in the annual conferences, is always open to all. Newcomers have many readily available venues and opportunities through which to become involved: by responding to the call for papers, newcomers can be slotted in the plenary and concurrent panels, or present their works-in-progress to receive careful readings and commentary from other LatCrit scholars; by participating in the post-conference planning sessions, newcomers can become directly involved in planning future annual conferences; and by attending the Annual LatCrit Retreats, newcomers can participate in any of the many other LatCrit initiatives beyond the annual conferences that are currently underway.

n161 See supra note 119 on the meaning and significance of "human resources" in the LatCrit project.

n162 These efforts are ongoing, but already have yielded several "special projects" outlined in the following section of this Afterword.

n163 To review the program materials for these two colloquia, visit <www.latcrit.org>.

n164 See supra note 102 and accompanying text on LatCrit rejection of the domestic/foreign dichotomy.


n166 See supra notes 37 and 38 and sources cited therein on "Latina/o" classifications and their problems.

n167 The proceedings of these colloquia appear in Colloquium, Spain, the Americas and Latino/as: International and Comparative Law in Triangular Perspective, 9 U. Miami Int'l & Comp. L. Rev. (2000); the program materials are posted at <www.latcrit.org>.

n168 By "postcolonial neoliberalism" and "corporate globalization" we mean the inter/national economic policies and global political economy that impose "free" markets on diverse societies for the benefit of corporate profits, oftentimes subjugating humans to exploitation and poverty, based on colonial and neocolonial histories and legacies. See generally Paul Hirst & Grahame Thompson, Globalization in Question: The International Economy and the Possibilities of Governance (1996); Development Studies: A Reader (Stuart Corbridge ed., 1996). The United States government has created a "special envoy to the Americas" whose principal task, according to the current envoy, is to ensure "economic integration of the hemisphere" under neoliberal dictates. See Don Bohning, MacKay on "Learning Curve" as
Clinton's Envoy to Americas, Miami Herald, June 3, 1999, at 14A. The accelerating drive to impose neoliberal economies worldwide through international instruments of coercion, oftentimes at the expense of humans, provoked bloody street protests during the most recent meeting of the World Trade Organization (WTO), held in Seattle, USA, as the millennium drew to a close. See, e.g., Kenneth Klee, The Siege of Seattle, Newsweek, Dec. 13, 1999, at 30. This year, therefore, the conference program delved into these issues as part of continuing programmatic "streams" to internationalize LatCrit theorizing and praxis. See supra notes 104-06 and accompanying text on the WTO workshop at LatCrit V and related program events. Of course, Spain's colonial record and its continuing repercussions throughout the Americas has been well documented, especially in more recent years. See generally Richard Drinnon, Facing West: The Metaphysic of Indian-Hating and Empire-Building (1990) (focusing on indigenous populations); Lyle H. McAlister, Spain and Portugal in the New World, 1492-1700 (1984) (providing a general account of Iberian colonialism's rise and zenith); David J. Weber, The Spanish Frontier in North America (1992) (focusing specifically on Spain's imperial efforts in what today is known as North America); For personal and contemporaneous accounts of Spain's imperial expeditions, see Bernal Diaz, The Conquest of New Spain (J.M. Cohen trans. 1963) (providing an eyewitness account of the conquest and its politics) and Bartolome De Las Casas, The Devastation of the Indies: A Brief Account (Herma Briffault trans., 1974) (providing another first-hand, and critical, account). The subjugation of indigenous and related communities in North America under the Anglocentric rule of the United States is of course well documented too. See, e.g., Race and Races 173-245 (Juan F. Perea, Richard Delgado, Angela P. Harris & Stephanie Wildman eds., 2000) (providing an excellent, concise overview); see also Charles F. Wilkinson, American Indians, Time, and the Law (1987); Readings in American Indian Law: Recalling the Rhythm of Revival (Jo Carillo ed., 1998); see also supra note 37 and sources cited therein on the imperialistic policies and actions of the United States in Central and South Americas.

n169 Valdes, Hispanismo, supra note 165, at 324-28 (discussing Hispanismo as a form of identity ideology).

n170 For an excellent collection of essays on Latina/o-Latin American relations, see Borderless Borders: U.S. Latinos, Latin Americans, and the Paradox of Interdependence (Frank Bonilla, Edwin Melendez, Rebecca Morales & Maria de los Angeles Torres eds., 1998).

n171 The long-standing LatCrit commitment to interdisciplinary analysis and discourse is evident in the programs and symposia of the past five years, all of which include participation by scholars from disciplines other than law. See supra notes 25-27 and sources cited therein on the LatCrit symposia, and visit <www.latcrit.org> for the LatCrit programs of the conferences and colloquia.

n172 See supra notes 103-05 and accompanying text on the planning and presentation of this colloquium.

n173 See infra notes 192-94 and accompanying text on the series of rotating colloquia presently being planned.


n175 For more information on the LatCrit VI program and conference, visit <www.latcrit.org>.

n176 See supra notes 104 and 118 on the NAIL/TWAIL programs and similar events.

n177 For LatCrit reflections on the situation confronting politically conscious students of color in the legal academy, see Bender, Silencing Culture and Culturing Silence, supra note 15; Iglesias, Foreword-LatCrit III, supra note 14, at 607-08; Montoya, Silence and Silencing, supra note 15; Roberts, The Paradox of Silence, supra note 15.

n178 This concurrent panel, titled "LatCrit Theory: The Field of Education," featured
several graduate students from UCLA, including Jolynn Asato, Nadine Bermudez, Alejandro Covarrubias, Rachel Estrella and Anita Revilla. Several law and graduate students also have been given the opportunity to publish in LatCrit symposia, and some have grasped this opportunity. See, e.g., Aniella Gonzalez, Being Individuals: A Comparative Look at Relationships, Gender & the Public/Private Dichotomy, 9 U. Miami Int'l & Comp. L. Rev. 115; Angie L. Padin, Hispanismo as Leverage: LatCrit Questions Spain's Motives, 9 U. Miami Int'l & Comp. L. Rev. 165 (2001); Nicholas A. Gunia, Half The Story Has Never Been Told: Popular Jamaican Music As Anti-subordination Praxis, 33 U.C. Davis L. Rev. 1333 (2000). For more information, visit <www.latcrit.org>.

n179 See supra notes 26-29 on the relationship of the conferences to the symposia.


n181 See, e.g., Valdes, Making Waves, supra note 79, at 156-58 (discussing student-related and curricular issues).

n182 For three years, the University of Miami School of Law's study-abroad law program in Spain, which we co-directed until summer 2000, served this purpose. Due precisely to the kinds of institutional hostility that affect outsider efforts and scholars throughout the country, this program was discontinued by decanal decision to remove the co-directors of the program at the height of its success: in 2000, it enrolled over 80 students, making it one of the five most popular such programs in the country and a "profit center" for the law school. All information relating to the program was removed from the University of Miami School of Law's website over the co-directors' objection in the fall of 2000 but remains on file with the authors. As a result of these developments, LatCrit planners presently are considering study-abroad programs based at other law schools to resume operation of this "Critical Global Classroom."

n183 During the three summers we directed the program, enrolled students were taught courses in international and comparative law by Spanish legal scholars and a diverse array of prominent critical scholars including, Elizabeth M. Iglesias, Kevin R. Johnson, Ratna Kapur, William Piatt, Celina Romany and Francisco Valdes. In the summer of 1999 and 2000, students also attended the LatCrit
International and Comparative Law Colloquia, where they heard presentations by scholars teaching in the program, numerous other Spanish legal scholars and activists, as well as North American critical scholars who traveled to Spain specifically to participate in the LatCrit Colloquia: Lundy Langston, Lillian Manzor, Ediberto Roman, Natsu Saito, Gema Perez-Sanchez, and Robert Westley. For the program materials of these two colloquia, see Spain/Espana, Conference Materials and Articles <http://www.latcrit.org>.

n184 It is no secret that law students in many, if not most, law schools throughout the United States are for the most part denied access to critical legal theories by the marginalization of outsider scholars and scholarship in law school faculties and the curricular cannon - a marginalization effected in part by dismissing the "objectivity" of outsider scholarship. While this status quo may serve the short-term interests of dominant elites in the legal academy and society, it does not serve either minority or non-minority students, who thus are denied the intellectual exposure and analytical tools they need to confront difference and conceptualize new possibilities for the 21st century, whose realities increasingly will require them to traverse cultural, racial and national borders. See, e.g., Paula Lustbader, Essay, From Dreams to Reality: The Emerging Role of Law School Academic Support Programs, 31 U.S.F.L. Rev. 839, 840 (noting repeated arguments that the legal system will inadequately respond to a culturally diverse society until a critical mass of diverse lawyers and legal academicians enter the system and influence it); see also Beverly Horsburgh, Decent And Indecent Proposals In The Law: Reflections On Opening The Contracts Discourse To Include Outsiders, 1 Wm. & Mary J. Women & L. 57 (1994) (challenging parochialism of dominant ideology that casts legal discourse as objective until "it becomes skewed ... because of an individual professor's views").

n185 A recent survey indicates that merely a handful of the nation's 200-plus law schools offer courses devoted "primarily" to the study of Latina/o communities and the legal issues that are especially germane to them. Francisco Valdes, Barely at the Margins: Race and Ethnicity in Legal Education - A Curricular Survey With LatCritical Commentary, 80 Or. L. Rev. (forthcoming 2002). By comparison, five years earlier, in 1995, 66 law schools reported a total of 112 courses devoted "primarily" or partially to the study of law and sexual orientation or sexuality. See Francisco Valdes, Tracking and Assessing the (Non)Inclusion of Courses on Sexuality and/or Sexual Orientation in the American Law School Curriculum: Reports from the Field After a Decade of Effort, 1 Nat. J. Sex. Orient. L. 149 (1995). For further readings on the implications of curricular neglect, see Judith G. Greenberg, Erasing Race From Legal Education, 28 U. Mich. J.L. Ref. 51, 67-75 (1994) (arguing that race is intentionally ignored in the curricula of legal education under the guise of color-blindness and as a result, students of color, and in particular, African American students, are alienated from their law school educations); Montoya, Silence and Silencing, supra note 15 (on the silence imposed on issues of race in classroom and judicial discourse).


n187 This closed listserv has included about 50 faculty members and 50 students from schools all over the country. Although the listserv has remained relatively dormant during the past year or so, we fully anticipate its lively reactivation if and when the CGC project comes to life.

n188 See supra note 155 and accompanying text on the LatCrit Primer.

n189 See supra notes 177-78 and accompanying text on student involvement in LatCrit programs.
Information on these and similar initiatives is posted from time to time to the LatCrit website at <www.latcrit.org>.

See supra note 77 and accompanying text on the "culture wars" and their effects on outsider communities within the United States.

See supra notes 163-74 and accompanying text on the prior three colloquia on international legal issues.

In an example of how these institution-building projects are designed to be synergistic, we expect that these initial thoughts about colloquium themes will be developed and refined during the First Annual LatCrit Retreat, another current institution-building project, which we expect to conduct in conjunction with the next conference, LatCrit VI, in Florida. For discussion of the retreats, see infra notes 207-08 and accompanying text.

See supra note 108-55 and accompanying text on the "theory" behind the practices associated with the conferences and their planning process.

As we note below, the first occasion is the upcoming World Conference Against Racism, Racial Discrimination, Xenophobia and Related Forms of Oppression sponsored by the United Nations and scheduled to convene in Durban, South Africa during August 2001; see generally International Human rights in Context: Law, Politics, Morals (Henry J. Steiner & Philip Alston eds., 1996)

See supra notes 45 and 85-87 and sources cited therein on human resources

See Kwan, Jeffrey Dahmer, supra note 13 on cosynthesis.

See supra notes 101-02 and sources cited therein on international law in LatCrit theory.


See supra note 119 and sources cited therein on "human resources" and related concerns.

In the early years, videotaping was comprehensive, covering all program events. Those videos were used to transcribe the proceedings of the conference for preparation of the symposia, but the growth of the conferences both in numbers and complexity have forced us to discontinue that practice. Today, videotaping is selective to ensure a continuity of LatCrit's "video history" from the first gathering to the present.

The LatCrit video archives are stored for safekeeping with us as LatCrit co-chairs.

See supra note 155 and accompanying text on the LatCrit Primer and brochure.

See supra notes 108-30 and accompanying text on the planning process of the annual conferences.

See Transition Memo from LatCrit IV to V (copy on file with authors).

On more substantive levels, this initiative also will yield conference programming dedicated to exploring the "digital divide" within the LatCrit community as well as throughout international society, programming which follows up on the stream of events during the past several years on communications and related issues. For instance, at LatCrit III Plenary Panel Three was on

n207 We anticipate the first LatCrit retreat will take place next year in Florida, in conjunction with LatCrit VI at the University of Florida in 2001.

n208 See supra notes 108-30 and accompanying text on long-term planning and related issues.